REPORTED JUDGMENTS

OF

HON'BLE MR. JUSTICE IBAD-UR-REHMAN LODHI

JUDGE, LAHORE HIGH COURT, LAHORE

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Mr. Justice Ibad-ur-Rehman Lodhi

Judge, Lahore High Court, Lahore

(March 27, 2012 to December 27, 2018)

Mr. Justice Ibad-ur-Rehman Lodhi was born on 28th of December 1956 at Rawalpindi. His lordship completed basic education in Rawalpindi and graduated from Government College Asghar Mall, Rawalpindi in 1976. After obtaining LL.B. Degree he joined legal profession in 1982 at Rawalpindi and enrolled as an Advocate in the same year and awarded the lincence to practice as an Advocate of High Court in 1984. He was elected as Secretary District Bar Association, Rawalpindi in the year 1988.

Mr. Justice Ibad-ur-Rehman Lodhi was enrolled as an Advocate of the Supreme Court of Pakistan on August 01, 1996 whereas remained as Member Punjab Bar Council for the term 1995 to 1999 and during this period has been performing functions mainly in Disciplinary Committee of the Punjab Bar Council, earlier as Member and subsequently as Chairman thereof.

Throughout the career his lordship conducted a large number of cases primarily on Civil and Constiutional side in the High Court and the Supreme Court of Pakistan. He was elevated as Additional Judge of the Lahore High Court and took oath as such on 27.03.2012 and remained as Judge, Lahore High Court till retirement on December 27, 2018.

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2012 C L C 1776
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
NASIM BEGUM----Petitioner
versus
FARAH ABSAR and 7 others----Respondents

Civil Revision No.801 of 2011, heard on 18th July, 2012.

(a) Pleadings---
----Amendment of pleadings---Scope---Although courts were supposed to be liberal in granting amendments in pleadings but such liberty was not to be stretched to such an extent that parties were allowed to adopt a complete U-turn from what had originally pleaded; particularly in absence of any justifiable reason for getting the original pleadings amended---No amendment prejudicial to the interest of a party who, by means of the original pleadings, had accrued some rights; could be allowed under the law---Party to a proceedings, if once taken a particular stand, it was estopped to effect a change in the same and admissions made in pleadings could not be permitted to be retracted subsequently.

(b) Succession Act (XXXIX of 1925)---
----Ss. 384 & 383--- Succession certificate--- Revision---Maintainability---Application of the respondent-Bank for amendment in its written reply in relation to the Bank Account of the deceased was allowed by the Trial Court---Said order of Trial Court was assailed by the petitioners---Contention of the respondent Bank was that revision against said order was not maintainable---Validity---Proceedings under the Succession Act, 1925, even if carried out by Civil Court, were always deemed to be proceedings before the District Judge---Right of appeal was available under section 384(1) of the Succession Act, 1925 in cases of granting , refusing or revoking of a certificate; whereas by virtue of section 383(3) the High Court was provided the right to entertain revision from an order of District Judge in cases other than the ones mentioned in section 384(1), Succession Act, 1925---Revision was therefore, competent.

(c) Succession Act (XXXIX of 1925)---
----S. 383(3)---Revision---Jurisdiction of the High Court---Scope---High Court had inherent powers to look into and call for the record of any case which had been decided by any court subordinate to the High Court in which no appeal lay and if such subordinate court appeared to have exercised a jurisdiction not vested in it by law or to have acted in exercise of its jurisdiction illegally or with material irregularity.

Ch. Imran Hassan Ali for Petitioner.
Muhammad Amin Jan and Malik Abdul Jalil for Respondents Nos.1 to 6.
Raja Tahir Mehmood for Respondent No.7.

JUDGMENT
IBAD-UR-REHMAN LODHI, J.--- A dispute to obtain the shares from the estate of deceased Malik Khuda Bakhsh is pending before the Civil Courts at Chakwal. United Bank

Limited, Main Branch, Chakwal where the bank account was being maintained concerning the subject-matter of the succession application was also impleaded in the original proceedings as respondent No.5. The bank on 2-5-2011 filed a reply to the said petition for obtaining succession certificate and particularly in reply to Para.2, the following was the stance taken:---

> "In reply to Para.2 of the plaint, it is submitted that petition was moved to the Bank by Malik Khuda Baksh on 18-9-1988 whereby Mst. Nasim Begum was authorized to operate the account. She was mentioned as account-holder, signature Card was issued accordingly with instruction of "either of survivor". Hence she can operate the account as per bank rules after the death of Malik Khuda Bakhsh."

However, through an undated application, which was received on record by the learned Civil Judge 1st Class by putting his initial and stamp and that too without date, the Bank sought the deletion of some portion of Para.2 as reproduced above and addition to the following effect:---

DELETION, which was inadvertently mentioned:---

Portion of 3rd, 4th and 5th line of para number 2, which is reproduced as:
"She was mentioned as account-holder"
"Hence she can operate the account as per Bank rules after the death of Malik Khuda Bakhsh."

ADDITION: for elaboration:

In the beginning of para number 2

That account number 22582 was opened on 24-10-1984 with status of single Malik Khuda Baksh. Title of account remained single from 1984 to till death of Malik Khuda Baksh on 8-6-2011. Mst. Nasim Begum was not mentioned as account-holder.

In the end of para number 2:--

Validity of authority was ceased at death of Malik Khuda Baksh on 8-6-2011.

The said application was allowed on 10-9-2011 by the learned Civil Judge 1st Class at Chakwal. Such order is impugned herein through the present revision petition.

2. I have gone through the application seeking amendment. The Bank has not mentioned any reason as to why a particular stance was taken in originally filed reply and why at a subsequent stage altogether different stance is attempted to be incorporated in place of the original one. I have specifically asked the learned counsel for the respondent/ bank as to whether any official/officer of the Bank has been held, responsible for placing wrong information, which was made basis of filing original reply and also to explain as to why and on the basis of what material the amendment was being sought, to which the learned counsel

has replied that no one in the Bank has been proceeded against in this regard and responsibility has not been fixed for such alleged lapse.

3. Although the courts are supposed to be liberal in granting amendments in the pleadings but the liberty is not to be stretched to such extent that the parties are allowed to adopt a complete U-turn from what has been originally pleaded in their pleadings, particularly, in absence of any justifiable reason for getting the original pleadings amended. No amendment prejudicial to the interest of a party, who by means ofthe original pleadings, has accrued some rights, can be allowed under the law and a party to the proceedings once taken a particular stand is estopped to effect a change in the same and admissions made in the pleadings cannot be permitted to be retracted subsequently.

4. The learned counsel for the respondent/Bank has also objected to the maintainability of the revision petition. The proceedings under the Succession Act even if being carried out by a Civil Court are always deemed to be the proceedings before the District Judge and the right of appeal is available under section 384 (1) of the Succession Act, 1925 only in cases of an order of District Judge granting, refusing or revoking a certificate whereas by virtue of section 383(3) a High Court is provided the right to entertain a revision from an order of District Judge other than mentioned in section 384(1), thus the revision is competent and even otherwise this Court has inherent powers to look into and call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies, if such subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have acted in exercise of its jurisdiction illegally or with material irregularity. Thus exercise of revisional powers in this case is proper remedy against the order passed by learned Civil Judge 1st Class on 10-9-2011.

5. The learned trial Court while granting the application seeking amendment in the reply filed by the respondent/Bank has exercised its jurisdiction not vested under the law and the impugned order suffers from illegality and irregularity and is not sustainable, therefore, the same is set aside. The application moved by the respondent/ Bank seeking deletion or addition in the originality filed reply is dismissed.

6. Resultantly, this revision petition is allowed.

KMZ/N-55/L Petition allowed.

2012 C L C 1955
[Lahore]
Before lbad-ur-Rehman Lodhi, J
FAZAL DIN-Appellant
Versus
AMJAD ALI----Respondent

Second Appeal from Order No.23 of 2009, decided on 6th September, 2012.

Punjab Rented Premises Act (VII of 2009)--
----Ss. 13, 15, 19 & 28---Ejectment application---Allegation of default in payment of rent and damage to rented property---Not less than 52 documents and mostly receipts of rent showing deposit of rent, either directly to the landlord or through the process of deposit in the court, were placed by the tenant on record, but none of such receipt, had shown the payment of rent for alleged period (five months) for which default had been alleged---When the rent in question became due, there seemed to be no attempt on the part of the tenant to tender such rent by any substituted modes, either through money order or by depositing of the same before the court of Rent Controller---Landlord who appeared in the court, was subjected to lengthy cross-examination, but he was never confronted with the alleged practice of receiving rent periodically in lump sum after considerable gaps of time---Wilful default in payment of rent for period in question having been established on record, and there being no serious denial by the tenant with regard to the damage to the property, findings arrived at by the forums below, being justified, called for no interference---Appeal was dismissed.

Mehrban Ali v. Haji Muhammad Qasim PLD 1976 Lah. 1052 distinguished.
Malka Begum v. Mehr Ali Hashmi 1984 SCMR 755 and Mahmood Ahmed v. Muhammad Nawaz Ahmed, Advocate 1984 CLC 1067 rel.
Mian Abdul Aziz for Appellant. Zafar Ali Shah for Respondent.
Date of hearing: 6th September, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.-- This appeal is against the order of ejectment passed against the appellant firstly by the learned Rent Controller on 1-3-2007, and consequently the same was upheld by the learned appellate authority on 6-12-2008. The respondent-landlord filed an ejectment petition mainly on the allegation of default in payment of rent for a period from August, 2001 to December, 2001 and also that the appellant-tenant caused damage to the rented property.

2. The learned counsel for the appellant, in support of his contentions, has mainly relied upon the documentary evidence consisting of Exh.R.1 to Exh.R.11, which are receipts of rent, issued by the landlord, and tried to demonstrate that it was the usual practice of the landlord to receive the rent after intervals in lump sum. The learned counsel for the appellant is of the view that even if it was a default, the same, in no circumstance, would be considered as a "wilful default" and in fact it was a conscious attempt on the part of the

landlord, who created the default for seeking ejectment of the appellant. With regard to damage caused to the property, the learned counsel for the appellant has candidly conceded that in fact it was on account of establishment of a P.C.O inside the shop for which purposes some alterations in the already existing structure were to be carried out and in his view no damage was caused on account of such change in the construction, rather it increases the value of the property.

3. Responding to the arguments of the learned counsel for the appellant, the other side has argued that no receipts of the period of alleged default have been produced and it was a wilful default: The learned counsel for the respondent further contends that tenancy started in 1993 and with the help of the documents Exh.R.1 to Exh.R.11, the appellant is showing the practice of the respondent as that of receipt of rent after considerable intervals, which covers only a negligible period of long tenancy. According to the learned counsel for the respondent, keeping in view the longstanding tenancy by merely producing eleven receipts, it would not have been established that it was a practice on the part of the landlord to accept the delayed payment of rent after considerable intervals.

4. I have considered the arguments of the learned counsel for the parties and perused the record.

5. The period of default as has been alleged is from August; 2001 to December, 2001 and notwithstanding the fact that not less than 52 documents and most of them are receipts showing deposit .of rent either directly to the landlord or through the process of deposit in the Court are placed on record but none of such receipts shows the payment of rent of the period for which default has been alleged. It is further noted that when the rent became due, in question, there seems to be no attempt on the part of the tenant to tender such rent by any substituted mode either through money order or by depositing of the same before the Court of learned Rent Controller. The landlord Amjad Ali appeared in the witness-box and he was subjected to lengthy cross-examination, but he was never confronted with the alleged practice of receiving rent periodically in lump sum after considerable gaps of time.

6. The learned counsel for the appellant has placed reliance on the case Mehrban All vs. Haji Muhammad Qasim (PLD 1976 Lahore 1052), but the same is of no avail to the appellant, as in the reported matter, there was an attempt on the part of the tenant to tender the rent with regard to disputed period through money order.

7. The learned counsel for the respondent, in support of his arguments, placed reliance on the case of Malka Begum v. Mehr Ali Hashmi (1984 SCMR 755), wherein the Hon'ble Supreme Court of Pakistan has held that the tender of rent after period prescribed by law, is not a proper tender and tenant is guilty of default though acceptance of delayed payment can mean a condonation of that default and that the defence based merely on ground of landlord receiving or collecting rent by intervals of several months is not a good defence. It is also the settled principle by the Hon'ble Supreme Court of Pakistan that a tenant is under a legal obligation to pay rent to landlord and that, landlord is not supposed to go to collect rent. The subsequent tender of rent of period has been held by the Hon'ble Supreme Court as of no avail to the tenant.

8. By placing reliance on the case. of Mahmood Ahmed v. Muhammad Nawaz Ahmed, Advocate (1984 CLC 1067), the learned counsel for the respondent is of the view that there is no proof available on the record that landlord made tenant to believe that rent was not payable and in such eventuality, the default in payment of rent is established and the learned Rent Controller has no option but to order the eviction of the tenant.

9. The wilful default in payment of rent for the period from August, 2001 to December, 2001 has been established on record and with regard to the damage to the property, there is no serious denial on 1 the part of the tenant and, therefore, the findings arrived at by the forums below are justified and call for no interference. Resultantly, this appeal fails and dismissed.

10. Since it is a commercial property and reportedly the tenant-appellant is running some business thereon, therefore, it would be appropriate that a reasonable time for vacation of the property is granted and for that purpose, four months' time is granted to the tenant-appellant to vacate the rented property and to hand over its vacant and peaceful possession to the respondent-landlord.

HBT/F-32/L Appeal dismissed.

2012 C L D 1654
[Lahore]
Before Ijaz Ahmad and Ibad ur Rehman Lodhi, JJ
Mrs. QAMAR KHALID RASOOL---Appellant
Versus
FAYSAL BANK LIMITED and anther---Respondents

E.F.A. No.253 of 2010, heard on 15th May, 2012.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---
----S. 19(7)---Civil Procedure Code (V of 1908), O.XXI, R.90 & S.47---Execution of decree---Sale of property---Application/objection petition for setting aside auction on ground of alleged irregularities and fraud by the Court Auctioneer, the Bank staff and the auction-purchaser---Said application/objection-petition was dismissed by Banking Court and order of the Banking Court was assailed by the appellant---Validity---Reserve price which was determined by the decree-holder Bank in the year 2008 was reduced after a period of one year; which was a mischievous act of the decree-holder Bank---Manner in which the auction proceedings were conducted showed pre-determination in the minds of the Court Auctioneer and the auction-purchaser and both were in prior knowledge as to at what rate the highest bid would be finalized and what would be the one-fourth bid amount, and the exact same amount in shape of an already prepared Pay Order was in possession of the auction-purchaser---Said Pay Order was naturally prepared prior to the participation of the auction-purchaser in the auction proceedings---Collusiveness of the interested persons was seen, and the appellant was deprived of the actual value of her property---Banking Court

while confirming the sale price had conveniently ignored the fact that a year ago the decree-holder Bank had itself determined the value of the property much higher than to what the property was to put to auction for and objections raised by the appellant in such regard were not considered in an appropriate manner; and sale of such tainted proceedings should not have been confirmed---Inadequacy of price, if was by the reason of fraud and material irregularity; would provide a ground for setting aside the decree and also the sale in the execution of such a decree---Dismissal of application/objection petition under Order XXI, Rule 90 of the C.P.C. without recording of evidence of parties was not justified, and without recording findings adduced on such evidence; the Banking Court should not proceed toreject an objection petition filed under Order XXI, Rule 90, C.P.C.---Appeal was accepted, and the sale as a result of the impugned auction was set aside.
Brig. (Retd.) Mazhar-ul-Haq and another v. Messrs Muslim Commercial Bank Limited, Islamabad and another PLD 1993 Lah. 706 and Mir Wali Khan and another v. Manager, Agricultural Development Bank of Pakistan, Muzaffargarh and another PLD 2003 SC 500 rel.

(b) Civil Procedure Code (V of 1908)---
----O.XXI, R.90---Application for setting aside sale as a result of execution of a decree---Practice and Procedure---Dismissal of application under Order XXI, Rule, 90, C.P.C. without recording of evidence of parties was not justified, and the court, without recording findings adduced on such evidence should not proceed to reject an objection petition filed under Order XXI, R.90, C.P.C.

Mir Wali Khan and another v. Manager, Agricultural Development Bank of Pakistan, Muzaffargarh and another PLD 2003 SC 500 rel.
Syed Ijaz Ali Akbar Sabzwari for Appellant.
Muhammad Naeem Sehgal and Shehzada Mazhar for Respondents.
Date of hearing: 15th May, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This is an appeal calling in question order dated 22-2-2010 passed by the learned Judge Banking Court-III, Lahore whereby objection petition filed by appellant under the provisions of section 47 read with Order XXI, Rule 90, C.P.C. was rejected.

2. The facts relevant for the purpose of present appeal are that the appellant obtained a financial assistance from the respondent Bank but defaulted in payment of the monthly installments which resulted in putting to auction the mortgaged property abutting Cavalry Road, Lahore with a measurement of 3-Kanal.

The Bank in an advertisement published in daily "Jang" in its edition of 31-1-2008 got published a public notice intimating the Public at Large, the fact of putting the property to open auction and a reserve price of Rs.3,83,61,458 was fixed.

3. The suit filed by the Bank for recovery was decreed by the learned Banking Court on 7-3-2009 for recovery of sum of Rs.1,95,36,969. This decree passed by the learned Judge Banking Court was not challenged by any side.

4. The Court Auctioneer appointed by the Court for conducting the auction proceedings determined the sale reserve price as Rs.3,18,00,000.

5. The first attempt for auction failed when on 22-6-2009, no bidder was attracted at the site to participate in the auction proceedings but ultimately as per the record the auction was conducted and on 4-8-2009 the property was sold in auction by the Court Auctioneer in favour of auction purchaser against his offer of Rs.3,19,00,000.

6. The appellant at that juncture, by pleading acquiring the knowledge of the act of putting her property to open auction as on 10-8-2009, approached the learned Banking Court by means of a petition under section 47 read with provisions of Order XXI, Rule 90, C.P.C., challenging the auction proceedings and seeking the sale to be set aside on the grounds of irregularities and fraud as was committed in her estimation by the Court Auctioneer, the Banking Staff and the Auction Purchaser.

7. The learned Judge Banking Court on 22-2-2010 after getting the reply to the said petition from bank and auction purchaser, rejected the objection petition and simultaneously confirmed the sale. Sale certificate, however, was not issued when in the present proceedings a restraint order was passed on 16-3-2010.

8. Learned counsel for the Bank and Auction Purchaser have vehemently argued that mere inadequacy of price by itself is not a sufficient ground for interference by the Court.

9. We have heard the learned counsel for the parties at length and have perused the record with their able assistance.

10. We have noticed that the reserve price which in the year 2008 was determined by the Bank itself as Rs.3,83,61,456 was reduced after period of one year by a sum of over Rs.64,00,000 and it was done by mischievous act of decree holder Bank.

11. We have further noticed that on 4-8-2009 when the property was put to auction, the proceedings according to report of Court Auctioneer were conducted in the evening time particularly after closure of banks but the manner in which the auction purchaser was allowed to participate in the proceedings and when the bid was closed at Rs.3,19,00,000, the auction purchaser without any delay of a moment, immediately brought out from his pocket a Pay Order for a sum of Rs.79,75,000 being 1/4th of bid amount, it shows the pre-determination at least in the minds of Court Auctioneer and the auction purchaser that both were in prior knowledge as to at what rate the highest bid will be finalized and what would be 1/4th of the bid amount and the same exact amount, in shape of already prepared Pay Order, was already in possession of the auction purchaser which Pay Order was naturally prepared prior to the participation of auction purchaser in the auction proceedings. This

shows the collusiveness of the persons interested whereby the appellant was deprived of the actual value of her property.

12. We have also seen the proceedings carried out by the Court Auctioneer at the site which speaks volume about the manner and conduct in which such proceedings were carried out. In the attendance sheet prepared by the Court Auctioneer shown to have been prepared on 4-8-2009. It is shown that in addition to Fawad Jehanzeb, the ultimate highest bidder, who too was represented through his agent, there was only one other person who was attending the proceedings in his personal capacity whereas the other persons again were shown represented through some agents. In the bid sheet it is but obvious that only Fawad Jehanzeb and Muhammad Saleem Qadri participated in the competition and first bid was offered by Fawad Jehanzeb the auction purchaser to the tune of Rs.3,18,50,000 and with an increase of Rs.25,000, the other bid of Rs.3,18,75,000 was offered by the only other person Muhammad Saleem Qadri and then the final bid of Rs.3,19,00,000 was offered by the auction purchaser Fawad Jehanzeb, who was declared successful bidder.

13. The learned Judge Banking Court while confirming the sale on 22-2-2010 has conveniently ignored the fact that earlier at least a year back the decree holder Bank itself determined the value of the property much more than to what the property was put to auction in the proceedings and objections raised by the appellant before it are not considered in an appropriate manner and a sale which was result of such tainted proceedings should not have been confirmed. The material irregularities in conducting the sale have not been taken into consideration by the learned Judge Banking Court.

This Court in case titled Brig. (Retd.) Mazhar-ul-Haq and another v. Messrs Muslim Commercial Bank Limited, Islamabad and another (PLD 1993 Lahore 706) has held that if the inadequacy of price was byreason of fraud and material irregularity, it would provide a ground for setting aside the decree as also the sale in execution of such decree.

14. The learned Banking Court has only obtained replies to the objection petition from the decree holder Bank and auction purchaser which practice in negation of Law laid down by the Hon'ble Supreme Court of Pakistan in Mir Wali Khan and another v. Manager, Agricultural Development Bank of Pakistan, Muzaffargarh and another (PLD 2003 Supreme Court 500), wherein it was held that the dismissal of application under Order XXI, Rule 90, C.P.C. without recording evidence of parties was not justified and it was further held that without recording evidence of the parties and by recording of findings based on such evidence adduced by the parties, the Banking Court should not have been proceeded to reject the objection petition.

15. The result is that the appeal is accepted, objection petition filed by the appellant before the learned Judge Banking Court-III, Lahore is allowed and the sale as a result of auction dated 4-8-2009 in favour of respondent No.2/the auction purchaser, is set aside. The order dated 22-2-2010 passed by the learned Banking Court is also set aside. The learned Judge Banking Court will proceed afresh for putting the property to open auction after determination of the actual market price of property.
KMZ/Q-4/L Appeal allowed.

2012 C L D 1709
[Lahore]
Before Ijaz Ahmad and Ibad ur Rehman Lodhi, JJ
Haji MUHAMMAD NAWAZ KHOKHAR---Appellant
Versus
UNITED BANK LIMITED through President and 3 others---Respondents

F.A.O. No.90 of 2003, heard on 16th May, 2012.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---
----S. 9---Civil Procedure Code (V of 1908), O.VII, R.11---Suit for recovery of damages and violation of contractual obligations---Rejection of plaint---Remedy against wrong---Plaintiff filed suit against bank in civil court of plenary jurisdiction but on the application of bank plaint was returned to him for filing the same before Banking Court---After return of plaint, the plaintiff filed suit before Banking Court and there on the application of bank plaint was rejected under O.VII, R.11, C.P.C.---Validity---No one could be left without remedy and if a wrong had been committed with him and he was in search of some redress against such wrong, there must be some forum available to entertain his claim and to adjudicate upon proceedings instituted by such person---Conduct of bank was nothing but to make plaintiff a shuttlecock in between different forums for redress of his grievances---After return of plaint from civil court, plaintiff rightly availed the forum of Banking Court, which with reference to pecuniary jurisdiction, was at relevant time lying with High Court in its Banking jurisdiction---Division Bench of High Court set aside the order passed by Single Judge of High Court whereby plaint was rejected and case was remanded for regular trial---Appeal was allowed in circumstances.

State Bank of Pakistan v. Chiragh Sun Engineering Ltd. and another 2000 YLR 1198 and Qayyum Nawaz Khan and another v. The Regional Manager, Agricultural Development Bank of Pakistan, Dera Ismail Khan and 4 others PLD 1997 Pesh. 72 ref.
Salman Aslam Butt for Appellant.
M. Akram Raja for Respondent.
Date of hearing: 16th May, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The appellant at the first instance filed suit in the civil court for redress of his stated grievance and to get damages from the Bank, which according to the appellant, he was entitled on account of the misdeeds and violation of contractual obligations on the part of the Bank or its officials, causing personal damages to the appellant as surety/indemnifier.

2. The Bank appeared in the said suit and moved an application under the provisions of Order VII, Rule 11, C.P.C., seeking rejection of the plaint of the said suit, mainly on the ground that the civil court lacks jurisdiction to adjudicate upon the matter relate-able to the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997. The learned Civil Judge ceased of the matter instead of applying penal provisions of Order VII,

Rule 11, C.P.C., in alternate opted to return the plaint by application of provisions of Order VII, Rule 10, C.P.C. vide order dated 8-7-1998.

3. After return of plaint from the civil court, the appellant presented the same in the Banking Jurisdiction of this Court by means of C.O.S. No.155 of 1998, somewhere in October, 1998. It remained pending in this Court for more than a period of 4 years and after lapse of such time, the respondent-bank through C.M. No.559-B of 2002, sought rejection of the plaint of the suit of the appellant again under the provisions of Order VII, Rule 11, C.P.C., which ultimately taken up by a learned Single Judge of this Court on 22-1-2003 and it was held that the suit was not triable by this Court and plaint was ordered to be returned to the plaintiff/appellant for institution of the same before the court of competent jurisdiction. The order so passed is now subject matter of the present appeal. Paras 8 and 9 of the impugned order are relevant for the present purposes, which are reproduced herein below:--

> "(8) Since the present suit has been filed by the plaintiff in his personal capacity or in his capacity as Director of a public limited company, I am, therefore, of the opinion that this Court has no jurisdiction to entertain and try the present suit. Plaintiff has not sued the defendants with regard to his capacity as guarantor, indemnifier, mortgagor or surety i.e. obligations arising out of finance. The present suit, thus does not relate and does not arise out of finance or advance by United Bank Limited to N. Khokhar Textile Industries Limited.
>
> (9) In view thereof, the cause raised in the suit, is not tri-able by this Court. In absence of jurisdiction, the provisions invokeable are contained in Order VII, Rule 10, C.P.C. and not in Order VII, Rule 10, C.P.C. This application is, therefore, disposed of with the direction that plaint be returned to the plaintiff for institution of the same before the Court of competent jurisdiction, if so advised. Documents be also returned along with the plaint as per procedure".

4. The appellant challenges the legality of order dated 22-1-2003 through the present appeal i.e. F.A.O. No.90 of 2003.

5. Learned counsel appearing for the appellant by referring firstly the order passed by the civil court, as noted above and the stance taken by the bank before the civil court in non-suiting the appellant there-from and the contents of his plaint, has argued that it was at the objection of the respondent-bank that the civil court returned the plaint of the appellant and when the plaint was presented and the same was entertained and was being adjudicated upon here in this Court, the respondent-bank applied the same weapon to injure the appellant and the same penal provisions are being attracted against the appellant before the forum, which was subsequently opted by the appellant for redress of his grievance.

6. Learned counsel for the respondent-bank has now taken a stance that it is the civil court, which has got jurisdiction to entertain suits like present one and the jurisdiction was rightly refused to be exercised by the learned Single Judge of this Court in Banking-Jurisdiction.

7. We have heard, learned counsel for the parties and perused the record.

8. From the contents of the plaint, it is but obvious that the appellant/plaintiff preferred a suit for damages on account of his stated sufferings, which were caused due to the misfeasance on the part of the bank or its officials.

9. The honourable Sindh High Court in case of STATE BANK OF PAKISTAN v. CHIRAGH SUN ENGINEERING LTD. and another (2000 YLR 1198) has held that a person cannot be allowed to seek ouster of the jurisdiction of an exclusive forum established by law by merely adding a claim in the nature of a tort arising out of legal relationship constituted by a contract for finance facilities. As such an interpretation would obviously obviate one of the main objects of the Act, 1997 to constitute a special forum for adjudication of disputes between the banks and the borrowers/customers.

10. The honourable Peshawar High Court in case of QAYYUM NAWAZ KHAN and another v. THE REGIONAL MANAGER, AGRICULTURAL DEVELOPMENT BANK OF PAKISTAN, DERA ISMAIL KHAN and 4 others (PLD 1997 Peshawar 72) has held as under:--

> "(7) So far as F.A.O. No.3/93 is concerned, the learned trial Court on the one hand came to the conclusion that he has got no jurisdiction and returned the plaint under Order VII, Rule 10, C.P.C. for presentation before the proper forum, but at the same time allowed the appellants to amend their plaint. The dispute between the parties relates to the recovery of Advance by the ADBP and the Banking Tribunal constituted under the Banking Companies (Recovery of Loans) Ordinance, 1979, has the exclusive jurisdiction, therefore, the learned trial Court was right in returning the pliant to the appellants under Order VII, Rule 10, C.P.C. for presentation before the proper forum. Consequently, F.A.O. No.3/93 is dismissed.
>
> (8) As far as F.A.O. No.4/93 is concerned, the trial Court has also no jurisdiction to entertain the suit with regard to damages which is an off-shoot of the main suit for declaration and which has been returned to the respondents for presentation before the proper forum. Resultantly F.A.O. No.4/93 is accepted, the impugned order dated 11-7-1993 with regard to the finding of the trial Court that the Civil Court has got jurisdiction in respect of the relief for compensation for defamation etc. and permission for the consequential amendment in the pliant, is set aside and the learned trial Court is directed to return the plaint in toto to the respondents for presentation before the proper forum. However, the parties are directed to burden their own costs."

11. From what has been discussed above, it can safely be held that no one can be left without any remedy and if a wrong has been committed with him and he is in search of some redress against such wrong, there must be some forum available to entertain his claim and to adjudicate upon the proceedings instituted by such person. In the present case the conduct of the bank is nothing, but to make the appellant a shuttle-cock in between different forums for redress of his grievances. After return of the plaint from civil court, the appellant

rightly availed the forum of Banking Court, which with reference to pecuniary jurisdiction, was at the relevant time lying with this Court in its Banking-Jurisdiction.

12. The result is that the impugned order passed on 22-1-2003 in C.M. No.559-B of 2003 in C.O.S. No.155 of 1998 is set aside by allowing this appeal and the C.O.S. would be proceeded for its regular trial.

MH/M-207/L Appeal allowed.

2012 M L D 1234

[Lahore]

Before Ch. Muhammad Younis and Ibad-ur-Rehman Lodhi, JJ

ALAMDAR HUSSAIN---Appellant

Versus

NAZIR HUSSAIN SHAH and 3 others---Respondents

R.F.A. No.1027 of 2010, heard on 12th April, 2012.

Suit for Damages---

----Recovery of damages and compensation---Quantum---Proof---Plaintiffs sought recovery of damages and compensation with the background of long standing litigation which ended into their favour---Trial Court partially decreed the suit in favour of plaintiffs---Validity---Breakup of amount claimed by plaintiffs was provided in the plaint but when one of the plaintiffs appeared in witness box as prosecution witnesses, he failed to provide details of his claimed losses and no supporting evidence in order to substantiate claim of plaintiffs was produced---Remaining two witnesses mainly deposed to what was not their direct and personal knowledge---Pleadings could not attain status of evidence and a fact pleaded by a party must have been proved by unimpeachable evidence---Plaintiffs failed to establish their claims for which decree was granted in their favour---Mere saying of plaintiffs or witness was not enough to put a stamp of solid proof upon such version---Trial court fell in to error while granting imaginary losses, therefore, findings of Trial Court were reversed---High Court in exercise of appellate jurisdiction set aside judgment and decree passed by Trial Court and suit of plaintiffs was dismissed---Appeal was allowed in circumstances. [pp. 1237, 1238] A & B

Muhammad Yasin Chughtai for Appellant.
Sh. Sakhawat Ali for Respondent.
Date of hearing: 12th April, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This is an appeal from the judgment and decree dated 13-10-2010 passed by the learned Civil Judge at Lahore in Civil Suit No.179/1/2004. The respondents/plaintiffs had to file their suit asking for a decree of an amount of Rs.4,56,00,000 on account of damages and compensation with the background of a long standing litigation which ended into their favour when Civil Review Petition No.27 of 2003

was dismissed by the Hon'ble Supreme Court of Pakistan on 12-5-2006 and a decree in a suit for specific performance passed by the learned trial court on 5-7-1984 was upheld.

2. The plaintiffs/respondents on the basis of a breakup of damages as has been given in detail in para 17 of the plaint have measured their damages on account of losses of reputation, mental torture, Jhar Bandobast, physical loss by cutting of trees and selling of soil and theft of Tube Well, loss of business, miscellaneous expenses and fee of advocates for the said litigations coming in totality to Rs.4,56,00,000.

3. The suit was contested on factual as well as legal plane including bar of limitation however vide impugned judgment and decree the suit to the extent of recovery of Rs.56,00,000 was decreed whereas withregard to remaining suit amount of Rs.4,00,00,000 the same was dismissed.

4. Only the defendant in the suit challenged the partial decree to the extent of Rs.56,00,000 whereas plaintiffs/respondents herein opted not to challenge the same and seems to be satisfied with what was decreed in their favour.

5. The learned counsel for parties while arguing on appeal mainly stressed upon the findings of the learned trial court on issues Nos.1, 3 and 6 and for that reason we would be giving findings to such issues only. Even otherwise the issues mentioned above are the relevant issues for adjudication.

6. The objection with regard to the limitation was specifically taken by the defendant and issue No.3 was framed by the learned trial court which was answered against the defendant by the learned trial court by treating the suit filed on 4-11-2004 as within time on account of dismissal of Civil Review Petition No.27 of 2003 by the Hon'ble Supreme of Pakistan on 12-5-2006.

7. The learned trial court has erred in deciding issue No.3 and by giving benefit of a subsequent event occurred later in time to that of stated point of time of which according to the plaintiffs the cause of action accrued in their favour. Para 22 of the plaint would be relevant in order to determine the question as to whether the suit was filed within limitation or not. The plaintiffs in said para of the plaint have mentioned that for the first time cause of action accrued in their favour when they demanded the suit amount from the defendant. Here the plaintiffs even in the pleadings failed to give any exact date or at least point of time as to when for the first time that demand was made. According to the version of the plaintiffs, secondly the cause of action accrued when a legal notice was issued by the plaintiff which was not responded to by the defendant. In the plaint no date of issuance of legal notice has been provided nor during the course of recording of evidence such notice was attempted to be brought on record in evidence and even there is no mention as to what was the mode of issuance of that notice. In view of Article 22 of Limitation Act, 1908, for filing a suit for compensation for any injury to a person, the limitation provided is one year from the date when injury is committed. The plaint is silent as to when the injury was committed for which the plaintiffs filed the suit for compensation and therefore the findings

of the learned trial court on issue No.3 are erroneous and cannot be sustained, the suit is therefore held to be filed beyond limitation.

8. By referring the power of attorney on the strength of which Nazir Hussain one of the plaintiffs in his personal capacity and also as attorney on behalf of remaining plaintiffs, the learned counsel for appellant has attempted to persuade us that the suit was filed by an incompetent person and that the findings of the learned trial court on such issue which was decided against the defendant was erroneous one. The copy of the general power of attorney is available on record and with the assistance of both the learned counsel for parties we have gone through the same and are of the view that in view of the following powers specifically assigned to the attorney to the following effect:--

by the principals, the person who filed the suit in capacity of the attorney of plaintiffs Nos.2 to 4 was competent to file the same and thus the findings of the learned trial court on such issue is maintained.

9. Now we come to the main issue which is issue No.1 on the basis of findings of which the plaintiffs were held entitled to recovery of Rs.56,00,000 on account of damages. While giving findings on such issue, the learned trial court has granted the decree to the extent of Rs.56,00,000 on account of the following heads:-

(i) Mental Torture Rs.25,00,000

(ii) Jhar Bandobast Rs.16,00,000

(iii) Miscellaneous Expenses Rs.5,00,000

(iv) Fee of Advocates Rs.10,00,000

No doubt in the plaint in para No.17 a breakup to the claimed amount was provided but when the plaintiff No.1 appeared in the witness box as P.W.1, he has failed to provide the details of his claimed losses and it is also manifest that no supporting evidence in order to substantiate the claim of the plaintiffs was produced. The remaining two witnesses P.W.2 and P.W.3 have mainly deposed to what was not in their direct and personal knowledge. The pleadings cannot attain the status of evidence and a fact pleaded by a party must have been proved by unimpeachable evidence. In the case in hand the plaintiffs have miserably failed to establish their such claims for which a decree has been granted in their favour. Mere saying of the plaintiffs or a witness would not be enough to put a stamp of a solid proof upon such version. In the present case, the learned trial court fell in error while granting the imaginary losses stated to have been suffered by the plaintiff e.g. towards mental torture as against the claimed amount of Rs.1,00,00,000. The learned trial court granted a decree to the extent of Rs.25,00,000. Neither the plaintiffs in their evidence satisfied the stated losses to the extent of Rs.1,00,00,000 nor the learned trial court has given any plausible reasons to grant an amount of Rs.25,00,000 on this account and all has been done on imaginations.

10. Similarly, towards Jhar Bandobast, the required evidence was not brought and rather was not proved according to law.

An amount of Rs.5,00,000 has been granted on miscellaneous expenses and for that also the plaintiffs have failed to bring on record any breakup of the amount and amount of Rs.10,00,000 has been granted by way of the impugned decree to the plaintiff against the amount of fee stated to have been paid by the plaintiffs to the Advocates. No evidence in this regard is available on record. Even otherwise according to the High Court Rules and Orders a certificate of the counsel conducting the case must have been filed before the start of arguments and at no stage of earlier litigation any such required certificate was made part of the record, in absence of which nothing can be granted towards that claim.

11. We have noticed that in the earlier round of litigation which has been made basis of the present suit this Court while allowing R.S.A. No.35 of 1993 on 8-10-2001 and the Hon'ble Supreme Court of Pakistan while dismissing Civil Appeal No.2028 of 2001 on 28-10-2002 awarded costs to the plaintiffs and even at those both stages the plaintiffs were not held entitled to any special compensatory cost.

12. It is also a fact to be noted that plaintiffs have not challenged the dismissal of their plaint qua Rs.4,00,00,000 and seems to be satisfied with what was decreed in their favour. The conduct in forgoing the major portion of their claim shows that in their own estimation their claim was not sound and reasonable.

13. For what has been discussed above, the findings of learned trial court on issue No.1 are thus reversed.

14. As a result the appeal is allowed and judgment and decree dated 13-10-2010 is hereby set aside. Resultantly the suit of the plaintiffs is dismissed without any order as to costs.

M.H./A-78/L Appeal allowed.

2012 M L D 1243

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

GHULAM SARWAR---Petitioner

Versus

VICE-CHANCELLOR, KING EDWARD MEDICAL UNIVERSITY, LAHORE and 3 others---Respondents

Writ Petition No.11993 of 2008, heard on 14th May, 2012.

Constitution of Pakistan---

----Art. 199---Constitutional petition---Educational Institution---Petitioner after availing three chances for appearing in First Professional MBBS examination, was declared as having failed and was held as ineligible for further medical education in Pakistan---Contention of the petitioner was that according to the University regulations, he could avail

up to four chances to clear his examination---Validity----By virtue of the statute and regulations contained in the calendar of the University, a candidate who failed to clear the First Professional MBBS examination in four chances availed or not availed, offered by the University, shall cease to be eligible for further medical/dental education---Said regulation was amended by the Vice-Chancellor who curtailed the number of chances for appearing in the examination to three and this was made effective retrospectively on the petitioner and it was clear from the language of the notification that the same was issued in anticipation for the approval from other relevant body and no such subsequent approval was accorded---Petitioner, in circumstances, was illegally refused the opportunity to avail his fourth chance---High Court directed the University to allow the petitioner to appear in the examination---Constitutional petition was allowed, accordingly.

Muhammad Amjad Ali Sherazi for Petitioner.
Muhammad Nasir Chohan, A.A.-G., Muhammad Farooq Qureshi Chishti and Ejaz Farrukh, Law Officer for Respondents.
Date of hearing: 14th May, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The petitioner was admitted in First Professional M.B.B.S. in King Edward Medical University in the session 2003-2004 and according to his understanding he was at his credit four chances to clear the First Professional M.B.B.S. Part-1 examination, but after availing three chances i.e. the supplementary examination 2004 under Roll No.71 held in May, 2005, Annual examination under Roll No.419 held in October, 2005 and supplementary examination 2005 under Roll No.110 held in May, 2006, he was declared fail.

2. When the result of the First Professional M.B.B.S. part-1 supplementary examination 2004 held in May, 2005 was declared, in the notification in column provided under the head "Subjects to re-appear and period" against Serial No.71 meant for the present petitioner, it was specifically noted by the University as Annual, 2006, but after declaring fail in the supplementary 2005, the petitioner was held ineligible for further medical education in Pakistan. This resulted into filing of this petition.

3. Earlier the position of regulations was in such a nature that four chances were available for a candidate to clear his First Professional M.B.B.S. Examination, however, according to the respondents, it took a change when through notification dated 10-3-2006 the Vice Chancellor of the University caused amendment in said regulation by curtailing the four chances into three chances and strangely while issuing such notification on 10-3-2006, it was made effective retrospectively on the annual examination of 2004. Further it is clear from the language used in the said Notification that the same was issued in anticipation of the approval of the other relevant bodies. No subsequent approval from any relevant body was assigned to such amendment carried out by the Vice Chancellor. It was specifically asked from the respondents as to whether any subsequent approval was accorded to such amendment carried out by the Vice Chancellor in anticipation of the approval, the answer was in negative.

4. The affairs of the University are being run through the statute and regulations contained in the calendar of the University in Volume-II, Part-X, Chapter-IV. By virtue of section 8(a). It is the position that a candidate, who fails to clear the First Professional M.B.B.S. examination in four chances availed or not availed, offered by the University, shall cease to be eligible for further medical/dental education. This above noted regulation was amended on 10-3-2006 by the Vice Chancellor, as hereinabove discussed in detail.

5. From the report and para wise comments furnished by respondents Nos.1 and 2, it is clear that the First chance was not allowed to the petitioner and he was only allowed to avail three chances, as is mentioned by the said respondents in para-3 of their report and parawise comments, which for the sake of convenience is reproduced below:--

"(3). That after becoming eligible the petitioner availed three chances to clear the First Professional Part-I Examination but he could not pass the examination as per detail as reflected below:-

Chance No.	Roll No.	Examination	Held in	status	Result
1.	-	Annual, 2004	October, 2004	Not allowed	-
2.	71	Supplementary, 2004	May, 2005	Appeared	fail
3.	419	Annual, 2005	October, 2005	Appeared	fail
4.	110	Supplementary, 2005	May, 2006	Appeared	Fail---Not eligible for further Medical Education in Pakistan declared by the University of the Punjab

6. The entry in Notification dated 12-7-2005 showing the result of the First Professional M.B.B.S. Part-1 supplementary examination, 2004 held in May, 2005 clearly proved that the petitioner was afforded three chances to attempt for clearance of M.B.B.S. Part-1 Examination and a chance was available till Annual Examination, 2006. The respondents in halfhearted manner have attempted to convince the Court that this was entered as a clerical mistake, but when asked as to whether any clarification or corrigendum to that effect was issued, they have failed to demonstrate as such.

7. What emerges from the above, is that the petitioner was having four chances to avail for clearance of First Professional M.B.B.S. Part-1 Examination and he was unauthorizedly and illegally refused to avail his 4th chance.

8. Resultantly, this petition is ALLOWED and the petitioner is held entitled to avail 4th chance for clearance of First Professional M.B.B.S. Part-1 Examination and the respondents are directed to allow the petitioner to appear as his 4th chance in the first forthcoming examination to be held for First Professional M.B.B.S. Part-1 Examination.

K.M.Z./G-21/L Petition accepted.

2012 M L D 1538

[Lahore]

Before Ijaz Ahmad and Ibad-ur-Rehman Lodhi, JJ

Ch. ZAFAR HUSSAIN and 5 others---Petitioners

Versus

BORDER AREA COMMITTEE through Chairman and 6 others---Respondents

Writ Petition No.174-R of 2011, heard on 29th May, 2012.

West Pakistan Border Area Regulations, 1959---

----Reglns. 10 & 11---Constitution of Pakistan, Arts. 23, 24 & 199---Constitutional petition---Land was allotted to the Army Officer who transferred the land to one of the respondents after obtaining a "No Objection Certificate", whereafter said respondent sold the land to the predecessor-in-interest of the petitioners---Border Area Committee cancelled the allotment of land in favour of the said respondent, and said action of the Border Area Committee was assailed by the petitioners---Validity---Allotment made in the name of the original allottee could be cancelled but once it was further transferred, and that too after obtaining a "No Objection Certificate" from the General Headquarters or Border Area Committee by the original allottee, then power to cancel the land from the subsequent transferee's name would not be within the powers of the Border Area Committee---No allotment was liable to be cancelled finally till the allottee had been given a fair chance to explain such conduct complained against---Once original allotee had been allowed to transfer his property under a "No Objection Certificate", issued by the Border Area Committee or the General Headquarters, then in case of transfer to another individual , the terms and conditions which were applicable to the original allottee would come to an end and the subsequent purchaser would be considered a free citizen of Pakistan and would be at liberty to deal with his acquired land in any manner which he deemed fit and proper---Subsequent purchaser would no more be bound to observe the conditions which were made applicable to the original allottee under the West Pakistan Border Area Regulations, 1959 and subsequent matters would be regulated by the Constitution which guaranteed every citizen under Art.23 to have a right to acquire, hold and dispose of his property in any part of Pakistan and by virtue of Art. 24, it was a fundamental right of a citizen of Pakistan that he would not be deprived of property---Land allotted under the West Pakistan Border Area Regulations, 1959 was undoubtedly situated within Pakistan and was thus subject to be held with under provisions of the Constitution---High Court declared the transfer of land in favour of the petitioners to be in accordance with law---Constitutional petition was allowed, in circumstances.

Nauman Qaiser for Petitioners.

Muhammad Siraj-ul-Islam Khan, Addl. Advocate General and Amir Zahoor Chohan for Respondents.

Date of hearing: 29th May, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The area of 400-Kanals was allotted to an Army Personnel i.e. Lt. Col. Bashir Ahmad Qureshi in the year 1962 and proprietary rights were conferred to the said allottee. Mutation No.5 was sanctioned in favour of allottee on 27-12-1970. On the event of death of allottee, the property was devolved to his legal heirs and mutation of inheritance was sanctioned having No.47 of 1984. In 1985, the legal heirs of original allottee after obtaining No Objection Certificate from Border Area Committee/General Headquarters transferred the said land in favour of respondent No. 6 and thisreflected in Mutation No. 50 of 1985. Respondent No. 6 sold the land to Muhammad Anwar, predecessor in interest of the petitioners, on 13-5-1997 through a mutation. On 17-7-2007 the Border Area Committee cancelled the allotment of the land in favour of respondent No.6. Said cancellation was challenged by predecessor in interest of the present petitioners through W.P.No.45-R of 2008 and this Court vide order dated 13-1-2009 remanded the matter back to the Border Area Committee for decision afresh which Committee on 1-2-2010 refused to interfere in the earlier cancellation which again resulted in filing W.P. No.37-R of 2010, the matter was remanded to the Committee. The Border Area Committee sticked to its earlier findings and again refused to recall the cancellation vide order dated 2-11-2011 which is impugned herein in this petition.

2. The question to be answered is that when once a No Objection Certificate was obtained by the original allottee, whether for any further transaction of land a fresh No Objection Certificate would still be required by the subsequent purchaser and in order to resolve this issue we have in front of us West Pakistan Border Area Regulations, 1959.

3. The Regulations as noted above underwent a change in Punjab by way of the West Pakistan Border Area Regulations, 1959 (Punjab Amendment) Ordinance, 1981 (Punjab Ordinance III of 1981). In section 11 Schedule III(b) of the amending Ordinance, it is the legal position that the allotment shall be liable to be cancelled if the land is transferred by the allottee to any person without the permission of the General Headquarters. The concept of cancellation of allotment is provided in paragraph 10(a) which provides that if in view of Committee scrutinizing the allotment of any State land or immovable evacuee property within any Border Area, the Committee is satisfied that any allotment was made to a person not eligible for allotment, may proceed to cancel such allotment and direct the allottee to surrender forthwith the property to the Deputy Commissioner or the Committee. Here the missing of word "subsequent purchaser" is conspicuous and it is clear that the allotment from the name of original allottee can be cancelled but once it is further transferred and that too after obtaining the No Objection Certificate from the General Headquarters or Border Area Committee by the original allottee then the power to cancel the land from the subsequent transferee's name would not be within the powers of the Border Area Committee.

4. In view of paragraph 10 of Schedule under the regulations, allotment from the name of "allottee" is liable to be cancelled for breach of any of the conditions contained in paragraphs 5, 6 and 9 but no allotment is liable to be cancelled finally till the allottee has been given a fair chance to explain his such conduct complained against.

5. Once an original allottee, who has been accommodated under Rehabilitation Settlement Scheme has been allowed to transfer his property under a No Objection Certificate issued by the General Headquarters or Border Area Committee, then in case of transfer to another individual the terms and conditions which were applicable to the allottee would come to an end and the subsequent purchaser would be considered a free citizen of Pakistan and would be at liberty to deal with his acquired land in any manner which deems fit and proper. The subsequent purchaser would no more be bound to observe the conditions which were made applicable to the original allottee under the West Pakistan Border Area Regulations, 1959 and the subsequent matters would be regulated under the Supreme Law i.e. Constitution which guarantees every citizen under Article 23 thereof to have a right to acquire, hold and dispose of property in any part of Pakistan and by virtue of Article 24 of the Constitution, it is again fundamental right of a citizen of Pakistan that he will not be deprived of property. The lands allotted under the Regulations, 1959 are undoubtedly situated within the Pakistan and thus are subject to be held with under the provisions of Constitution. The findings arrived at by the Border Area Committee whereby the allotment in favour of respondent No.6 (a subsequent transferee) was cancelled only for the reason of there being no NOC from General Headquarters or Border Area Committee is declared an act to have been taken by the Border Area Committee without lawful authority and of no legal effect and same is set aside. The transfer of the land in favour of the predecessor in interest of the petitioner is declared to be in accordance with law and protected under the Constitutional provisions and it is declared that once a No Objection Certificate is issued by the Border Area Committee to the original allottee for transfer of the land, allotted to the said allottee by the Border Area Committee, then for subsequent transaction, no fresh No Objection Certificate from Border Area Committee or as the case may be the General Headquarters would require.

6. In view of above, this petition stands allowed.
K.M.Z./Z-25/L Petition allowed.

2012 M L D 1631

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

AHSAN SULEMAN and 2 others---Petitioners

Versus

ADDITIONAL DISTRICT JUDGE, LAHORE and 2 others---Respondents

Writ Petition No.1353 of 2008, heard on 4th June, 2012.

West Pakistan Family Courts Act (XXXV of 1964)---

----Ss.5 & 17---West Pakistan Family Courts Rules, 1965, Rr.5 & 6---Civil Procedure Code (V of 1908) Ss. 16 & 20---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of dower---Applicability of Ss.16 & 20, C.P.C.---Scope---Husband's (petitioner) application for return of plaint of the wife on the ground of lack of territorial jurisdiction of the Family Court; was dismissed concurrently---Validity---Language of Rule 6 of the West Pakistan Family Courts Rules, 1965 were clear that where the cause of action

wholly or in part arose, the court of such place would have the exclusive jurisdiction to try the suit filed before it---In view of S. 17 of the West Pakistan Family Courts Act, 1964; Ss. 16 & 20 of the C.P.C. were not to be taken into consideration particularly when the prevailing position of legal provisions was contained in the special law, the West Pakistan Family Courts Act, 1964---Provisions of S. 5 of the Act and Rules 5 and 6 of the West Pakistan Family Courts Rules, 1965 catered the position with regard to the determination of jurisdiction of the Family Court and in presence of such provisions, the provisions of general law should not be taken into consideration---Constitutional petition was dismissed.

Major Muhammad Khalid Karim v. Mst. Saadia Yaqub and others PLD 2012 SC 66; Shakeel Ahmad v. Additional District Judge, Lahore and another PLD 2008 Lah. 410; Muhammad Iqbal through Special Attorney Faiz Sultan v. Parveen Iqbal PLD 2005 SC 22 and Syed Zia ul Hassan Gilani v. Mian Khadim Hussain and 7 others PLD 2001 Lah. 188 distingiushed.

Ch. Ali Muhammad for Petitioners.
Muhammad Nasir Iqbal Siddiqui for Respondents.
Date of hearing: 4th June, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---A suit for recovery of dower amount and dowry was filed on 18-9-2006 by respondent No.3 before the Judge Family Court at Lahore.

The writ petitioner/defendant in the suit on appearance instead of filing written statement preferred a miscellaneous application under Rule 5 of West Pakistan Family Courts Rules, 1965 seeking return of plaint claiming lack of territorial jurisdiction by the Family Court at Lahore, mainly on the assertion that the articles of dowry which were claimed in the plaint were lying at Multan.

2. The learned Judge Family Court vide order dated 28-6-2007 dismissed such application after contest.

3. Feeling aggrieved of the dismissal of his application, the petitioner preferred an appeal under the provisions of section 14 of Family Courts Act, 1964 before the learned District Judge at Lahore and a learned Additional District Judge ceased of the matter describing the appeal as not maintainable being against the interim order dated 28-6-2007 and dismissed the same on 10-1-2008.

4. It was on 19-2-2008 when a Constitutional petition, preferred by the petitioner calling in question the findings of courts below was entertained by this Court and announcement of the final judgment in the case before trial court was stayed.

5. The learned counsel for petitioner on referring section 5 of the Family Courts Act, 1964 and Rules 5 and 6 of West Pakistan Family Courts Rules, 1965 has reiterated the stance which was earlier taken by him in the courts below and also in the memo of Constitutional petition. He has placed reliance on the judgments in the cases of Major Muhammad Khalid

Karim v. Mst. Saadia Yaqub and others (PLD 2012 Supreme Court 66), Shakeel Ahmad v. Additional District Judge, Lahore and another (PLD 2008 Lahore 410), Muhammad Iqbal through Special Attorney Faiz Sultan v. Parveen Iqbal (PLD 2005 Supreme Court 22) and Syed Zia ul Hassan Gilani v. Mian Khadim Hussain and 7 others (PLD 2001 Lahore 188).

6. The learned counsel for respondent No.3 supported the findings arrived at by the courts below and prayed for the dismissal of the writ petition.

7. In addition to section 5 of West Pakistan Family Courts Act, 1964 which generally deal with jurisdiction of Family Courts, Rules 5 and 6 of the West Pakistan Family Courts Rules, 1965 are to be taken into consideration for resolution of issue raised here in the present petition. Rule 6 of the said Rules provides that the Court which shall have jurisdiction to try a suit will be that within the local limits of which:--

(a) the cause of action wholly or in part has arisen, or

(b) where the parties reside or last resided together.

It is clear from the reading of language of Rule 6 that where the cause of action wholly or in part has arisen, the Court of such place shall have exclusive jurisdiction to try the suit filed before it.

8. The judgments, relied upon in support of his version by the learned counsel for petitioner, are not directly relatable to issue raised in this petition. The case of Major Muhammad Khalid Karim v. Mst. Saadia Yaqub and others (PLD 2012 Supreme Court 66) relates to the custody matter. A comparison was studied within section 7(2) of Family Courts Act, 1964 and section 9(1) of the Guardians and Wards Act, 1890 and point considered by the apex Court was with regard to the jurisdiction of a Court dealing with the custody matter under the Guardians and Wards Act, 1890.

In the case of Shakeel Ahmad v. Additional District Judge, Lahore and another (PLD 2008 Lahore 410), it is the ratio of the judgment that it is the right of the wife to bring the suit within local limits of Family Court where she ordinarily resides and the ordinary residence is not to be determined through some hard and fast Rules. Again the case Muhammad Iqbal through Special Attorney Faiz Sultan v. Parveen Iqbal (PLD 2005 Supreme Court 22) is with regard to the Guardianship matters and lastly in the case Syed Zia ul Hassan Gilani v. Mian Khadim Hussain and 7 others (PLD 2001 Lahore 188), this Court has taken into consideration for determination of territorial jurisdiction, the provisions of Code of Civil Procedure contained in section 20 thereof.

9. I am afraid, in view of section 17 West Pakistan Family Courts Act, 1964 only sections 10 and 11 of C.P.C. can be made applicable to the proceedings before any Family Court but for determination of the jurisdiction sections 16 and 20, C.P.C. are not to be taken into consideration particularly in the prevailing position of legal provisions contained in Special Law viz. the Family Laws. The provisions of section 5 of the Act and Rules 5 and 6 of the Rules cater position with regard to the determination of jurisdiction of the Family Court and

in presence of such provisions in Special Law, the provisions of General Law should not be taken into consideration.

10. In the plaint filed before the Family Court at Lahore in para 10, the plaintiff has categorically stated that she is permanent resident of Lahore where cause of action was also accrued, her such assertion has not been controverted by the defendant/writ petitioner. If para 10 of the plaint is read in conjunction with Rule 6(a) of West Pakistan Family Courts Rules, 1965 it would be manifestly clear that the Family Court at Lahore would have every jurisdiction to entertain and adjudicate upon the plaint presented before it by the plaintiff/respondent No.3. The courts below have thus dealt with the matter in accordance with law and arrived at just decision.

11. The respondent lady filed her suit for recovery of dowry articles and dower amount as back as in the year 2006 and as yet she has not succeeded in getting her suit decided on merits for simple reason that the petitioner has entered into a fight on technicalities and the parties have been fighting on such technicalities for the past almost six years.

12. The result is that the petition is dismissed, the findings of courts below are maintained with regard to jurisdiction of the Family Court at Lahore and the trial court is directed to decide the pending suit of respondent No.3 in some expeditious manner and would try to decide the suit finally before 31st of July, 2012. The parties are directed to appear before the learned District Judge, Lahore on 12-6-2012, who will entrust the trial of the suit to some learned Judge Family Court posted at Lahore.

KMZ/A-109/L Petition dismissed.

2012 M L D 1943

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

RAZIA BIBI and another---Petitioners

versus

MUHAMMAD IQBAL and 2 others---Respondents

Writ Petition No.15512 of 2011, decided on 12th September, 2012.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5 & Sched.---Constitution of Pakistan, Art. 199---Constitutional petition---Wife (petitioner) assailed order of Family Court whereby after marriage was dissolved on the basis of khula, wife was ordered to relinquish right to maintenance allowance in lieu of condition of khula---Validity---Maintenance allowance was considered not as "benefit" but a "right" of the wife---Claim of maintenance being not a benefit the wife had received from husband was not returnable in case of khula as it was duty of the husband to maintain his wife so long as she remained in wedlock---Wife was entitled in law to maintenance during pendency of suit and period of iddat and would not forfeit such right

merely because she had sought divorce on basis of khula---Order of Family Court was set aside---Constitutional petition was allowed, in circumstances.

Muhammadan Law by D.F. Mulla; Shafiqan Bibi v. Senior Civil Judge/Judge Family Court, Okara and another 1999 CLC 160; Iftikhar Ahmed v. Husan Pari and others 1988 CLC 2355 and M. Saglain Zaheer v. Mst. Zaibun Nisa Zaheer alias Zaibi and another 1988 MLD 427 rel.

(b) Islamic Law

------Dissolution of marriage by way of Khula---Effect---Divorce effected by khula or mubarat operated as a release by the wife of her dower, but did not affect the liability of the husband to maintain the wife during her Iddat.

Muhammadan Law by D.F. Mulla rel.

Muhammad Ehsan Gondal for Petitioners.

ORDER

IBAD-UR-REHMAN LODHI, J.--Through this constitutional petition, Mst. Razia Bibi petitioner No.1 has challenged the condition attached with a decree for dissolution of marriage granted on the basis of Khula and in addition to the benefit of dower also the right of maintenance was ordered to be relinquished in lieu of condition of Khula. The learned Judge Family Court, Malakwal, District Mandi Baha-ud-Din, vide judgment and decree dated 8-9-2010, while giving findings on Issue No.1 in Family Suit No.80 of 2010 has given the following relief:--

> Relief (i) The marriage between the parties is dissolved on the sole ground of Khula. The plaintiff shall return dower amount to the defendant and shall not claim maintenance allowance.

The findings so arrived at by the learned Judge Family Court were called in question through regular appeal, but the learned Appellate Judge on 28-2-2011 affirmed the findings of the learned trial court and the condition of not claiming the maintenance allowance remain attached with relief of dissolution of marriage as was granted to the petitioner on the basis of Khula.

2. Respondent No.1 herein was summoned through every possible means and finally after proclamation in Press as a substituted service, he was proceeded against ex parte vide order dated 20-6-2012.

3. The learned counsel for the petitioner, in support of this petition, has argued with vehemence that some "benefit" is to be attached in case the marriage is to be dissolved on the demand of the wife on the basis of Khula but the right of maintenance can never be considered a "benefit" and thus, the same cannot be ordered to be taken away or to be withheld as a condition of grant of decree of dissolution of marriage.

4. In view of Paragraph 320 of Muhammadan Law by D.F. Mulla, a divorce effected by Khula or Mubara'at operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain the wife during her Iddat.

5. This Court in case of "Shafigan Bibi v. Senior Civil Judge/Judge Family Court, Okara and another" (1999 CLC 160) has examined the question of return of benefits in case of dissolution of marriage on thebasis of Khula and the maintenance has been considered as no "benefit" but a "right" of wife and it was held that the judgment and decree of the learned Judge Family Court to the extent of withdrawing the benefit of dower in lieu of Khula was correct in making decree conditional on returning of the same but the claim of maintenance was held as not a "benefit" received by the wife from husband and, therefore, it was not returnable in case of Khula, for, it was a duty of the husband to maintain his wife so long as she remained in wedlock. In the reported matter, the decree passed by the learned trial court for dissolution of marriage on the basis of Khula to the extent of relinquishment of claim of maintenance allowance was declared to be without lawful authority and of no legal effect. Earlier in case of "Iftikhar Ahmed v. Husan Pari and others (1988 CLC 2355); it was held that wife was entitled in law to maintenance and would not forfeit such right merely because she had sought divorce on the basis of Khula and a wife was held entitled and not to be deprived of her right to be maintained during pendency of suit based on the ground of Khula and until expiration of Iddat period. Such principle of law, as noted above, also found support from another reported case of "M. Saglain Zaheer v. Mst. Zaibun Nisa Zaheer alias Zaibi and another" (1988 MLD 427).

6. Adjudged the impugned judgment in light of the above settled position there would be no other finding than that the direction for relinquishment of claim of maintenance of the petitioner in lieu of decree for dissolution of marriage on the basis of' Khula is without lawful authority and of no legal effect.

7. Resultantly, this petition is allowed and the condition attached with the decree for dissolution of marriage for relinquishment of claim of maintenance of the petitioner as against respondent No.1 is declared as without lawful authority and of no legal effect.

KMZ/R-36/L Petition allowed.

2012 P Cr. L J 1655

[Lahore]

Before Ibad ur Rehman Lodhi, J

MUHAMMAD SADIQ and 2 others---Petitioners

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.7573/B of 2012, decided on 19th June, 2012.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S.380---Theft in dwelling house---Pre-arrest bail, grant of---Accused had sought pre-arrest bail in a case registered against them under S.380, P.P.C.---Three co-accused in the case had already been allowed bail by High Court---Complainant had lodged the F.I.R. after an uncertain period of five or six months---Relationship of employees and employer existed between the parties and a civil suit for injunction was pending between them before Civil Court---Plaint of the suit contained all the required material of financial transaction between the parties---Complainant had surrendered to the jurisdiction of Civil Court and he had not prayed for rejection of the plaint---Dispute between the parties would finally be settled in the civil suit and the monetary claim raised in criminal action by the complainant would also be thrashed in the Civil Court---Mala fides on the part of the complainant while in league with the Provincial Police Department were very much obvious and accused were entitled to be protected against humiliation and rough treatment, which was visualized in the peculiar circumstances of the case---Ad interim pre-arrest bail already granted to accused was confirmed in circumstances.

Petitioner No.1 in handcuffs.
Mian Arshad Ali Mahar for Petitioners Nos.2 and 3.
Ch. Karamat Ali, Deputy Prosecutor-General Punjab with Afzal, S.-I. and Shahid Aslam, A.S.-I. with record for the State.
Humayun Rashid for the Complainant.

ORDER

IBAD UR REHMAN LODHI, J.---Petitioners Muhammad Sadiq, Muhammad Afzal and Muhammad Siddique seek pre-arrest bail in case F.I.R. No.276, dated 22-4-2012 offence under section 380, P.P.C. registered at Police Station Haveli Lakha, District Okara.

2. On 4-6-2012 petitioners viz. Muhammad Sadiq, Muhammad Afzal and Muhammad Siddique were allowed ad interim bail by this Court but on 11-6-2012 when the matter was fixed for hearing it was informed by the learned counsel for the petitioners that one of the petitioners Muhammad Sadiq has been taken illegally by Rahim Yar Khan Police at the behest of the complainant who is close relative of Provincial Police Officer and for that particular date the personal attendance of the said petitioner was exempted. The information was laid before this Court on 15-6-2012 that said Muhammad Sadiq has been arrested in case F.I.R. No.144, dated 7-5-2012 registered under section 489-F, P.P.C. at the Police Station City B-Division, Rahim Yar Khan and he was shifted to Rahim Yar Khan and there he was confined in District Jail. On receipt of such information it was directed that Muhammad Sadiq be produced before this Court and today he has been produced by Rahim Yar Khan Police.

3. From the record it reveals that on 9-6-2012 when he was already protected under interim bail vide order dated 4-6-2012, was taken into custody by Rahim Yar Khan Police at Depalpur, District Okara and thereafter shifted to Rahim Yar Khan. All which has been done by the Punjab Police either from Rahim Yar Khan or from Okara, was in clear violation of the provisions of section 86, Cr.P.C. which provides that if a person arrested on the strength of a warrant issued under section 76, Cr.P.C. appears to be the person intended by the court which

issued the warrant, the Magistrate or District Superintendent, as the case may be, of the District from where such person is arrested, direct the removal in custody to warrant issuing court. It is further provided that if the offence is not bailable or no direction has been endorsed under section 76 on the warrant, the Sessions Judge of the Sessions Division in which the person is arrested may, subject to the provisions of section 497 and for sufficient reasons, release the person on an interim bail on such bond or security as the Sessions Judge thinks fit and direct the person to appear by a specified date before the court which issued the warrant and forward the bond to that court.

4. In the case in hand, no such procedure as provided in section 86 has been adopted. The police of Rahim Yar Khan was not equipped with any warrant of arrest issued under section 76, Cr.P.C., the Magistrate or District Superintendent of Okara District never directed the removal of petitioner Muhammad Sadiq in custody to any court at Rahim Yar Khan. Learned Sessions Judge of Okara Sessions Division, has never been approached in order to meet the mandatory requirements of section 86, Cr.P.C. and such whole of the episode whereby Muhammad Sadiq petitioner was apprehended from Okara in a case registered at' Rahim Yar Khan and then his shifting to Rahim Yar Khan without fulfilling the requirements of section 86, Cr.P.C. and production of said Muhammad Sadiq before some Magistrate in Rahim Yar Khan and the order passed by that Magistrate remanding the said petitioner to judicial custody is an illegal exercise.

5. Had a warrant as required under section 76, Cr.P.C. was issued the petitioner Muhammad Sadiq would certainly have been produced before the learned Sessions Judge sifting at Okara Sessions Division but this was not done. The jurisdiction which was vested in Sessions Judge at Okara is being exercised by this Court under section 497, Cr.P.C. and keeping in view the illegalities pointed out in the above lines petitioner Muhammad Sadiq is admitted to post-arrest bail in case F.I.R. No.144, dated 7-5-2012 registered under section 489-F, P.P.C. at the Police Station City B-Division, Rahim Yar Khan with one surety amounting to Rs.1,00,000 to the satisfaction of Deputy Registrar (Judicial) of this Court.

6. Keeping in view the highhandedness adopted by the Punjab Police with the petitioner Muhammad Sadiq it is ordered that if at any subsequent stage within Province of Punjab on the basis of any registered criminal case the person of Muhammad Sadiq is required, the investigating agency of said case would place all the material before the learned Sessions Judge at Okara and subsequent proceedings will be regulated under the directions of learned Sessions Judge concerned. These directions are also applicable in case of other two petitioners, namely, Muhammad Afzal and Muhammad Siddique as the learned counsel for the petitioners expressed his apprehension that the other two petitioners would also be victimized in similar manner.

7. As far as the 'present petition is concerned, three co-accused persons viz. Ranjha, Tahir Mehmood and Muhammad Anwar, have already been allowed bail on 4-6-2012 by this Court in Criminal Miscellaneous No.7184-B of 2012.

8. The F.I.R. was lodged by the complainant after uncertain period of 5/6 months. Admittedly, there has been relationship of the parties of employees and employer. A civil suit for

injunction titled Ch. Muhammad Sadiq versus Fahim Haider and others is pending in between the parties before the competent court of civil jurisdiction at Depalpur and the plaint of the suit contains all required material of financial transaction in between the parties. The complainant of the suit has surrendered to the jurisdiction of civil court and has never moved for rejection of plaint. The dispute in between the parties will finally be settled down after complete trial of the civil suit and the monetary claim raised in criminal action by the complainant would also be thrashed by the civil court. The mala fides on the part of the complainant while in league with the Provincial. Police Department are very much obvious. The petitioners are entitled to be protected against humiliation and rough treatment which is visualized in the peculiar circumstances of the case.

9. Resultantly, this petition is allowed, ad interim pre-arrest bail already granted to the petitioners on 4-6-2012 is confirmed on the already furnished bail bonds.

10. Station House Officer of Police Station City B-Division, Rahim Yar Khan is directed to place on record his explanation as-to under what lawful authority he has allowed the practice adopted by the investigating staff of his police station in picking up the person of Muhammad Sadiq in an illegal manner from Okara and his subsequent shifting to Rahim Yar Khan. His explanation must reach this Courtwithin seven days from today.

NHQ/M-247/L Pre-arrest bail allowed.

2012 P Cr. L J 1788

[Lahore]

Before Sagheer Ahmad Qadri and Ibad-ur-Rehman Lodhi, JJ

ABDUL REHMAN SHANWARI and 4 others---Appellants

versus

ANTI-NARCOTIC FORCE and another---Respondents

Criminal Appeal No.342 of 2011, heard on 18th June, 2012.

Control of Narcotic Substances Act (XXV of 1997)---

---Ss. 12, 19 & 39---Forfeiture of assets of accused---Accused was tried and sentenced in two different cases---Conviction was set aside by High Court and case was remanded to the Trial Court for decision afresh---In the first round, subsequent to conviction of accused, his property was ordered to be forfeited---Appellate Court having set asideconviction of accused, forfeiture order had lost its efficacy---Subsequently when Anti-Narcotic Force moved again the Trial Court, Trial Court without giving any show cause notice to the owners of the property, straightaway, ordered the forfeiture of the property---When the earlier conviction of accused was set aside and fresh order convicting accused was passed by the Trial Court, it was incumbent upon the Trial Court to observe the procedure provided, particularly in S.39 of the Control of Narcotic Substances Act, 1997, if the assets of accused were going to be forfeited, and for satisfaction of the court a detailed inquiry was sine qua non and also a declaration to the effect that the assets/subject-matter of forfeiture were derived, generated or obtained in contravention of S.12 of the Control of Narcotic Substances Act, 1997, was necessary, but the Trial Court had failed either to observe such

procedure or to give any declaration as was required under the law---Impugned orders were declared to have been passed without lawful authority and illegal, and were set aside, in circumstances---Matter was remanded by the High Court to the Trial Court for decision afresh of the case of forfeiture of the assets of accused, after adopting all codal formalities.

Mian Muzaffar Ahmad for Appellants.
A.D. Naseem, Special Prosecutor for ANF.
Date of hearing: 18th June, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---Through the present appeal, appellants-Abdul' Rehman Shanwari, Zia-ur-Rehman, Ibad-ur-Rehman, Hamza and Muhammad Asif have assailed the findings of learned Judge Special Court under the Control of Narcotic Substances, Lahore dated 28-2-2011, whereby the findings earlier arrived at on 21-1-2011 were affirmed and a detailed probe was refused on forfeiture of the property of the appellants...

2. The facts relevant for the purpose of the disposal of this appeal are that appellant No.1 was tried and sentenced under the provision of Control of Narcotic Substances Act, 1997 in two different cases registered through F.I.Rs. Nos.66 and 67 of 2000 dated 15-9-2000 with Police Station Anti-Narcotic Force, Model Town, Lahore and vide judgment dated 27-8-2005 he was convicted and sentenced to death. On appeal, his conviction was set aside by this Court on 18-5-2009 and the case was remanded to the learned trial Court for decision afresh. In post, remand proceedings, the learned trial Court maintained the conviction, however, instead of death sentence he was awarded life imprisonment.

3. In the first round, subsequent to his conviction, vide judgment dated 2740-2006 his property was ordered to be forfeited in favour of Federal Government and it was clearly mentioned by the learned trial Court that house, which was forfeited, was in the name of the convict and his four sons.

4.. The conviction as was announced on 27-8-2005 by the learned trial court was set aside by this Court in appeal on 18-5-2009 and thus the forfeiture ordered on the basis of such conviction lost its any efficacy and for that purpose the Anti-Narcotic Force moved again the learned trial Court for afresh forfeiture. This time, the learned trial Court on 21-1-2011. without giving any show-cause notice to the owners of the property straightaway ordered the forfeiture of house as was ordered in earlier round of litigation and such findings were affirmed on 28-2-2011.

5. The learned counsel for the appellants mainly, while placing reliance on provisions under section 39 of the Control of Narcotic Substances Act 1997, has argued that in case of any sentence of imprisonment for more than three years, if court is moved by any authorized officer by way of application in writing along with a list of assets of the convict or his associate, relative or any other person holding or possessing such assets on his behalf, for the forfeiture, the Special Court upon "satisfaction" that any such assets were derived, generated or obtained in contravention of section 12 of the Act or are liable to be forfeited

under section 19 of the Act, it may order that such assets shall stand forfeited to the Federal Government. But a proviso attached with such subsection requires that no order under this section shall be made without issuing a notice to show-cause and providing a reasonable opportunity of being heard to the persons being affected by such order.

6. The learned Special Prosecutor for ANF has halfheartedly conceded the position that after conviction as was announced in post remand proceedings no notice as is required under the proviso to section 39(2) of the Control of Narcotic Substances Act, 1997 has been issued to the appellants nor they were provided any reasonable opportunity of being heard, thus, the orders impugned herein suffers from illegality and are not sustainable.

7. When the earlier conviction was set aside and fresh order convicting appellant No.1 was passed by the learned trial Court it was incumbent upon it to observe the procedure provided, particularly in section 39 of the Control of Narcotic Substances Act 1997 if the assets of the convict are going to be forfeited and for satisfaction of the court a detailed inquiry was sine qua non and also a declaration to the effect that the assets/subject-matter of forfeiture were derived, generated, or obtained in contravention of section 12 thereof was necessary but the learned trial Court has miserably failed either to observe such procedure or to give any declaration as is required under the law. The impugned orders are thus declared to have been passed without lawful authority and illegal and are set aside.

8. Keeping in view the above, the matter is remanded back to the learned trial Court for decision afresh of the case of forfeiture of the assets of the convict but after adopting all codel formalities as has been pointed out in the above lines. The learned trial Court would finalize the proceedings within two months from today.

9 With the above observations, this appeal is disposed of accordingly.

HBT/A-1201L Case remanded.

2012 P Cr. L J 1983

[Lahore]

Before Sagheer Ahmad Qadri and Ibad-ur-Rehman Lodhi, JJ

TARIQ SULTAN and another---Petitioners

Versus

NATIONAL ACCOUNTABILITY BUREAU through Chairman and 2 others---Respondents

Writ Petition No.15374 of 2012, heard on 4th September, 2012.

National Accountability Ordinance (XVIII of 1999)---

----Ss. 5 (da), 9 (a)(xii) & 17---Criminal Procedure Code (V of 1898), S.403---Constitution of Pakistan, Arts. 13 & 199---Constitutional petition--- Show-cause notice--- Double jeopardy, principle of---Applicability---Petitioners, who were accused in Accountability Reference, were acquitted by Supreme Court but later on Accountability Court issued show-

cause notices to the petitioners treating them as Benamidars and their explanation was called for---Petitioners sought recalling of show-cause notices but Trial Court declined to recall the same---Validity---After detailed findings and acquittal of petitioners from charge framed against them under S.9 of National Accountability Ordinance, 1999, issuance of show-cause notices under challenge and declining to recall the same by Trial Court were without lawful authority and of no legal effect---Issuance of show-cause notices was nothing but action which had been forbidden not only under the provisions of S.403, Cr.P.C. but also Art.13 of Constitution---High Court declared that show-cause notices issued to petitioners were illegal and without lawful authority and order passed by Trial Court was illegal order and the same was set aside---Petition was allowed in circumstances.

Muhammad Amjad Pervaiz for Petitioners.
Mian Muhammad Tahir Hanif, Additional Deputy Prosecutor-General and Mian Muhammad Bashir, Deputy Prosecutor-General for NAB.
Date of hearing: 4th September, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The legality of findings arrived at by the learned Judge Accountability Court No.V, Lahore in order dated 9-4-2012 whereby the application moved by the present petitioners under Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 403, Cr.P.C. and section 17 of National Accountability Bureau Ordinance, 1999 was dismissed in questioned through present petition.

2. The background relevant for the purpose of disposal of present petition is that in Reference No.11 of 2003, the petitioners were charge sheeted on 23-5-2007 for providing aid and abetting by active assistance to the co-accused Rasheed Ahmad, Patwari in accumulation of property/assets in his own name and in the names of the petitioners as beneficiaries which were disproportionate to his known sources of income and thus the present petitioners were also charged for an offence punishable under section 9(a)(xii) of National Accountability Bureau Ordinance, 1999. The charge was amended on 4-11-2007 by providing the details of the properties of accused Rasheed Ahmad but to the extent of present petitioners, who were arrayed as accused Nos. 2 and 3 in the Reference, the charge was same as was originally framed.

3. The petitioners through an independent application sought their acquittal within the meaning of section 265-K, Cr.P.C. and the learned Judge Accountability Court on 7-4-2010 proceeded to dismiss said application. Such dismissal was challenged by the petitioners by means of Writ Petition No. 7355 of 2010 which was finally decided by learned Division Bench of this Court on 17-5-2010. The writ petition was accepted and the petitioners were acquitted from the charge against them in the Reference pending before the learned Judge Accountability Court No.V, Lahore at that time.

4. The State through Prosecutor-General NAB preferred Civil Petition No.2000 of 2010 before the Hon'ble Supreme Court of Pakistan against the judgment dated 17-5-2010 passed in Writ Petition No.7355 of 2010 which was dismissed on 3-7-2012.

On 20-3-2012, the learned Judge Accountability Court issued show-cause notices to the petitioners, treating them as 'Benamidars' and the explanation of the petitioners was called for with regard to the holdings of the main accused Rasheed Ahmad, Patwari.

5. The issuance of show-cause notices was challenged and the learned trial Court was requested to recall the said show-cause notices on the ground that already on the same charges, the petitioners have been acquitted from this court which acquittal attained finality when a Civil Petition, filed before the Hon'ble Supreme Court of Pakistan, challenging the findings arrived at by this Court on 17-5-2010 in Writ Petition No.7355 of 2010 was dismissed.

6. The learned Judge Accountability Court No.V, Lahore vide order dated 9-4-2012 has dismissed such request of recalling the show-cause notices and directed the petitioners to file reply to the said show-cause notices. The issuance of show-cause notices to the petitioners and dismissal of their application for recalling of said show-cause notices are the acts challenged in the present petition.

7. In support of the petition, learned counsel for the petitioners contends that the petitioners cannot be prosecuted for the same offence more than once and that the earlier acquittal by this Court from the same charge provides a bar against issuance of any show-cause notice or to carry out any proceedings against the petitioners on the same charges which earlier they have already faced.

8. The learned Prosecutors, appearing on behalf of NAB, have opposed the contentions of the writ petitioners and prayed that the findings of the learned trial Court be maintained.

9. We have heard the learned counsel for the parties and perused the record with their assistance.

10. By virtue of section 17 of the National Accountability Bureau Ordinance, 1999, the provisions of Code of Criminal Procedure, 1898 are mutatis mutandis made applicable to the proceedings under the National Accountability Bureau Ordinance, 1999 whereas in view of section 403, Cr.P.C. a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not to be liable to be tried against for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made.

11. The Supreme Law of the Country viz. the Constitution provides by virtue of Article 13(a) that no person shall be prosecuted or punished for the same offence more than once.

12. In the present case, the trial against the petitioners commenced at the time when the copies of the prosecution material were supplied to the petitioners and then charge was framed and by means of order dated 17-5-2010 passed by this Court in Writ Petition No.7355 of 2010, the petitioners were acquitted of such charge. The perusal of show-cause

notices issued against the petitioners reveal that the same accusation is repeated against the petitioners which has already been dealt with by this Court while acquitting the petitioners.

13. The learned Trial Judge in the impugned order is of the view that the petitioners are still 'Benamidars' and in view of the learned Trial Judge, this Court has never given any findings as to the status of the petitioners as that of 'Benamidars' or otherwise. The learned Judge is misconceived in his such findings. The term "Benamidar" is defined in section 5(da) of the National Accountability Bureau Ordinance, 1999 which reads as under:--

> "benamidar" means any person who ostensibly holds or is in possession or custody of any property of an accused on his behalf for the benefit and enjoyment of the accused."

This Court, in order dated 17-5-2010, has held in unambiguous terms that the petitioners have purchased the property from the main accused Rasheed Ahmad and the findings so arrived at attained finalitywhen the leave was refused by the Hon'ble Supreme Court of Pakistan on 3-7-2012 against the said order and keeping in view the definition of 'Benamidar' as reproduced hereinabove, the property which the petitioners had purchased can in no way be termed as a property ostensibly held or possessed on behalf of the main accused or for the benefit or enjoyment of the said accused. By no stretch of imagination the petitioners can be held as 'Benamidars' with regard to the property held by the main accused Rasheed Ahmad. After such detailed findings and acquittal of the petitioners from the charge framed against them under section 9 of the National Accountability Bureau Ordinance, 1999, the issuance of show-cause notices under challenge and declining the prayer of the petitioners for recalling the same by the learned Accountability Judge are without lawful authority and of no legal effect. The effect of issuance of show-cause notices is nothing but an action which has been forbidden not only under the provisions of section 403, Cr.P.C. but also under Article 13 of the Constitutional of Islamic Republic Pakistan, 1973.

14. The result is that this writ petition succeeds and the same is allowed, declaring show-cause notices issued to the petitioners as illegal and without lawful authority and the order passed by the learned Judge Accountability Court on 9-4-2010 is an illegal order which is set aside by accepting the application moved by the petitioners for recalling of the show-cause notices.

MH/T-22/L Petition allowed.

P L D 2012 Lahore 392

Before Ibad-ur-Rehman Lodhi, J

MUHAMMAD ASLAM---Petitioner

Versus

AYYAN GHAZANFFAR and 2 others---Respondents

Writ Petition No.9564 of 2012, heard on 7th May, 2012.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 13(3)---West Pakistan Land Revenue Act (XVII of 1967), Chap.VIII---Constitution of Pakistan, Art. 199 ---Constitutional petition---Suit for recovery of maintenance allowance of minors---Enforcement of decree against attorney of the defendant---Maintainability---Suit was decreed by Family Court, and since the defendant was out of the country, the petitioner-grandfather of the minors, appeared to defend the suit on behalf of the defendant on the basis of a deed of Special Power of Attorney---Executing Court placed liability for the decree on the petitioner (grand father) and issued non-bailable warrants of arrest against the petitioner---Contention of the petitioner (grandfather) was that the judgment-debtor had movable and immovable property in the country which could be attached for the satisfaction of the decree and that the petitioner after initial hearing, had subsequently disassociated himself from the proceedings of the Family Court in the suit, and therefore, he could not be held liable under provisions of the West Pakistan Family Courts Act, 1964---Validity---Departure from express provisions of S.13(3) of the West Pakistan Family Courts Act, 1964 would violate the law and the procedure prescribed for execution of decree in the said provision was to be resorted to---Provisions of the Civil Procedure Code, 1908, although were excluded by S.17 of the Act, but general principles thereunder could be invoked for due administration of justice where no procedure was provided in the West Pakistan Family Courts Act, 1964---Family Court was empowered to direct recovery of decree amount from the arrears of land revenue and Chap.VIII of the West Pakistan Land Revenue Act, 1967 provided procedure for such recovery, and therefore, when a specific produce had been provided for enforcement of the decree, resort to general provisions of the Civil Procedure Code, 1908 would not be permissible---Judgment-debtor was bound to satisfy the decree whether himself or through his attorney and the basic liability was still upon the judgment-debtor and not the attorney---Executing Court, in the present case, had attached a car belonging to the defendant and the decree holders had placed on record "Fard Taleeqa" mentioning 8 items of movable properties of the judgment-debtor/ defendant within Pakistan---Deed of power of attorney was to be strictly construed and a power which had not been assigned in specific terms could not be presumed to have been given by the principal to the attorney---Attorney was given to the petitioner (grandfather) to defend the suit on behalf of the defendant and never provided for any liability to the effect that in case of any possible decree against the defendant/ judgment debtor, the same could equally be executable against the attorney---Attorney in his independent capacity could not be booked for satisfaction of the decree which was never granted against him---High Court set aside impugned orders of the Executing Court and directed the Executing Court to proceed according to S.13(3) of the West Pakistan Family Courts Act, 1964 and directed the revenue authorities to recover decretal amount as arrears of land revenue---Constitutional petition was allowed, accordingly.

Muhammad Pervez v. Mst.Nabila Yasmeen and 2 others 2004 SCMR 1352 distinguished.
Nasir Khan v. Tahira Rashida 1986 CLC 2381 and Mst. Sameena Bibi and 2 others v. Additional District Judge/Appellate Authority, Gujrat and 2 others 2007 CLC 987 rel.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 17---Civil Procedure Code (V of 1908), Preamble---Provisions of the Civil Procedure Code, 1908, although were excluded by S.17 of Act, but general principles thereunder could

be invoked for due administration of justice where no procedure was provided in the West Pakistan Family Courts Act, 1964.
Mst. Sameena Bibi and 2 others v. Additional District Judge/Appellate Authority, Gujrat and 2 others 2007 CLC 987 rel.

(c) West Pakistan Family Courts Act (XXXV of 1964)-
----S.13---West Pakistan Land Revenue Act (XVII of 1967) Chap.VIII--Enforcement of decree---Procedure---Family Court was empowered to direct recovery of decree amount from the arrears of land revenue and Chapter VIII of the West Pakistan Land Revenue Act, 1967 provided procedure for such recovery, and therefore, when a specific procedure had been provided for enforcement of the decree, resort to general provisions of the Civil Procedure Code, 1908 would not be permissible.

Muhammad Mahmood Chaudhry for Petitioner.
Syed Kazim Bukhari for Respondents.
Date of hearing: 7th May, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Through this Constitutional petition, the petitioner, who happened to be paternal grandfather of minors, in whose favour the decree dated 14-5-2011 for maintenance allowance was passed by the learned Judge Family Court, Lahore, has challenged the orders of the Executing Court issuing firstly show cause notice and subsequently the warrants of arrest of the petitioner.

2. In the suit for recovery of maintenance one Ghazanfar Aslam, the father of minors was impleaded as a defendant. The defendant, impleaded as such, was out of country at the relevant time and thus on the basis of a deed of Special Power of Attorney, the writ petitioner was appointed as his special attorney and in his such capacity he on some occasions appeared before the learned Judge Family Court, Lahore in the said maintenance suit but after filing written statement on behalf of the defendant he did not proceed to defend the suit seriously and allow the suit to be decreed. No appeal against such decree was preferred either by Ghazanfar Aslam himself or through his attorney, the present petitioner.

3. When execution petition was filed by the decree holders, the learned Executing Court vide order dated 16-12-2011 directed the petitioner/special attorney of judgment debtor to pay the monthly maintenance allowance of the minors and when the liability as was placed upon the petitioner was called in question by filing an objection petition, it was not only turned down on 19-3-2012 but also show cause notice was ordered to be issued to the petitioner directing him the complete satisfaction of the decree within 15-days. The last order recorded by the learned Judge Family Court, Lahore on 19-4-2012 in execution proceedings is to the effect that non-bailable warrants of arrest of special attorney of judgment debtor/petitioner were issued with a direction to the bailiff of the Court to produce him in custody before the court.

4. At this juncture, the petitioner invoked the Constitutional jurisdiction of this Court praying to set aside the order passed by the learned Judge Family Court as noted above.

5. In support of the petition, learned counsel appearing on behalf of writ petitioner maintains that there is moveable and immoveable property available in Pakistan in the name of Ghazanfar Aslam, the judgment debtor and by attachment and disposal of the same the decree can conveniently be satisfied. He further maintains that after appearing in some informal proceedings in the suit and filing of written statement, the petitioner disassociated himself from the proceedings of court and even a decree granted in favour of the decree holders was not further challenged by way of an appeal. He seriously questioned the issuance of show cause notice and the warrants of arrest for the petitioner in execution proceedings and termed such action as violative to the provisions of West Pakistan Family Courts Act, 1964.

6. Conversely, learned counsel representing respondents Nos.1 and 2/decree holders by referring some interim orders in the proceedings of the suit tried to convince that even interim maintenance was being paid by the present petitioner as special attorney. He refers the Wakalat Nama and written statement filed on behalf of the defendant of the suit, which both the documents were signed by writ petitioner in capacity of special attorney. Learned counsel has placed much reliance on a judgment passed by the Apex Court in case of Muhammad Pervez v. Mst. Nabila Yasmeen and 2 others (2004 SCMR 1352) and in his view the reported citation is applicable on the case in hand.

7. I have heard the learned counsel for the parties and have perused the record with their able assistance.

8. The West Pakistan Family Courts Act, 1964 (Act XXXV of 1964) is special enactment and provides special provisions. Particularly by virtue of section 13 thereof enforcement of decrees has been dealtwith. For convenience, section 13(3) is reproduced herein below:--

"Where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the court, ["not exceeding thirty days"] the same shall, if the Court so directs, be recovered as arrears of land revenue, and on recovery shall be paid to the decree-holder."

This Court in case titled Nasir Khan v. Tahira Rashida (1986 CLC 2381) has held that departure from the express provisions of section 13(3) of West Pakistan Family Courts Act, 1964 would be violative to law and the procedure prescribed for execution of money decree in said provision of law is to be resorted to.

9. In case of Mst. Sameena Bibi and 2 others v. Additional District Judge/Appellate Authority, Gujrat and 2 others (2007 CLC 987) it has been held that though provisions of Civil Procedure Code, 1908 were excluded from applicability to proceedings before Family Court by virtue of section 17 of West Pakistan Family Courts Act, 1964, yet general principles there-under could be invoked for due Administration of Justice where no procedure was provided in the West Pakistan Family Courts Act, 1964.

10. The judgment, mainly relied upon by the learned counsel for respondents Nos.1 and 2 i.e. Muhammad Pervez's case (supra), is considered as distinguishable keeping in view the peculiar circumstances of the present case, for, in the reported matter, it was general attorney who appeared on behalf of the defendant in the suit and said attorney made a binding statement before the court to the effect that on the next date of hearing, the father of the judgment debtor would be produced before the court and subsequent to that statement none including the attorney appeared before the court and consequently the executing court issued non-bailable warrants of arrest of the attorney. The attorney in that case defended the cause of defendant throughout the proceedings and keeping in view of such conduct it was held that once the decrees passed the same, cannot be allowed to be set at naught through the mala fide act of the defendant/judgment debtor. Even after holding that warrants were issued for the arrest of attorney were in accordance with law, the Hon'ble Supreme Court of Pakistan still was of the view that the judgment debtor is bound to satisfy the decree either himself or through the attorney. The basic liability was still upon the judgment debtor and not the attorney.

11. In the present case, the learned Executing Court vide order dated 30-7-2011 has proceeded to attach the Toyota Corolla Car having registration No.LEF-1130 for satisfaction of the decree. Even otherwise the decree holders on 30-7-2011 have placed on record of the execution file a "Fard Taleeqa" mentioning 8 items of moveable properties of judgment debtor. During proceedings in the present petition, the learned counsel for petitioner has mentioned some immovable property still in the name of judgment debtor Ghazanfar Aslam, situated within Pakistan. With C.M. No.3 of 2012, learned counsel for petitioner placed on record some documents including a transfer letter of a plot being maintained by the Punjab Cooperative Housing Society Limited, Defence Road, Lahore, showing that both spouses i.e. Ghazanfar Aslam and Shabana Ghazanfar are transferees of a plot in the said society.

12. Whenever the question of interpretation of Power of Attorney is considered, it is now a consensus on the point that deed of power of attorney is strictly to be construed and a power which has not been assigned in specific terms cannot be presumed to have been given by the principal to the attorney. The attorney in this case when extended the power to defend the suit on behalf of the defendant was never provided with any liability to the effect that in case of any possible decree against defendant/judgment debtor, the same can equally be executable against the attorney. Even in Muhammad Pervez's case (Supra) the Hon'ble Supreme Court of Pakistan is of the view that it is the judgment debtor Fazal-e-Haq who is bound to satisfy the decree either himself or through attorney. Keeping in view such findings of the Hon'ble Supreme Court of Pakistan, the attorney in his independent capacity cannot be booked for satisfaction of decree which was never granted against him.

13. The Family Court after passing a decree which relates payment of money is empowered to direct that the amount of decree be recovered as arrears of land revenue and on recovery shall be paid to the decree holder. Chapter VIII of the West Pakistan Land Revenue Act, 1967 (Act XVII of 1967) provides the procedure for collection of land revenue and when in Special Law a specific procedure has been provided for enforcement of decree the resort to general provisions of Civil Procedure Code would not be permissible.

14. The result of the above discussion is that this petition is allowed and the orders impugned herein are declared to have been passed without lawful authority, thus are set aside.

15. The learned Judge Family Court/Executing Court is directed to proceed in view of section 13(3) of West Pakistan Family Courts Act, 1964 and direct the revenue authorities to recover the decretal amount as arrears of land revenue. The information as noted herein above with regard to moveable and immovable property belonging to the judgment debtor Ghazanfar Aslam be collected from the record by the learned Executing Court and in addition to that the writ petitioner Muhammad Aslam is also directed to appear before the learned Executing Court on 16-5-2012 and to render every possible assistance and to provide full particular of the assets of Ghazanfar Aslam within limits of Pakistan in order to further subject the same to process of law to be adopted by the learned Executing Court or the revenue authority as the case may be. The learned Executing Court is expected not to give any extension in time to the revenue authority to the time frame already provided in Chapter VIII of Land Revenue Act, 1967, so that the minors who are still in search of execution of decree for maintenance allowance since last one year can be adequately compensated at the earliest.

K.M.Z./M-181/L Order accordingly.

P L D 2012 Lahore 445

Before Ibad-ur-Rehman Lodhi, J

ABDUL MAJEED---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, FAISALABAD and 4 others---Respondents

Writ Petition No.22305 of 2010, decided on 18th May, 2012.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5 & Sched. ---Constitution of Pakistan, Art. 199---Constitutional petition---Maintenance allowance for minors, recovery of---Petitioner was grandfather of minors and he failed to provide maintenance allowance as fixed by Family Court---Plea raised by petitioner was that he was a pensioner having meagre sources of income and was unable to pay maintenance to minors as fixed by Family Court---Validity---By putting a person with 76 years of age behind the bars, the minors would not be adequately compensated with regard to their maintenance, when grandfather was a pensioner and not in a position to maintain the minors---Such was not enough to attend miseries of the minors---High Court observed that system of Zakat could be linked up with Family Court to the extent that if Family Court was of the view that persons liable to pay maintenance were poor and those who should have to receive maintenance also fell under the clause of eligible persons entitled to receive Zakat funds, then suitable directions to Zakat and Ushr Council be also issued---Family Courts were also expected not to deal with delicate matters touching the rights of people, particularly destitute ladies and needy minors and instead of dealing with

their such affairs in mechanical manner, there was a need to adopt new line of action to start with creation of a society, which was dreamed of as a social welfare State---By putting person behind the bars for non-providing maintenance to deserving people, no service was being offered to such needy people but their miseries were being added---High Court directed the authorities to register the minors as regular beneficiaries from District Bail-ul-Maal---Petition was disposed of accordingly.

Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404; Sohail Muhammad Shees Farooq v. Mst. Minza Roomana and another 1998 MLD 1972; Haji Nizam Khan v. Additional District Judge, Lyallpur and others PLD 1976 Lah. 930; Ghulam Nabi v. Muhammad Asghar and 3 others PLD 1991 SC 543; Abdul Ghani v. Muhammad Ishfaq and others 1994 CLC 444; Abdullah v. Jawaria Aslam and 2 others 2004 YLR 616 and Mawra Arshad v. Sheikh Ehsan Ghani 2005 SCMR 1293 ref.

(b) Constitution of Pakistan---
----Arts. 5 & 7---Loyalty to State and obedience to Constitution and law---Every child born in Pakistan is subject matter of the Constitution and State is responsible to provide all what has been guaranteed in the Constitution.

(c) Constitution of Pakistan---
----Part-II, Chap. 2 [Arts. 29 to 40]---Principles of policy---Scope---Each organ and authority of the State and each person performing on behalf of an organ or authority of the State is responsible to act in accordance with such principles in so far as they relate to the functions of the organ or authority.

(d) Constitution of Pakistan---
----Arts. 31 & Part II, Chap.2 [Arts. 29 to 40]---Principles of Policy---Islamic way of life---Any organ of the State can be directed by an order of the Court to observe Principle of Policy in their respectivespheres of working.

Shahid Shaukat for Petitioner.
Muhammad Nasir Chohan, A.A.G. for Respondents.
Date of hearing: 26th April, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---When for the first time, the file of the present writ petition was placed before me, it was all set to send the petitioner to prison for his default in making payment of the amount of maintenance, awarded to his grand-children by way of a decree of a learned Judge Family Court. In such situation, firstly I put a question to myself as to whether by putting a person with 76 years of age behind the bars, the minors would be adequately compensated with regard to their maintenance, particularly when the grand-father with the help of his pension documents has placed on record his position of getting Rs.5688/- per month against pension and also maintaining his aged wife in addition to his own liability. The answer naturally was in negative, but this was not enough to attend the

miseries of the minors and having in mind the parental jurisdiction of this Court, I felt myself bound to look into the possible means to socially accommodate the minors with regard to their, at least day-to-day expenses.

2. This takes me to examine the point as to in such like situation, what would be the responsibility of State, particularly State of "Islamic Republic of Pakistan".

3. In order to examine inter-relation matters of State and people, we have a social contract under the name of Constitution, which was enacted and given to the people of Pakistan through their chosen representatives in the National Assembly.

4. Preamble of any legislation is always considered a key to that legislation and in view of the preamble of Constitution it is inter alia provided that the principles of social justice as enunciated by Islam, shall be fully observed and also the fundamental rights were guaranteed to provide the social and economic justice to the people of Pakistan. Needless to mention here that a child born in Pakistan is subject matter of the Constitution and State is responsible to provide all what has been guaranteed in the Constitution.

5. The "State" is defined in Article 7 of the Constitution, which means the Federal Government, Parliament, a Provincial Government, a Provincial Assembly and such local or other authorities in Pakistan as, are by law empowered to impose any tax or cess.

6 In the definition of State as provided in Article 7 of the Constitution, the different organs or authorities are also included in the definition of State.

7. While dealing with the Constitution, it would be appropriate to examine the different Articles of the Constitution relevant for the present purposes.
Article 14 of the Constitution provides that the dignity of man shall be inviolable.
Chapter-2 of the Constitution set out the principles known as Principles of Policy and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with such principles in so far as they relate to the functions of the organ or authority.
In view of Article 30 of the Constitution, the responsibility of deciding whether any action of an organ or authority of the State or of any person performing functions on behalf of an organ or authority of the State, is in accordance with Principle of Policy is that of the organ or authority of the State, or the person concerned.
Article 35 of the Constitution imposes a responsibility on the State to protect the family, the mother and the child.
In view of Article 37 of the Constitution, State is again responsible to promote the social justice and to eradicate social evils and in view of Article 38 of the Constitution, the promotion of social and economic well-being of the people is again the duty of the State.

8. A Full Bench of honourable Sindh High Court in case of SHARF FARIDI and 3 others v. THE FEDERATION OF ISLAMIC REPUBLIC OF PAKISTAN through Prime Minister of Pakistan and another (PLD 1989 Karachi, 404) has dealt with a number of constitutional provisions including Chapter-2 relating to the Principles of Policy and it found that in the

wake of controversy, it was necessary first to ascertain the principles of interpretation, which may be applicable in such a situation. The governing principle is that as the Constitution is a document, which affects the life, liberty and the rights of the people and also provides to governance of the country, it has to keep alive to meet the social, moral, commercial, political and legal bars and problems, which may arise from time-to-time. It is also held that the Constitution should not be interpreted in a narrow and pedantic manner. It should be given liberal and broad interpretation to any enactment, which transgress the limitation placed by Constitution, would be declared void.

9. In order to achieve the goals on the basis of Principles of Policy and to see as to whether the provisions of Chapter-2 are being implemented at Federal and Provincial level, a duty in view of Article 29(3) has been cast upon the President and the Governor of each province to cause to be prepared and laid before each House of Parliament or, as the case may be, the Provincial Assembly, a report on the observance and implementation of the Principles of Policy for discussion by the chosen representatives in the Assemblies on such report.

10. There is a general impression that the Principles of Policy are not justice able and are provided in the Constitution, just for glorification purposes. This impression gained strength, when a report was called for, from the Secretary, Provincial Assembly of Punjab with regard to the report required to be laid by the Governor in view of Article 29(3) of the Constitution, who reported vide his memo dated 18-4-2012, to the following effect:--
"I am directed to refer to your letter No.6810-AG dated 6th April, 2012 on the subject cited above (copy enclosed) and to state that under clause (3) of Article 29 of the Constitution, a report on the observance and implementation of Principles of Policy in respect of each year is required to be laid in the Provincial Assembly and as per rule 130 of the Rules of Procedure of Provincial Assembly of the Punjab 1997 the report in relation to the affairs of the Province of the Punjab shall be laid in the House by a Minister.

2. The said report for the year 2011 has not yet been laid in the Provincial Assembly of the Punjab."
By not laying the report, the Governor or the Minister, who according to the Secretary, Punjab Assembly was supposed to lay such report in view of the rules of procedure of Provincial Assembly, have not only that failed to perform their constitutional duty, but also extended a message to the people at large that the Principles of Policy are provided in the Constitution just to add beauty in the wordings of the Constitution.

11. In case titled SOHAIL MUHAMMAD SHEES FAROOQ v. Mst. MINZA ROOMANA and another (1998 MLD 1972), it was held that in the family matters it is the Social Justice and not a Legal Justice, which is to be advanced and such is also the obligation of State under the Principles of Policy, as provided in the Constitution, which charges the executive to advance social justice and eradicate evil, and protect weaker section of the society.
Although, the studying of the enactments of Bait-ul-Maal does not support the proposition that this institution is specifically established to cater the needs of the broken families, poor ladies and orphan children are very well subject of these laws.

12. In Pakistan, we have no enacted law, providing any mechanism for the deprived minors to get maintenance and in some judgments passed in the past, wherein the duty to maintain the minors has been assigned a status of statutory or legal duty were seemingly passed ignoring the factual position that in fact no such statutory enactment is in existence in Pakistan.

13. No doubt, the matter of maintenance for the minors is being dealt with by the Family Courts in Pakistan, for which an Act known as West Pakistan Family Courts Act, (Act XXXV) of 1964 was promulgated. Section 5 thereof gives jurisdiction to the Family Courts to adjudicate upon certain matters, the same is reproduced herein below:--
"5. Jurisdiction.---[(1)] Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in [Part I of the Schedule.]" and when such jurisdictional clause is to be interpreted, we have to look into the provisions of Muslim Family Laws Ordinance (VII) of 1961 and on reading of Section 9 of the same and section 5 of the Family Courts Act, (Act XXXV) of 1964 together with the schedule provided in the Family Courts Act, particularly Item No.3 relating to the maintenance, it would be abundantly clear that maintenance of wife or wives may be a subject matter of a suit to be instituted before a Judge Family Court. This legal position do raise a necessity for our law givers to suitably amend Section 9 of Ordinance, 1961 and then the relevant provisions of Family Courts Act, 1964, so as to give a statutory right to the minors to be enforceable through a legal process.

14. Muhammadan Law is being applied in our judicial system and in the present case, the petitioner, grand-father of the children was bound down to pay maintenance in view of the provision of head-note 370(3) of Muhammadan Law by D.F. Mullah, but even the provisions of said section have not been taken into consideration in its totality, which no doubt imposes a liability on grand-father of the children to maintain them, PROVIDED he is in easy circumstances.

15. Notwithstanding the fact that Muhammadan Law being relied upon in our system is not an enacted law, rather a collection of opinion of companions of Prophet (P.B.U.H.) and his disciples and also an analogical deductions derived from a comparison of Quran, Hadis, ljmaa, or it is mostly derived through the books of scholars on Islam and strictly speaking the provisions of Muhammadan Law are also not enforceable through force of law.

16. In our judicial history, the liability of grand-father to maintain his grand-children in absence or in case of inability of their real father to maintain them, has been dealt with at different times. In case of Haji NIZAM KHAN v. ADDITIONAL DISTRICT JUDGE, LAYALLPUR AND OTHERS (PLD 1976 Lahore 930), this concept has been dealt with in detail along with the liability of the State with regard to the Principles of Policy enunciated in the Constitution and this Court in the reported citation was of the view that the judiciary though cannot direct organs, authorities and persons included in definition of State under Article 7 to act according to the Principles of Policy, yet Superior judiciary is not barred either to set down a rule for itself to follow Principles of Policy or to declare it for subordinate judiciary to act in accordance with said principles. It was also the settled view in

the said citation that there is no bar on the Superior judiciary to declare a law in accordance with the said Principles of Policy. It is a mandate contained in Article 31(1) of the Constitution to take steps to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam. Hence, any organ of the State can be directed by an order of the Court to observe the Principles of Policy in their respective spheres of working.

17. In GHULAM NABI v. MUHAMMAD ASGHAR and 3 others (PLD 1991 SC 543), it was observed that in absence of father, priority-wise, it was the duty of grand-father to maintain the minors.

18. In case of ABDUL GHANI v. MUHAMMAD ISHFAQ and others (1994 CLC 444), it was the observation of a learned Single Bench of this Court that minors have a STATUTORY right to get maintenance from their grand-father after the death of their real father.

19. In case of ABDULLAH v. JAWARIA ASLAM and 2 others (2004 YLR 616), again a learned Single Bench of this Court was of the view that if the grand-father is a man of means then he is bound by LAW to maintain the grand-children.

20. In case of MAWRA ARSHAD v. Sheikh EHSAN GHANI (2005 SCMR 1293), though it was a case filed as Criminal Original, complaining a disobedience of some earlier commitment made by the respondents therein, however, it was found by the apex Court that when father and grand-father both were bound to make payment according to their commitment, if father is alive, but not attending to the needs of his children, the grand-father is duty bound to pay maintenance to the minors, which will be reimbursed to grand-father by the father of the minors.

21. In all the above reported citations, although in some of those, some statutory or legal provisions are mentioned, but without disclosing as to which is the governing statutory law on the subject of maintenance to minors and as discussed above, yet in Pakistan a law is to be enacted on the subject of the right of minors to get maintenance through a judicial process.

22. The State by feeling its responsibility, both at Federal and Provincial level, has constituted the institutions for social welfare and Bait-ul-Maal is one of such institutions and in establishment of Bait-ul-Maal the Province of Punjab has taken lead when through Act, VII of 1991 i.e. the Punjab Bait-ul-Maal Act, 1991, was promulgated on 30th March, 1991 and the basic principle of said legislation was to provide for the establishment of charitable funds and by virtue of Section 5 of the said Act, the utilization of the Bait-ul-Maal has been provided, which includes the relief and rehabilitation of the poor and the needy, particularly poor widows and orphans, educational assistance to the poor and deserving students and other purposes also. There are District Bait-ul-Maal Committees in view of Section 7(3) of the said Act working at all district levels.

23. In addition to above legislation there is also a Zakat and Ushr Ordinance (XVIII), 1980, which provides the manner of collection of such funds and utilization thereof includes the

assistance to the needy, particularly the orphans and widows by virtue of Section 8 thereof, which is reproduced herein below:-

8. Utilization of Zakat Funds.---The moneys in a Zakat Fund shall be utilized for the following purposes, namely,

(a) assistance to the needy, the indigent and the poor particularly orphans and widows, the handicapped and the disabled, eligible to receive Zakat under Shariah for their subsistence or rehabilitation, either directly or indirectly through Deeni Madaris, or educational, vocational or social institutions, public hospitals, charitable institutions and other institutions providing health care.

24. The system of Zakat can be linked up with the Family Courts to the extent that if the Family Court is of the view that the persons liable to pay maintenance are poor and those who should have to receive maintenance also fall under the clause of eligible persons entitled to receive Zakat funds, then the suitable directions to Zakat and Ushr Council be also issued.

25. At Federal Level, considering the responsibility of the
State in different social matters institution under the name of Pakistan Bait-ul-Maal has been established by promulgating Pakistan Bait-ul-Maal Act, 1991, which opened with the wording of preamble as under:-

WHEREAS it is the duty of the State to provide for basic necessities of life, such as food, clothing, housing, education and medical relief for all citizen irrespective of their sex, caste, creed or race, who are permanently or temporarily unable to earn their livelihood on account of sickness or unemployment or circumstances beyond their control. Section 4 of Pakistan Bait-ul-Maal Act further elaborate its purposes in the following manner:--

(4). Administration of Bait-ul-Maal.---The Bait-ul-Maal shall be administered by the Board and the moneys in the Bait-ul-Maal shall be utilized for the following purposes namely:--

(a) to provide financial assistance to destitute and needy widows, orphans, invalid, infirm and other needy persons"

(b)

26. There is also a Child Support Programme under the Pakistan Bait-ul-Maal scheme and its objectives naturally contain to promote primary school education and to reduce dropout ratio by providing additional resources to ultra poor families for sending their children to schools.

27. In the Local Government Ordinance, promulgated in all provinces simultaneously the needs of poor and needy persons are catered under the head of Community Development by constitution of Social Welfare Institutions, Bait-ul-Maal Wing and relief and rehabilitation proceedings at District level.

28. The over-all picture emerges before us in view of analysis of all what has been discussed above is, that on papers, we have announced good ideas, but its practical effect is no where seen and the persons like petitioner, who themselves deserve to be looked after or

maintained, are burdened to share their, what they are getting a meager amount with others, and in such manner, we are pushing the people behindpoverty line, where reportedly 40 % of our population is already suffering miseries by living under that poverty line.

29. We have to look forward, if we want to live in a dignified manner, not only as a State, but also in all our individual lives and we have to pay respect and dignity to the people, with whom the social contract in the shape of Constitution has been entered into by the State through the chosen representatives of the people.

30. Our Family Courts are also expected not to deal with the delicate matters touching the rights of the people, particularly the destitute ladies and needy minors and instead of dealing with their such affairs in a mechanical manner, there is a need to adopt a new line of action to start with the creation of a society, which is dreamed of as a social welfare State. By putting the persons behind the bars for non-providing the maintenance to deserving people, no service is being offered to such needy people, but their miseries are being added. This needs some new venues to be opened and it is suggested as follows:--
(i) The legislators and the Pakistan Law Commission, which recommends suitable legislation, are to take steps to amend the provisions of Section 9 of Muslim Family Laws Ordinance, 1961. Section 5 and Schedule of West Pakistan Family Courts Act, 1964, to enable the minors to get their right of maintenance through a recognized mode of law through judicial process,
(ii) The Family Courts in the Province, if reached to the conclusion that father or the grand-father, as the case may be, are themselves not in a position to afford in easy circumstance to maintain their dependents, after an inquiry as provided in C.P.C. for pauperism, to direct the plaintiffs before the said courts to implead the State as a respondent in the pending list and then to direct the relevant organ or authority of the State, including Bait-ul-Maal and the Local Governments to regularly pay the determined maintenance to the minors. Needless to mention here that when the right of the minors or ladies seeking maintenance has been determined by a court of law, there will be no further need to verify their such claims by the organ or authority, which would be directed to pay the maintenance to such people.

31. The office is directed to circulate the copies of this judgment to all the learned District Judges in the Province, who will direct the learned Judges of the Family Courts to observe the procedure as is proposed above.

32. In order to ascertain as to what is the position in District Faisalabad with regard to the Community Development Program, which is a part of the Bait-ul-Maal Scheme, report was solicited from District Co-ordination Officer, Faisalabad and the same was furnished through the Provincial Law Officer and the D.C.O. has reported that the Community Development Department of City District Government, Faisalabad is actively helping the weaker parts of the society. The D.C.O., Faisalabad is directed to register the minors, viz, Arman Tayyab son of Muhammad Tayyab Majeed and Mst. Zainab Tayyab daughter of Muhammad Tayyab Majeed, residents of House No.151-D, St.No.4/5, Mohalla Fateh Abad, Faisalabad, as regular beneficiaries from District Bait-ul-Maal and Rs.5000/- per month per minor, is to be regularly paid to them without any break or fail w.e.f. May, 2012. The son Arman Tayyab is entitled to continue to get the maintenance till his age of majority, whereas the daughter Mst. Zainab

Tayyab is entitled to get the maintenance till her marriage. 10% annual increase will be added in the fixed maintenance. The compliance report be furnished by the D.C.O. to the Deputy Registrar (Judl.) of this Court for examination by the Court within a fortnight.

M.H./A-105/L Order accordingly.

P L D 2012 Lahore 490

Before Ibad-ur-Rehman Lodhi, J

MUHAMMAD KHALID---Petitioner

Versus

MUHAMMAD NAEEM and 6 others---Respondents

Writ Petition No.901 of 2011, heard on 30th May, 2012.

Arbitration Act (X of 1940)---

----Ss. 18, 14 & 17---West Pakistan Urban Rent Restriction Ordinance (VI of 1959), S.13---Constitution of Pakistan, Art.199---Constitutional petition---Consolidation of proceedings ongoing simultaneously before Rent Controller in an ejectment petition and civil court for enforcement of award under Ss.18, 14 & 17 of the Arbitration Act, 1940---Scope---Ejectment petition before the Rent Controller was in its final stage of adjudication, and the matter had also been referred to a panel arbitrators; whose award was filed before the civil court for enforcement---Petitioner had sought amalgamation of proceedings on the ground that the Presiding Officer before whom the petition for enforcement of award was filed was also incidentally the Rent Controller in the matter---Said application of the petitioner was' dismissed---Validity---Ejectment petition before Rent Controller was at concluding stage whereas the petition moved under Arbitration Act, 1940 before the civil court was at the initial stages---Proceedings under the 'Arbitration Act, 1940 were to be taken up by the civil court while ejectment petition was to be decided by the Rent Controller who was a persona designate under the provisions of the West Pakistan Rent Restriction Ordinance, 1959; as such, the two jurisdictions were entirely different---Pleadings, issues, evidence and other material in both the matters being different, ought to be decided independently and separately---Civil Judge could be assigned different jurisdictions, for example, as a Rent Controller or Family Judge, but it did not mean that while exercising different jurisdictions, all proceedings before the same Civil Judge could be amalgamated---Presiding Officer, in the present case, was the same who was acting as a Rent Controller, and also the Civil Judge, but in one he was a persona designata and was exercising quasi judicial jurisdiction, whereas with regard to the other he was acting as a Civil Judge under the Provisions of the Civil Procedure Code, 1908---Neither two jurisdictions nor the proceedings under two entirely different laws could be consolidated or amalgamated---Constitutional petition was dismissed, in circumstances.

Pakistan through General Manager, FAFI, Lahore. v. Messrs Agro Marketing Corporation Ltd. and 2 others 1981 CLC 443 rel

Ijaz Hussain Shah and 12 others v. Ghulam Akbar -Shah 2000 YLR 1207 and Manzoor Ahmad. v. Messrs FACTO (Pakistan) Ltd. and others 1996 MLD 265 ref.

M.A. Fatmi for Petitioner.

Khalifa Shujaat Amin for Respondents.

Date of hearing: 30th May, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Pre-admission notices were issued to respondents Nos. 1 to 6, however after hearing learned counsel for respondents, I considered it appropriate to decide the case on merits and as such the case is admitted to regular hearing. Learned counsel for respondents Nos.l to 6 is present and accepts notice on behalf of said respondents.

2. Since short point is involved, learned counsel for parties request for hearing of the case today. So be it.

3. An ejectment petition was filed on 20-6-2007 under the provisions of West Pakistan Urban Rent Restriction Ordinance, 1959. The learned Rent Controller took cognizance of the matter and both the parties surrendered to its jurisdiction.

4. The premises in question being located in some commercial area, the parties simultaneously referred their some matter to the association of the businessmen for resolution and according to the record, the Arbitrators on 7-10-1997 announced their award which was brought to the, notice of the learned Senior Civil Judge at Lahore by the writ petitioner under the provisions of sections 14 and 17 of the Arbitration Act, 1940.

5. Although, both the proceedings were pending in two different forums viz. the ejectment proceedings before the learned Rent Controller whereas the petition under Arbitration Act before the learned Civil Judge. But incidentally, both the said offices were being kept by one Presiding Officer exercising two different jurisdictions.

6. The petitioner moved the learned Rent Controller for consolidation of both the matters viz. the ejectment petition and the proceedings under Arbitration Act, which request after contest was refused by the learned Rent Controller on 3-12-2010. The order so passed by the learned Rent Controller was challenged through the present writ petition which was originally taken up for hearing on 3-2-2011, when not only pre-admission notice was issued but the proceedings before the learned Rent Controller were ordered to be remained stayed. As a result whereof, the proceedings in ejectment petition were held in abeyance where- only the final arguments were to be advanced by both the parties, in comparison whereof the arbitration proceedings were at initial stages.

7. The learned counsel for petitioner, with the help of a case titled Ijaz Hussain Shah and 12 others v. Ghulam Akbar Shah (2000 YLR 1207), has argued that both the proceedings could have been consolidated as the matter in such proceedings was in between the same parties. In the referred case the landlord after consolidation had accepted the jurisdiction of trial court with regard to both the matters and therefore, it was held that he was estopped to resile from such situation when the case had been finally decided against him.

8. The learned counsel for respondent, by placing reliance upon the cases of Pakistan through General Manager, FAFI, Lahore versus 'Messrs Agro Marketing Corporation Ltd. And 2 others (1981 CLC 443) and Manzoor Ahmad v. Messrs FACTO (Pakistan) Ltd. And others (1996 MLD 265) has supported the impugned order whereby the consolidation was refused by the learned Rent Controller.

9. Having heard, the learned counsel for the parties and going through the record. I am of the view that the learned Rent Controller has rightly refused the consolidation of two proceedings one under Rent Laws and the other under the Arbitration Act. As indicated above, in ejectment petition, evidence of both the sides was concluded and it was fixed for final arguments when the proceedings were ordered to be stayed by this Court in the present writ petition whereas the petition moved under Arbitration Act, 1940 was at initial stages. In case of Pakistan through General Manager, FAFI, Lahore (supra), even with regard to the consolidation of two civil suits this Court taken note of two different stages of the proceedings in the suits and it was held that consolidation of suits, may justifiably be asked for before commencement of trial of suits sought to be got consolidated, or where common evidence given in such suits but where such stage has passed, the prayer for consolidation was held not practicable.

10. The proceedings under Arbitration Act, 1940 are to be taken up by Civil Court while ejectment petition is to be decided by the Rent Controller a persona designata under the provisions of West Pakistan Urban Rent Restriction Ordinance, 1959. These two jurisdictions are entirely different. Pleadings, issues, evidence, and other material in both the matters being different ought to be decided independently and separately.

11. In our judicial system, a Civil Judge has been assigned different jurisdictions e.g. the power of Rent Controller under the Rent Laws, to act as a Family Judge under the Family Laws, to act as Guardian Judge under the Guardians, and Wards Act, to exercise powers as Magistrate under the provisions of Cr.P.C. etc. but that does not mean that while he is exercising different jurisdictions, all the proceedings before him can t be amalgamated. In the case in hand, although the Presiding Officer was the same who was acting as Rent Controller, as also the Civil Judge but in one he is a persona designata and exercising quasi judicial jurisdiction whereas with regard to other one he was acting as a Civil Judge under the Code of Civil Procedure. Neither two jurisdictions nor the proceedings under two entirely different laws can be consolidated or amalgamated. In this case by now the tenant is succeeded in avoiding the verdict of Rent Controller in ejectment petition on a plea of consolidation of the proceedings of such ejectment petition with that of an arbitration proceeding which is not permissible and practicable under the law.

12. No illegality or jurisdictional defect can be established in the impugned order and resultantly, the same is up held.

The petition having no force is dismissed.

13. The ejectment petition was filed in the year 2007 and this is 5th year of pendency of the same in the original forum. The parties are directed to appear before the Rent Controller on 6-6-2012 and the learned Rent Controller will proceed with the matter in a manner that it will be finally decided before 30th of June, 2012 positively under intimation to the Deputy Registrar (Judicial) of this Court.

K.M.Z./M-225/L Petition dismissed.

2012 Y L R 1875

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

MUHAMMAD ASLAM---Petitioner

Versus

M. NAZIR AHMAD and others---Respondents

Writ Petition No.13031 of 2012, heard on 10th April, 2012.

West Pakistan Land Revenue Rules, 1968---

----R.17---West Pakistan Board of Revenue Act (XI of 1957), S.8---Constitution of Pakistan, Art. 199---Constitutional petition---Lumberdar, appointment of---Review jurisdiction of Board of Revenue---Scope---Hereditary claim---Appointment of petitioner as Lumberdar was set aside by Board of Revenue in exercise of review powers under section 8 of West Pakistan Board of Revenue Act, 1957---Validity---Review by Board of Revenue under the provision of section 8 of West Pakistan Board of Revenue Act, 1957, was not at any cost amounted to an appeal---Board of Revenue reviewing any order was not permitted to sit in judgment on its own order or that of a predecessor-in-office, particularly when all grounds taken in review stood already agitated upon, in order under review--- Board of Revenue had no option to give findings on those grounds afresh without first establishing whether there was any apparent mistake or error in the order sought to be reviewed---Petitioner was not only appointed on consideration of his hereditary claim, but other matters, which were to be considered in view of Rule 17 of West Pakistan Land Revenue Rules, 1968, were also taken into consideration by revenue authorities--- Appointment of petitioner could not be termed as illegal or ultra vires---Board of Revenue exceeded its jurisdiction and exercised a jurisdiction, which was in fact not vested in it while passing order in question, accepting the review---Order passed by Board of Revenue in exercise of review jurisdiction was set aside, restoring earlier orders passed by revenue authorities, appointing petitioner as Lumberdar---Petition was allowed in circumstances.

Sh. Mehdi Hassan v. Province of Punjab through Member, Board of Revenue and 5 others 2007 SCMR 755; Muhammad Amin and 7 others v. Member (Consolidation), Board of Revenue, Punjab, and 3 others 1992 CLC 2338; Muhammad Din and 2 others v. Muhammad Amin and 8 others PLD 1994 SC 288 and Malik Ahmad Khan v. District Returning Officer, Jhang and 3 others 2005 CLC 1935 rel.

Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan PLD 1999 SC 484 distinguished.

Jehangir Akhtar Jhojha for Petitioner.
Malik Noor Muhammad Awan and M. Farooq Bedar for Respondents.
Muhammad Nasir Chohan, A.A.-G. for the State.
Zulfiqar Ali Ahmad, District Collector Okara along with record.
Date of hearing: 10th April, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---On demise of Nawab Din, who was a Lambardar of Chak No.29-D, Tehsil Depalpur, District Okara, on 17-12-2003, the Revenue Authorities proceeded to appoint his successor in office and for that purpose, originally 31 candidates applied and when 21 out of the original applicants withdrew from their such candidature, the remaining 10 were considered and Tehsildar Depalpur on 13-8-2004 recommended Muhammad Aslam, the son of deceased Lambardar to be appointed. These recommendations were approved by the District Officer (Revenue), when on 15-12-2005 Muhammad Aslam was ordered to be appointed as Lambardar of the said chak. Such appointment was challenged in 07 different Appeals before the Executive District Officer (Revenue), Okara, who took upall the Appeals together on 27-12-2006 and proceeded to dismiss all of those, confirming the appointment of Muhammad Aslam as Lambardar.

2. Only one unsuccessful appellant before the E.D.O.(R) preferred a Revision Petition under section 164 of Land Revenue Act, 1967, which was dismissed by the Member Judicial (III) in Board of Revenue Punjab, Lahore on 7-10-2008.

3. Still dis-satisfied with the findings in revision, respondent Nazir Ahmad sought review of the order dated 7-10-2008 within the meaning of section 8 of West Pakistan Board of Revenue Act, 1957. Another Member Judicial heard the review and vide order dated 27-5-2010 allowed the same and all earlier orders appointing and confirming such appointment in favour of Muhammad Aslam as Lambardar were set aside.

4. This time, it is Muhammad Aslam, who has challenged the vires of the order passed in review on 27-5-2010 through the present constitutional petition.

5. In support of the petition, learned counsel for the petitioner Mr. Jehangir Akhtar Jhojha, Advocate, has mainly argued that keeping in view the powers given to the Reviewing Authority, the Member Judicial sitting in Board of Revenue was having no jurisdiction to reopen the matter after re-hearing the arguments on merits. Learned counsel is of the view that there is very limited scope in review and that must be exercised keeping in view the restraints and fetters of review, either provided under Order XLVII, C.P.C. or section 8 of West Pakistan Board of Revenue Act, 1957.

6. Conversely, Malik Noor Muhammad Awan, Advocate, appearing for respondent No.1, mainly argued his case on merits and highlighted the disqualifications attached with the petitioner, disentitling him to the appointment of Lambardar. Learned A.A.-G. has placed reliance on the comments furnished by respondent No.8.

7. I have heard learned counsel for the parties and have gone through the record.

8. Admitted position is that the authorities in Revenue Hierarchy have unanimously not only recommended the appointment of the petitioner as Lambardar and throughout respondent No.1 has been contesting such appointment, but without any favourable result. In general law i.e. the Code of Civil Procedure, 1908, the remedy of review has been provided under Order XLVII Rule 1 read with section 114, which are reproduced here under for ready reference:--

"114. Review. Subject as aforesaid, any person considering himself aggrieved---

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred.
(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes; may apply for a review of judgment to the Court which passed the decree or made the order, and Court may make such order thereon as it thinks fit.

(2) Nothing contained in subsection. (1) shall apply to a review of any judgment pronounced or any order made by the Supreme Court.

Order XLVII (REVIEW)

(1) Application for review of judgment.---(1) Any person considering himself aggrieved---

(a) by a decree or order from which an appeal has been preferred.

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appearing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

9. The remedy of review in West Pakistan Board of Revenue Act, 1957, separately provided by virtue of section 8 thereof, which reads as under:--

(8) Review of orders passed by the Board.---(1) Any person consider-ing himself aggrieved by a decree passed or order made by the Board and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree passed or order made against him may apply to the Board for a review of judgment and the Board may, after giving notice to the parties affected thereby and after hearing them, pass such decree or order as the circumstances of the case require.

(1) Every application for a review of a decree or order under subsection (1) shall be made within ninety days from the date of that decree or order.

From the perusal of above provisions of law, it is abundantly clear that a person considering himself aggrieved by a decree passed or order made, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order under review was made or on account of some mistake or error apparent on the face of the record, may seek review of the order or judgment passed.

10. If the contentions of learned counsel for the petitioner are tested on the above touch stone, it would be the result that respondent No.1 in review was failed to meet the requirement of law for a successful review. The honourable Supreme Court of Pakistan in the case of Sh. MEHDI HASSAN v. PROVINCE OF PUNJAB through Member, Board of Revenue and 5 others (2007 SCMR 755), has authoritatively held that points already raised and considered by Court could not be re-agitated in review jurisdiction. This Court in the case of MUHAMMAD AMIN and 7 others v. MEMBER (CONSOLIDATION), BOARD OF REVENUE, PUNJAB, and 3 others (1992 CLC 2338) while dealing with the subject of review under section 8 of West Pakistan Board of Revenue Act, 1957 has held that the power to review being limited, Member Board of Revenue is not competent to set aside the order passed by his predecessor and substitute it by his own order, for, there had neither been any discovery of new or any important matter or evidence, which, after exercise of diligence was not within respondent's knowledge or could not be produced at the time when earlier order was passed nor order passed in earlier round suffered from any mistake or error apparent on the face of the record. Dealing the proposition from another angle, the honourable Supreme Court of Pakistan in the case of MUHAMMAD DIN and 2 others v. MUHAMMAD AMIN and 8 others (PLD 1994 S.C. 288), has provided the guidelines as to what would be the scope of review and held that the jurisdiction of review was not to be mistake with appeal and where the review petition was allowed in absence of a discovery of new or important matter for evidence, the High Court's view was upheld whereby the order passed in review by the Board of Revenue was set aside. This Court again in case of Malik AHMAD KHAN v. DISTRICT RETURNING OFFICER, JHANG and 3 others (2005 CLC 1935), while dealing with the subject of review has held, that review could not be made a pretext for re-arguing whole case and matter could not be re-opened under the garb of review application and that for a review, the grounds mentioned in the enabling provisions must be taken into consideration.

11. It is thus clear that the review under the provisions of section 8 of West Pakistan Board of Revenue Act, 1957, would not at any cost amount to an appeal and the Board reviewing the order would not be permitted to sit in judgment on its own order or that of a predecessor in office, particularly when all the grounds taken in the review stood already agitated upon, in the order under review, the Board would have no option to give findings on those grounds afresh without first establish-ing whether there was any apparent mistake or error in the order sought to be reviewed.

12. Learned counsel for the respondent by placing reliance on the judgment in Shariat Appeal No.69 of 1992 MAQBOOL AHMAD QURESHI v. THE ISLAMIC REPUBLIC OF PAKISTAN (PLD 1999 S.C. 484), has tried to attack the appointment of the petitioner as Lambardar by maintaining that considerations as have been provided in Rule 17 of West Pakistan Land Revenue Rules 1968 including the hereditary claim of the candidate has been declared as repugnant to the injunctions of Islam, therefore, the appointment of the petitioner on that score also was not legal. The honourable Supreme Court of Pakistan in that reported matter has no doubt has given some observations on the hereditary claim, but has not completely put a bar on such appointments. The relevant portion dealing with the subject in the said reported view is reproduced hereunder:--

"The objection with regard to provision of hereditary claim amongst other factors to be considered in matter of appointment under Rule 17 is without merit as this rule provides the relevant considerations which the Collector is to keep in view while making selection of the most suitable persons amongst the candidates. The cause to raise objection in respect of this Rule arose as the officer in the graded hierarchy of the Revenue adminis-tration in their judgments came to accord "hereditary claims", over-riding effect, as against other considerations of area, tribe, community etc. If" hereditary claim" is taken only as one of the relevant considerations, as contem-plated in the rules, in favour of a candidate whose other merits are favourable comparable with other contestants, no cause of grievance will arise, rather it will meet the plea of the administration that by appointment a person from amongst the nearest eligible heir of previous Lambardar continuity in the work and in the liaison created between the land owners and the adminis-tration is intended to be achieved. Rule 17 is, therefore, not repugnant to any Injunction of Islam."

13. In the case in hand the petitioner was not only appointed on the consideration of his hereditary claim, but other matters, which were to be considered in view of Rule 17 of West Pakistan Land Revenue Rules, 1968 were also taken into consideration by the lower authorities and thus his appointment on that score also cannot be termed as illegal or ultra vires.

14. The upshot of the above discussion is that the Member Judicial (III) in Board of Revenue exceeded to his jurisdiction and exercised a jurisdiction, which was in fact not vested in him while passing the impugned order on 25-7-2010, accepting the review. Resultantly the said order is set aside, restoring the earlier orders passed by the District Officer Revenue, Executive District Officer (Revenue) and Member Board of Revenue dated 15-12-2005, 27-12-2006 and 7-10-2008, respectively. The constitutional petition is allowed without any order as to cost.
M.H./M-116/L Petition allowed.

2012 Y L R 2841

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

Mst. GHAZALA SADIA alias GHAZALA SHAHEEN---Petitioner

Versus

MUHAMMAD SAJJAD and another---Respondents

Writ Petition No.23731 Of 2010, heard on 13th September, 2012.

West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5 & Sched.---Dissolution of marriage by way of Khula---Maintenance allowance---Effect---Divorce effected by Khula or Mubara'at operated as a release by the wife of her dower, but it did not affect the liability of the husband to maintain wife during her Iddat--Maintenance of wife had always been considered not. as a "benefit" but as a "right" of the wife and was not returnable in the case of Khula, for it was the duty of the husband to maintain his wife as long as she remained in wedlock---Even after divorce, till completion of Iddat, wife was still entitled to claim maintenance and fact that suit for recovery of maintenance was filed during subsistence of marriage or afterwards was of no significance, if during period for which maintenance was claimed marriage in between the parties remained intact.

Muhammadan Law by D.F. Mulla, Paragraph 320; Shafiqan Bibi v. Senior Civil Judge/Judge Family Court, Okara and another 1999 CLC 160; Iftikhar Ahmed v. Husan Pari and others 1988 CLC 2355; M. Saqlain Zaheer v. Mst. Zaibun Nisa Zaheer alias Zaibi and another 1988 MLD 427 and Mst. Shamim Akhtar v. Additional District Judge, Sialkot and another 1991 CLC 1142 rel.

Ch. Waris Ali Saroya for Petitioner.
Imran Mushtaq for Respondent No.l.
Date of hearing: 13th September, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The suit filed by the present petitioner before learned Judge Family Court, Sangla Hill, was decided on 22-4-2010 in the manner that the marriage of petitioner with respondent No.1 was ordered to be dissolved in lieu of dower amount. Dowry was granted according to the list Exh.D-1 and a maintenance of Rs.1,415 per month since the date of Nikah i.e. 8-4-2006 till completion of Iddat. Both the sides preferred appeals and the learned Appellate Court modified the decree for recovery of dowry by addition of a washing machine in the articles mentioned in Exh.-D-1, whereas, portion of the decree granting maintenance to the petitioner was set aside. The petitioner herein insisted upon the decree of dowry according to her own claim and also to restore the grant of maintenance in view of the decree passed by the learned Judge Family Court. The petition has been contested by respondent No.l.

2. With regard to dowry articles, the petitioner has failed to place on record any list of articles, which according to her claim, were given to her at the time of marriage in shape of dowry. Some receipts, which although were exhibited in the process of evidence, have been referred to by the learned counsel for the petitioner in support of her claim but all such receipts are private documents and with regard. to none any competent witness in order to prove the same was produced in the witness box, therefore, no reliance can be placed on such receipts. The list Exh.D-1 has been produced by the defendant in the suit with an admission that articles mentioned therein were lying with him. The learned Appellate Court has added an article viz. washing machine in the said list and the petitioner must be contended with such grant of decree, particularly, when there was no serious attempt on her part to prove her case with regard to dowry articles.

3. The claim of maintenance, which was granted to the petitioner by the learned Judge Family Court, has been refused by the learned Appellate Court treating the same as some "benefit" to which the petitioner was not entitled to claim from respondent No.1. A Muslim wife is entitled to, get maintenance as of right from her husband; The petitioner attained the status of wife of respondent No.1 on 8-4-2006 when she entered into a Nikah with him and after such date, it was his liability to provide maintenance to the petitioner, who was his wife. This right which has also been recognized in view of Paragraph 320 of Muhammadan Law by D.F. Mulla with regard to a Muslim wife seeking Khula. A divorce effected by Khula or Mubara'at operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain the wife during her Iddat.

4. This Court in ease., of "Shafiqan Bibi v. Senior Civil Jude/Judge Family Court, Okara and another" (1999 CLC 160) has held that the maintenance has always been considered as not a "benefit" but a "right" of wife and it was held that the judgment and decree of the learned Judge Family Court to the extent of withdrawing the benefit of dower in lieu of Khula was correct in making decree conditional on returning of the same but the claim of maintenance' was held as not a "benefit" received by the wife from husband and, therefore, it was not returnable in case ,of Khula, for, it was a duty of the husband to maintain his wife so long as she remained in wedlock. In the reported matter, the decree passed by the learned trial Court for dissolution ofmarriage on the basis of Khula to the extent of relinquishrnent of claim of maintenance allowance was declared to be without lawful authority and of no legal effect. Earlier in case of "l ftikhar. Ahmed v. Husan Pari and others" (1988 CLC 2355), it was held that wife was entitled in law to maintenance and would not forfeit such right merely because she had sought divorce on the basis of Khula. Such principle of law, as noted above, also found support from another reported case of "M. Saqlain? Zaheer v. Mst. Zaibun Nisa Zaheer alias Zaibi and another" (1988 MLD 427).

5. Earlier this Court in case of "Mst. Shamim Akhtar v. Additional District Jude Sialkot and another" (1991 CLC 1142) has dealt with similar situation where "Rukhsati" did not take place and the husband refused on that score alone the provision of maintenance to the wife and it was held that irrespective of the fact that whether "Rukhsati" takes place or not, it is the entitlement of the wife to have maintenance from her husband during subsistence of marriage and the wife was held entitled to the maintenance for a period the marriage between the parties had subsisted. Even after divorce, till completion of Iddat the wife is still

entitled to claim maintenance and the fact that whether suit for recovery of maintenance 7 was filed during subsistence of marriage or afterwards was of no significance, if during period for which maintenance was claimed, marriage in between the parties remained intact.

6. For what' has been discussed above, this petition is partly allowed. The decree, as was maintained in appeal with regard to dowry is maintained, however, maintenance, which was awarded to the petitioner by the learned Judge Family Court is restored at the rate of Rs.1,415 per month w. e. f. 8-4-2006 till the date the marriage subsisted in between the parties.

KMZ/G-35/L Order accordingly.

2012 Y L R 2892

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

ABDUL GHANI and others---Appellants

Versus

MUHAMMAD YASIN---Respondent

S.A.O. No.121 of 2009, heardon 26th September, 2012.

West Pakistan Urban Rent Rest riction Ordinance (VI of 1959)---

----Ss. 13 & 13-A---Ejectment of tenant---Illegal possession---Relation of landlord and tenant---Scope---Landlord sought recovery of possession of premises from tenant on the ground of default in payment of monthly rent---Rent Controller and Lower Appellate Court concurrently dismissed ejectment application and appeal filed by landlord on the ground that relation of landlord and tenant did not exist as landlord had himself stated the tenant as illegal occupant of premises---Validity---Landlord out of frustration, when he was neither getting any rent from tenant nor possession of rented premises, could term person in possession as encroacher or in illegal possession of suit property---Claim of tenant in order to give protection of his possession over suit property was only an agreement to sell, which did not create any title 'under the law---Requirement of 'issuance of notice under S. 13-A of West Pakistan Urban Rent Restriction Ordinance, 1959, in case of change of ownership was only meant to determine default in payment of rent by tenant-4n case of non-issuance of such notice, previous default could not be alleged against tenant but by act of non-issuance of such notice, title of new landlord would not become defective---Landlord proved existence of relationship of landlord and tenant successfully and when it was denied by tenant in ejectment petition, the moment such relationship was proved to be in existence, necessary consequence was nothing but to pass. eviction order against tenant---Judgments passed by two courts below, were result of illegality and the same were declared to have been passed without jurisdiction and of no legal effect---High Court set aside judgments and decrees passed by two courts below and allowed ejectment petition filed by landlord---Appeal was allowed in circumstances.

Abdul Rasheed v. Maqbool Ahmed and others 2011 SCMR 320 and Haji Jumma Khan v. Haji Zarin Khan I'LD 1999 SC 1101 ref.
Mian hived Iqbal Arain for Appellants.
Ch. Riaz Hussain for Respondent.
Date of hearing: 26th September, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--The appeal is still at pre-admission stage but on account of long pendency as the same has been filed in the year 2009, with the concurrence of learned counsel for the parties, this appeal is being heard as admitted case today.

2. The ejectment petition filed by the petitioner/appellant on the grounds of default in payment of rent and personal bona fide need was firstly dismissed by the Rent Controller, Lahore on 22-4-2009 and appeal filed against said dismissal also met the same fate when the same was dismissed on 27-8-2009.

3. The respondent resisted the ejectment on the ground that he on 15-7-2003, when he was already in possession of premises in question in his capacity of a tenant, entered into an agreement to sell with regard to the same property and subsequent thereto, he ceased to be a tenant and has been enjoying the possession of the premises as owner of the property.

4. There was another short limb of litigation in between the parties when the respondent herein filed a suit seeking injunction against his apprehended forcible eviction from the suit premises and the learned Civil Judge disposed of such suit on 11-5-2006 where according to the order passed by the learned Civil Judge, the appellant-landlord made a statement to the effect that present respondent is occupying the premises as an illegal encroacher. The order passed by the learned Civil Judge on 11-5-2006 is available in the present proceedings as Exh.R.2. Treating such stance of appellant as negation of the existence of relationship of landlord and tenant in between the parties, the courts below have non-suited the appellant on the ground that when, as per his own showing, he has treated the respondent as an illegal occupant how come at the same time he can be treated as a tenant.

5. I have heard the learned counsel for the parties and examined the record with their assistance.

6. Exh.R.2 is the basis for dismissal of the ejectment petition. I have seen the order, Exh. R.2. In the proceedings carried out by the learned Civil Judge on 11-5-2006, no separate statement either of the present appellant, who was defendant No.4 in the suit for injunction nor his learned counsel was recorded by the learned Judge seized of the matter and it is only mentioned in his order of the said date that learned counsel for defendant No.4 maintained that plaintiff of the suit viz. respondent herein was in illegal possession of the suit property.

7. The initial induction in the property since 21-4-1996 of' the respondent as a tenant is not denied. If in the year, 2006 the tenant was termed as an illegal occupant the meaning cannot be attached with such assertion to the effect that the relationship of landlord and tenant has been

denied. Firstly; as I have earlier noted that there is no particular statement separately recorded to that effect by the learned Civil Judge on 11-5-2006 and it is only an obiter wherein the order of the learned Civil Judge, the person in possession of the property was termed as an encroacher and secondly if for the sake of arguments, it is presumed that such statement was made by the appellant, even then by no stretch of imagination that can be given a meaning that it was a refusal from the tenancy of respondent. A landlord out of frustration, when neither he was getting any rent from the tenant nor possession of the rented premises; can term the person in possession as an encroacher or in illegal possession of the suit property.

8. The claim of the respondent in order to give protection of his possession over the suit property is only an agreement to sell which does not create any title under the law: In situation like the present one, the Hon'able Supreme Court of Pakistan has provided guidelines by way of reported judgments in case of Abdul Rasheed v. Maqbool Ahmed and others (2011 SCMR 320) wherein an earlier view of the Apex Court in case of Haji Jumma Khan v. Haji Zarin Khan (PLD 1999 Supreme .Court 1101) has been relied upon by holding that when a person in possession of a premises wherein he was initially inducted as a tenant subsequently claims to have purchased that premises through an agreement to sell, he has to vacate the premises and then to file a suit for specific performance of agreement to sell where after he would be given easy access to premises, in case he prevailed.

9. The non-issuance of notice under section 13-A of the Punjab Urban Rent Restriction Ordinance, 1959 has also been pleaded as a ground for non-suiting the petitioner in rent petition. The requirement of issuance of notice under section 13-A of the Ordinance in case of change in ownership is only meant to determine the default in payment of rent by the tenant and in case of non-issuance of such notice, the previous default cannot be alleged against tenant but by the act of non-issuance of such notice, the title of the new landlord would not become defective.

10. In the present case, the ground prevailed upon the courts below in non-suiting the appellant are not weighty and have no backing of law. The appellant has proved the existence of relationship of landlord and tenant successfully and when it was denied by the respondent in ejectrnent petition the moment such relationship was proved to be in existence the necessary consequence was nothing but to pass an eviction order against the respondent.

11. The judgments, impugned herein passed by the learned courts below respectively, are result of illegality and the same are declared to have been passed without jurisdiction and of no legal effect.

12. Resultantly, this appeal is allowed, impugned judgments and decrees passed by the learned courts below are set aside and the ejectment petition filed by the appellant is accepted.

MH/A-142/L Appeal allowed.

2012 Y L R 2933

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

BABAR ALI---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, SARGODHA and 2 others---Respondents

Writ Petition No.7463 of 2012, decided on 20th June, 2012.

Punjab Rented Premises Ordinance (XXI of 2007)---

----Ss. 21 & 22---Constitution of Pakistan, Art. 199---Constitutional petition---Tenant (petitioner) assailed orders of courts below whereby his application for leave to appeal was dismissed and ejectment orders were passed---Contention of the tenant was that mandatory provisions of law were not adhered to by the Rent Tribunal---Validity---Requirements as had been provided in statutory provisions had not been adhered to---No notice was issued through courier service and the mandatory requirement of notice to be accompanied by a copy of the application and documents annexed therewith was also not complied with---In order to invoke penal provisions, it was necessary for the Rent Tribunal to have issued a notice under S.21(i) of the Punjab Rented Premises Ordinance, 2007---Such notice could have been issued only after examining the petition and after satisfaction that it was accompanied by the requisite documents, in case of failure of the Tribunal to act accordingly, no reason, therefore, existed for causing appearance of the tenant before the Rent Tribunal and for starting the ten days period for filing application for leave to contest under S. 21 of the Ordinance---High Court, in circumstances, set aside orders of the courts below and dismissed ejectment petition of the land lord---Constitutional petition was allowed, in circumstances.

Younas Siddique v. Mst. Tahira Jabeen PLD 2009 Lah. 469 rel.

Hafiz Khalil Ahmad for Petitioner.

Sh. Tariq Mahmood for Respondents.

Date of hearing: 20th June, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---,Respondent No.3 claiming himself to be the owner of the property in question filed an ejectment petition on 31-7-2009 on the ground of default in payment of by the tenant/petitioner since 1-1-2009. The learned Special 'Judge (Rent) vide order dated 14-1-2010 refused to grant leave to contest the petition to the petitioner and straightaway ordered his ejectment. When such order was called in question by way of an appeal, learned Appellate authority allowed the same on 8-4-2010 and the matter was remanded back to the learned Special Judge (Rent) for re-consideration of the petition for leave to contest filed by the petitioner. The said acceptance of the appeal and the remand of the matter was never challenged any further by respondent No.3, whereas in post-remand proceedings firstly learned Special Judge (Rent) vide order dated 7-9-2010 refused to accept the prayer of the tenant for dismissal of the ejectment petition on the ground of non-observance of the mandatory legal steps as are provided in the then newly-enacted Punjab Rented Premises Ordinance, 2007 and

subsequently vide judgment dated 2-12-2010, leave was refused to the tenant/petitioner and again an ejectment order was passed. Such findings were maintained in appeal when the learned Addl. District Judge dismissed the same on 2-3-2012. The findings 'so arrived at by the fora below are challenged in the instant constitutional petition.

2. Learned counsel for the petitioner while placing reliance on the provisions of the Rent Law has argued that the learned Special Judge (Rent) has failed to observe the mandatory basic requirements of law, in entertaining the ejectrnent petition, in issuance of a notice to the tenant according to law, in dealing with the subsequent proceedings, in failing to require the tenant in the ejectment petition to file a petition for leave to contest and then in spite of the specific prayer refusing to dismiss the ejectment petition on account of non-compliance of the legal requirements provided in the relevant law. On account of all such lapses, proceedings carried out were having no legal value and the lapses on the part of the Special Judge (Rent) were sufficed to vitiate the trial.

3. Learned counsel for the respondents has controverted the arguments advanced by learned counsel for the petitioner and argued that notwithstanding some deficiency in the procedural requirements, substantial justice was extended to the parties and the view ultimately taken by the courts in passing the ejectment order has every protection of law.

4. I have heard learned counsel for the parties and perused the record.

5. It is very painful that the lower courts seem to be quite ignorant that the statutory provisions which are to be strictly adhered to by the said fora particularly with regard to the newly-promulgated Rent Laws are not being properly attended to. This Court in the case of "Younas Siddique. v, Mst. Tahira labeen (PLD 2009 Lahore 469) has by way of a well reasoned and detailed judgment put a great emphasis on observance of all the codal formalities by the Rent Tribunals. This Court in the same judgment directed the office to circulate a copy of the judgment to all the learned District Judges in the province who were expected to direct the Rent Tribunals dealing with the cases filed under new Rent Laws to act with due care and caution. The matters coming to this Court from the Rent Tribunals do disclose that the care and caution which was expected to be adopted by the said fora is completely being ignored. Either the supervisory jurisdiction of the learned District Judges in the province has come to some lower scale or by now it .has become a custom that the directions as contained in the judgments of the superior Courts could lightly be ignored. It is a dilemma and the Member Inspection Team of this Court has to take notice of such situation that when particularly the courts below are directed to observe certain provisions of law as per their requirement why such directions of law are conveniently being ignored or overlooked.

6. Corning to the case in hand, it is incumbent upon the Rent Tribunal in view of section 21 of Punjab Rented Premises Ordinance, 2007 in case an application under the said law is filed, the Tribunal shall issue notice to the respondent in the form prescribed in the schedule for appearance of the respondent on a date not later than 10 days through:

(i) Process Server

(ii) Registered Post A.D.

(iii) Courier Service..

Such notice is to be accompanied by copies of the application and documents annexed with the application. This provision goes to provide further that if the respondent fails to appear and the Rent Tribunal is satisfied that the notice has not been served on the respondent or the respondent is wilfully avoiding service of notice, the Tribunal may direct service of the notice by:-

(i) Affixing a copy of the notice at some conspicuous part of the rented premises or residence of the respondent or,

(ii) Publication in the press, electronic media or any other mode and after adopting of such modes, the Rent Tribunal may proceed ex parse against the respondent and pass the final order.

The notice prescribed in the schedule under section 21(i) of the Ordinance (ibid) do reveal that through the said notice, the respondent is to be required to obtain leave to contest the application within 10 days of the date of first appearance mentioned in the said notice. The interim orders as have been maintained by the learned Rent Tribunal in the present case, disclose that from the very inception, the requirements as have been provided in the statutory provisions have not been adhered to. On 31-7-2009 when for the first time, the ejectment petition was placed before the learned Tribunal, notice was ordered to be issued through registered post A. D. only and there is no mention in the said order and otherwise there is no evidence available on the record to establish that whether the Tribunal by mentioning the notice meant the notice as provided in the prescribed form in the schedule of the said law and surprisingly on the very next day i.e. 28-9-2009, learned Rent Tribunal only on the basis of a report of the process server has held that through ordinary mode, service upon the respondent was not possible, therefore, it was directed that through substituted service by publication in the press, the respondent be notified about the pendency of the ejectment petition. On 4-10-2009 when the respondent is shown to have appeared in person, after supply of a copy of the ejectment petition, he was asked to file a reply thereto and again on 5-11-2009, an opportunity for filing written reply was granted and when on 18-12-2009, a leave petition along with the prayer for rejection of the ejectment petition was filed, it was subsequently termed as a time-barred petition, and was dismissed. From the day to day proceedings recorded in the interim order sheet by the learned Rent Tribunal , and even from the arguments of learned counsel for the parties, it is, thus, established that no notice was issued through courier service. The mandatory requirement of a notice to be accompanied by a copy of application and documents annexed therewith was also not complied with. In order to invoke the penal provisions, it was necessary for the Rent Tribunal to have issued a notice in accordance with the law under section 21(i) read with the schedule of the Ordinance, 2007 (ibid) and further that such notice could have been issued only after examining the petition and satisfaction that it is accompanied by the requisite documents. As noted above, this has not been done and as such there is no

question of causing of an appearance by the petitioner before the Tribunal so as to make 10 day's time for filing the petition for leave to contest running.

7. The important fact is that when in the first round, the appeal of the petitioner was allowed by the learned Addl. District Judge, the same was never challenged wherein the procedure adopted by the Rent Tribunal was held as absolutely illegal and not sustainable in the eye of law but in post-remand proceedings, the learned Rent Tribunal again fell in same error and by ignoring that no mandatory requirements were fulfilled and it is a matter where leave is to be granted as the petition for leave to contest discloses sufficient grounds for production of oral evidence, the Rent Tribunal again refused to grant leave to contest the petition and the findings so arrived at by the Tribunal were upheld in some illegal manner by the learned First Appellate Court.

8. Having observed the above position, it is held that the findings arrived at by the lower fora are illegal and not sustainable in the eye of law and the mandatory requirements of the provisions of newly enacted Rent Laws have not been complied with which vitiates the very proceedings of the petition, the result is that this petition is allowed and the judgments arrived at by the Special Judge (Rent) and learned Addl. District Judge dated 2-12-2010 and 2-3-2012 respectively are set aside and the ejectment petition filed by the respondent No.3 is dismissed.

KMZ/B-23/L Petition allowed.

2012 Y L R 2885

[Lahore]

Before Sagheer Ahmed Qadri and Ibad-ur-Rehrnan Lodhi, JJ

BINYAMIN KHALIL---Petitioner

Versus

NATIONAL ACCOUNTABILITY BUREAU and others---Respondents

Criminal Miscellaneous Nos.10-Q; 4-Q and Writ Petition No.3754 of 2011, heard on 13th September, 2012.

National Accountability Ordinance (XVIII of 1999)---

---Ss. 5(r), 9(a)(viii) & 31-D---Constitution of Pakistan, Art.. 199---Constitutional petition---Wilful default---Quashing of reference---Statutory notice, requirement of---Petitioners were facing trial before Accountability Court on the allegation of wilful default in payment of bank loan---Plea raised by accused was that financial institution and authorities did not comply with legal requirements regarding issuance of statutory notices---Validity---Two notices, which were mandatorily required to be issued in accordance with provisions of National Accountability Ordinance, 1999, had not been issued by meeting requirement of law---First notice for period of 30 days was required to be issued by financial institution and then subsequent thereto a notice for seven days was requirement of law, . issued by Governor, State Bank of Pakistan---Governor State Bank of Pakistan issued 'notice on 9-1-2002, whereas notice by financial institution was issued on 18-10-2002, which were not

requirement of law---Mandatory requirement as contained in S. 5(r) read with S. 31-D of National Accountability Ordinance," 1999, were not followed in their letter and spirit and filing of reference and ' subsequent proceedings pending pursuant thereto were thus nullity in the eye of law and were liable to be quashed---High Court quashed reference against petitioner pending trial---Petition was allowed in circumstances.

Khan Asfandyar Wall and others v. Federation of Pakistan through Cabinet Division, Islamabad and others PLD 2001 SC 607 and Messrs Kaloodi International (Pvt.) Ltd. and another v. Federation of Pakistan and others PLD 2001 Kar. 311 ref.
Kh. Saeed-uz-Zafar for Petitioner.
Haroon-ur-Rasheed Cheema, Addl. Deputy Prosecutor-General of NAB for Respondent.
Date of hearing: 13th September, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Through this common judgment we intend to dispose of Criminal Miscellaneous No.10-Q of 2011, Criminal Miscellaneous No.4-Q of 2011 and Writ Petition No.3754 of 2011;seeking quashment of proceedings pending in pursuant of Accountability Reference No.14 of 2007 in Accountability Court No.III, Lahore.

2. The history in brief, relevant for the purpose of disposal of present petitions is that a Reference was filed on the complaint of Governor, - State Bank of Pakistan against the petitioners/ accused persons for proceeding under section 9(a)(viii) of National Accountability Bureau Ordinance,1999 punishable under section 10 thereof. The petitioners are Directors of Classic Knit Wear Private Limited, which availed a financial facility of Rs.32.522 Millions with mark-up to install a Knitwear Garments project at Bhiki, Faisalabad Road, District Sheikhupura from Pak Libya Holding Company Private Limited, Karachi. The petitioners/accused failed to discharge the liability as per the terms and conditions and allegedly misappropriated the hypothecated machinery of the project. Some criminal proceedings, in pursuance to F.I.R. No.19 of 2002 and suit for recovery before the Hon'ble Sindh High Court, were initiated but notwithstanding the disposal of the suit wherein a consent decree was .passed on 4-6-1999, the liability was not satisfied and a Reference under the provisions of National Accountability Bureau Ordinance had to be filed.

3. On having appeared before the learned Accountability Court, on behalf .of petitioners/accused, applications under section 265-K, Cr.P.C, were preferred seeking their acquittal of the' charges framed against them. The applications were taken up by the learned Judge Accountability Court No.III, Lahore on 29-1-2011 and were dismissed. The findings so arrived at are made basis of the challenge through present above said petitions.

4. The learned counsel for the petitioners argued with reference to various provisions of National Accountability Bureau Ordinance, 1999 and the case-law on the subject in support of the petitions and sought the quashment of the proceedings pending before the learned Accountability Court in pursuance to Accountability Reference No.14 of 2007 and acquittal of the accused/petitioners from the charge against them in the said Reference.

5. The learned Addl. Deputy Prosecutor-General for. NAB opposed the petitions and maintained that the Reference was filed after fulfilling all legal requirements and a complete trial would be the requirement of the law in which NAB intend to produce complete evidence to prove the charges against the petitioners.

6. We have heard the learned counsel for the parties and perused the record.

7. The Hon'ble Supreme Court of Pakistan has examined different provisions of National Accountability Bureau Ordinance in case of Khan Asfandyar Wall and others v. Federation of Pakistan???? thronh?? Cabinet Division, Islamabad and others (PLD 2001
Supreme Court 607). For the present purposes a part of paragraph 219 of the said judgment is being reproduced herein below for ready reference:--

> "However, in order to ensure across-the-board accountability we order the following directions for the application of section 5(r) of the impugned Ordinance. The same shall be suitably incorporated in the Rules to be framed under section 34 of the Ordinance, which shall on promulgation become part of the Ordinance.
>
> (i) No prosecution for 'wilful default' shall be launched before the expiry of 30 days statutory notice and an additional 7 days' notice shall also be served on the alleged defaulter to satisfy Governor, State Batik' of Pakistan that he has not committed any 'wilful default'. The report of Governor, State Bank of Pakistan as to the prima facie guilt or innocence will he subject to the final decision of the Accountability Court. The same procedure will be followed with regard to recovery of other public dues falling within the contemplation of section 5(r) of the Ordinance. The Governor, State Bank of Pakistan shall record his recommendations within 7-days with reasons therein. "

The provisions of section 5(r) of National Accountability Bureau Ordinance, 1999 are to the following effect whereby "wilful default" has been defined as under:--

> "Wilful default" a person [or a holder of public office] is said to commit an offence of wilful default under this Ordinance if he does not pay, for continues not to pay,] or return or repay the amount (due from him) to any bank, financial institution, cooperative society, Government department, statuary body or an authority established or controlled by Government on the date that it became due [as per agreement containing the obligation to pay return or repay or] according to the laws, rules, regulations, instructions, issued or notified by [the State Bank of Pakistan or the bank] financial institution, cooperative society, Government of Pakistan, statutory body or an authority established or controlled by a Government, as the case may be, and a [thirty days notice has been given to such person or holder of public office']---------- "Provided further that in the case of default concerning a bank or a' financial institution a seven days notice has also been given to "such person or' holder of public office" by the Governor, State Bank of P a k i s t a n . - - - -

Section 31-D of Ordinance reads as under:

"Inquiry, investigation or proceedings in respect of imprudent bank loans, etc.--- Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans-, defaulted loans or re-scheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from the Governor, State Bank of Pakistan.

Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.

8. In the present case the notice, as was required under section 5(r) of the Ordinance, was issued by the Pak Libya Holding Company Private Limited/ Financial Institution on 18-10-2002 whereas the notice for seven days, which is the requirement of law to be issued by the Governor, State Bank of Pakistan, was issued on 9-1-2002, Copy of the notice, issued by the Governor, State Bank of Pakistan calling upon the petitioners/ accused persons to show cause within seven days, as to why they should not be proceeded against on the allegation of "wilful default" under National Accountability Bureau Ordinance, 1999.

It is abundantly clear that two notices, 'which are mandatorily required to be issued in accordance with the provisions of Ordinance, have not been issued by meeting the requirement of law. The first notice for the period of 30-days is required to be issued by the Financial Institution and then subsequent thereto a notice for seven days is the requirement of law issued by the Governor, State Bank of Pakistan.

9. In the present case, we have observed that the Governor, State Bank of Pakistan has issued notice on 9-1-2002 whereas the notice issued by the Pak Libya Holding Company Private Limited was issued on 18-10-2002 which undoubtedly are not the requirement of law.

10. The learned Division Bench of Karachi High Court in case of Messrs Kaloodi International? (Pvt.)??? Ltd. And another v. Federation of Pakistan and others (PLD 2001 Karachi 311) has held that reference made in violation of mandatory provisions contained in section 31(d) of the Ordinance would render the very initiation of proceedings and all subsequent acts wholly illegal and void and the legality would not be curable by subsequent order of the Governor, State Bank of Pakistan with the result that the entire proceedings were held liable to be quashed. A reference to Khan Asfandyar Wali's case (Supra) was also made by the Karachi High Court.

11. In the case in nand the mandatory requirement as contained in section 5(r) read with section 31(d) of the Ordinance have not been followed in their letter and spirit and filing of reference and subsequent proceedings pending pursuant thereto are thus nullity in the eye of law and are liable to be quashed.

12. Resultantly, the petitions are allowed and the proceedings pending in the learned Accountability Court at Lahore .in pursuance of Accountability Reference No.14 of 2007 are quashed.

MH/B-26/L Petition allowed.

PLJ 2012 Cr.C. (Lahore) 729
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD MAQSOOD--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 7606-B of 2012, decided on 19.6.2012.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 376/511--Pre-arrest bail--Grant of--Confirmed--Allegation of--Attempt to commit Zina but never accomplished--Provisions of Section 511 PPC were also added as an offence which clearly indicates that the gravity of the offence has been lowered down by the prosecution itself--Allegations were that during the alleged occurrence the person of the complainant received injuries as also witnesses were also injured at the hands of the accused persons--But no medical examination was ever conducted of any alleged injured in absence of which the allegation of receiving injuries cannot be substantiated--Nothing incriminating was to be recovered from the petitioner, who, even otherwise, has joined the investigation after getting interim bail from High Court--Two days' delay in lodging the FIR made the case of the prosecution further doubtful--Petition allowed--Bail confirmed. [P. 730] A

Mian Mehmood Ahmed Kasuri, Advocate with Petitioner.

Ch. Karamat Ali, Deputy Prosecutor General Punjab for State.

Mr. Shahid Rafiq Mayo, Advocate for Complainant.

Date of hearing: 19.6.2012.

Order

Petitioner Muhammad Maqsood seeks pre-arrest bail in case FIR No. 133, dated 10.05.2012 offences under Sections 376/511, PPC registered at Police Station Usmanwala, District Kasur.

2. Admittedly, the offence was not complete in any sense. The allegation by the complainant in the FIR is to the effect that the petitioner was continuously in attempt to commit zina with her, but the same attempt was never accomplished. The provisions of Section 511 PPC are also added as an offence which clearly indicates that the gravity of the offence has been lowered down by the prosecution itself. Allegations are that during the alleged occurrence the person of the complainant received injuries as also witnesses Yar Muhammad, etc., were also injured at the hands of the accused persons. But no medical examination was ever conducted of any alleged injured in absence of which the allegation of receiving injuries

cannot be substantiated. Nothing incriminating is to be recovered from the petitioner, who, even otherwise, has joined the investigation after getting interim bail from this Court. The two days' delay in lodging the FIR makes the case of the prosecution further doubtful.

3. Resultantly, this petition is allowed, ad-interim pre-arrest bail already granted to the petitioner on 05.06.2012 is confirmed on the already furnished bail bonds.

(A.S.) Bail confirmed.

PLJ 2012 Cr.C. (Lahore) 784
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
Mirza ALAMGIR @ MAMA THAKUR--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 827-B of 2012, decided on 30.7.2012.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(1)--Pakistan Penal Code, (XLV of 1860)--Ss. 392, 395, 411 & 109--Bail, grant of--Expiry of statutory period--No previous criminal history--Validity--Almost double statutory period had gone but trial had not yet been concluded--No delay was attributed to accused and such fact in frank manner, even had been conceded for complainant, according to whom only three adjournments during whole of that period were sought on behalf of the accused--Petitioner had no previous criminal history and thus he could not be classified as hardened and desperate criminal--Expiry of statutory period in such like case, entitled the accused to be released on bail--Bail was allowed.[P. 785] A

Mr. Muhammad Bilal Gurmani, Advocate for Petitioner.

Mr. Shehryar Mehboob, Advocate for Complainant.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General Punjab for State.

Date of hearing: 30.7.2012.

Order

Through this petition, the petitioner seeks post arrest bail in case FIR No. 154/2010 dated 23.06.2010 registered under Sections 392, 395, 411, 109, PPC at Police Station Old Kotwali District Multan.

2. For the offences with which petitioner has been connected, a period of one year has been provided under third proviso of Section 497 (a), Cr.P.C. within which if the trial is not concluded then the petitioner would be entitled to be released on bail. In the present case, the petitioner was arrested on 27.07.2010 and almost double the statutory period has gone but trial has not yet been concluded. No delay is attributed to the petitioner and this fact in frank manner, even has been conceded by the learned counsel for the complainant, according to whom only three adjournments during whole of this period were sought on behalf of the present petitioner. The petitioner has no previous criminal history and thus he

cannot be classified as hardened and desperate criminal. The expiry of statutory period in such like cases, entitles the petitioner to be released on bail.

3. In view of what has been discussed above, this petition is allowed and petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail allowed.

PLJ 2012 Cr.C. (Lahore) 789 (DB)
Present: Sagheer Ahmad Qadri and Ibad-ur-Rehman Lodhi, JJ.
ABDUL KARIM and others--Petitioners
versus
STATE and others--Respondents

Crl. Misc. Nos. 4-Q & 10-Q of 2011, heard on 13.9.2012.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 569-A--National Accountability Bureau Ordinance, 1999, S. 5(r)--Inherent powers--Violation of mandatory provision--Notice for seven days--Requirement of law--Acquittal of charge--Quashment of proceedings--Notice issued by the Governor, State Bank of Pakistan calling upon the petitioners/accused persons to show cause within seven days, as to why they should not be proceeded against on the allegation of "willful default" under National Accountability Bureau Ordinance, 1999--Two notices, which are mandatorily required to be issued in accordance with the provisions of Ordinance, have not been issued by meeting the requirement of law--The first notice for the period of 30-days is required to be issued by the Financial Institution and then subsequent thereto a notice for seven days is the requirement of law issued by the Governor, State Bank of Pakistan--Violation of mandatory provisions contained in Section 31(d) of the Ordinance would render the very initiation of proceedings and all subsequent acts wholly illegal and void and the legality would not be curable by subsequent order of the Governor, State Bank of Pakistan with the result that the entire proceedings were held liable to be quashed--Mandatory requirement as contained in Section 5(r) read with Section 31(d) of the Ordinance have not been followed in their letter and spirit and filing of reference and subsequent proceedings pending pursuant thereto are thus nullity in the eye of law and are liable to be quashed--Pending proceeding was quashed. [P. 793] A, B, C & D

PLD 2001 Karachi 311, ref.

Faiz Rasool Khan Jalbani and Kh. Saeed-uz-Zafar, Advocate for Petitioner.

Mr. Haroon-ur-Rasheed Cheema, Addl. D.P.G. for NAB.

Date of hearing: 13.9.2012.

Judgment

Ibad-ur-Rehman Lodhi, J.--Through this common judgment we intend to dispose of Crl. Misc. No. 10-Q/2011, Crl. Misc. No. 4-Q/2011 and W.P. No. 3754/2011, seeking

quashment of proceedings pending in pursuant of Accountability Reference No. 14/2007 in Accountability Court No. III, Lahore.

2. The history in brief, relevant for the purpose of disposal of present petitions is that a Reference was filed on the complaint of Governor, State Bank of Pakistan against the petitioners/accused persons for proceeding under Section 9(a)(viii) of National Accountability Bureau Ordinance, 1999 punishable under Section 10 thereof. The petitioners are directors of Classic Knit Wear Private Limited, which availed a financial facility of Rs. 32.522 Millions with markup to install a Knitwear Garments project at Bhiki, Faisalabad Road, District Sheikhupura from Pak Libya Holding Company Private Limited, Karachi. The petitioners/accused failed to discharge the liability as per the terms and conditions and allegedly misappropriated the hypothecated machinery of the project. Some criminal proceedings, in pursuant to FIR No. 19/2002 and suit for recovery before the Hon'ble Sindh High Court, were initiated but notwithstanding the disposal of the suit wherein a consent decree was passed on 04.06.1999, the liability was not satisfied and a Reference under the provisions of National Accountability Bureau Ordinance had to be filed.

3. On having appeared before the learned Accountability Court, on behalf of petitioners/accused, applications under Section 265-K Cr.P.C., were preferred seeking their acquittal of the charges framed against them. The applications were taken up by the learned Judge Accountability Court No. III, Lahore on 29.01.2011 and were dismissed. The findings so arrived at are made basis of the challenge through present above said petitions.

4. The learned counsel for the petitioners argued with reference to various provisions of National Accountability Bureau Ordinance, 1999 and the case law on the subject in support of the petitions and sought the quashment of the proceedings pending before the learned Accountability Court in pursuant to Accountability Reference No. 14/2007 and acquittal of the accused/petitioners from the change against them in the said reference.

5. The learned Addl. Deputy Prosecutor General for NAB opposed the petitions and maintained that the Reference was filed after fulfilling all legal requirements and a complete trial would be the requirement of the law in which NAB intend to produce complete evidence to prove the charges against the petitioners.

6. We have heard the learned counsel for the parties and perused the record.

7. The Hon'ble Supreme Court of Pakistan has examined different provisions of National Accountability Bureau Ordinance in case of Khan Asfandyar Wali and others versus Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 Supreme Court 607). For the present purposes a part of paragraph 219 of the said judgment is being reproduced herein below for ready reference:--

"However, in order to ensure across-the-board accountability we order the following directions for the application of Section 5(R) of the impugned Ordinance. The same shall be suitably incorporated in the Rules to be framed under Section 34 of the Ordinance, which shall on promulgation become part of the Ordinance.

(i) No prosecution for `wilful default' shall be launched before the expiry of 30 days statutory notice and an additional 7 days' notice shall also be served on the alleged defaulter to satisfy Governor, State Bank of Pakistan that he has not committed any `willful default'. The report of Governor, State Bank of Pakistan as to the prima facie, guilt or innocence will

be subject to the final decision of the Accountability Court. The same procedure will be followed with regard to recovery of other public dues falling within the contemplation of Section 5(r) of the Ordinance. The Governor, State Bank of Pakistan shall record his recommendations within 7-days with reasons therein."

The provisions of Section 5(r) of National Accountability Bureau Ordinance, 1999 are to the following effect whereby "wilful default" has been defined as under:

"Wilful default" a person [or a holder of public office] is said to commit an offence of willful default under this Ordinance if he does not pay, [or continues not to pay,] or return or repay the amount [due from him] to any bank, financial institution, cooperative society, Government department, statuary body or an authority established or] controlled by Government on the date that it became due [as per agreement containing the obligation to pay return or repay] or according to the laws, rules, regulations, instructions, issued or notified by [the State Bank of Pakistan or the bank,] financial institution, cooperative society, Government of Pakistan, statutory body or an authority established or controlled by a Government, as the case may be, and a [thirty days notice has been given to `such person or holder of public office "] ----------

[Provided further that in the case of default concerning a bank or a financial institution a seven days notice has also been given to "such person or holder of public office" by the Governor, State Bank of Pakistan.----------

Section 31-D of Ordinance reads as under:--

"Inquiry, investigation or proceedings in respect of imprudent bank loans, etc.-- Notwithstanding anything contained in this Ordinance or any other taw for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or re-scheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from the Governor, State Bank of Pakistan.

Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference form the Governor, State Bank of Pakistan.

8. In the present case the notice, as was required under Section 5(r) of the Ordinance, was issued by the Pak Libya Holding Company Private Limited/Financial, Institution on 18.10.2002 whereas the notice for seven days, which is the requirement of law to be issued by the Governor, State Bank of Pakistan, was issued on 09.01.2002. Copy of the notice, issued by the Governor, State Bank of Pakistan calling upon the petitioners/accused persons to show cause within seven days, as to why they should not be proceeded against on the allegation of "willful default" under National Accountability Bureau Ordinance, 1999.

It is abundantly clear that two notices, which are mandatorily required to be issued in accordance with the provisions of Ordinance, have not been issued by meeting the requirement of law. The first notice for the period of 30-days is required to be issued by the Financial Institution and then subsequent thereto a notice for seven days is the requirement of law issued by the Governor, State Bank of Pakistan.

9. In the present case, we have observed that the Governor, State Bank of Pakistan has issued notice on 09.01.2002 whereas the notice issued by the Pak Libya Holding Company Private Limited was issued on 18.10.2002 which undoubtedly are not the requirement of law.

10. The learned Division Bench of Karachi High Court in case of Messrs Kaloodi International (Pvt.) Ltd. And another versus Federation of Pakistan and others (PLD 2001 Karachi 311) has held that reference made in violation of mandatory provisions contained in Section 31(d) of the Ordinance would render the very initiation of proceedings and all subsequent acts wholly illegal and void and the legality would not be curable by subsequent order of the Governor, State Rank of Pakistan with the result that the entire proceedings were held liable to be quashed. A reference to Khan Asfandyar Wali's case (Supra) was also made by the Karachi High Court.

11. In the case in hand the mandatory requirement as contained in Section 5(r) read with Section 31(d) of the Ordinance have not been followed in their letter and spirit and filing of reference and subsequent proceedings pending pursuant thereto are thus nullity in the eye of law and are liable to be quashed.

12. Resultantly, the petitions are allowed and the proceedings pending in the learned Accountability Court at Lahore in pursuance of Accountability Reference No. 14/2007 are quashed.

(A.S.) Petitions allowed.

2012 P.Cr.R. 1240
[Lahore]
Present: **IBAD-UR-REHMAN LODHI, J.**
Ashiq Hussain
Versus
The State and others

Crl. Misc. No. 6286-B of 2012, decided on 18th May, 2012.

BAIL (INJURIES CASE)---(Conduct of prosecution)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 337-A(iii)/34---Bail after arrest, grant of---Conduct of prosecution case---Veracity of case was missing---Alleged occurrence was dated 1.12.2011 whereas F.I.R. was registered on 4.1.2012 and medical examination of injured PW was got conducted on 31.12.2011 and duration of alleged injuries was recovered as to 2/3 hours---Bail after arrest allowed. (Paras 2,3)

[Alleged occurrence was dated 1.12.2011 whereas F.I.R. was registered on 4.1.2012 and medical examination of the injured was conducted on 31.12.2012 and duration of injuries was registered as between 2/3 hours. Veracity of case was open to question. Bail was allowed. High Court further taking notice of misconduct of police ordered as inquiry into the matter].

For the Petitioner: **Haji Khalid Rehman, Advocate.**

For the State: **Ch. Karamat Ali, Deputy Prosecutor-General, Punjab.**
Date of hearing: **18th May, 2012.**

ORDER

IBAD-UR-REHMAN LODHI, J. --- Through this petition, the petitioner seeks post-arrest bail in case F.I.R. No. 3/2012, dated 4.1.2012 registered under Sections 337-A(iii), 34, PPC at Police Station, Sahianwala District Faisalabad.

2. The occurrence according to the complainant took place on 1.12.2011 which was reported on 4.1.2012. According to medico-legal report available on record, the injured Faheem Ahmad Shahzad was produced before the Medical Officer on 31.12.2011 and after examining the person before him, the doctor opined with regard to the probable duration in-between the injuries and examination as 2 to 3 hours.

What is missing on the part of complainant or prosecution in this case, is the veracity.

3. Keeping in view the above conduct of the prosecution and the complainant, the petitioner, who has been arrested in this case and behind the bars is entitled to be released on bail.

4. In view of what has been discussed above, this petition is accepted and petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of Trial Court.

5. While examining the record of the case, I have noticed that offence which according to the prosecution's own showing was committed on 1.12.2011 and was entered under Section 154, Cr.P.C. with the police on 4.1.2012. The injured Faheem Ahmad Shahzad, however, got medically examined on 31.12.2011 and he was produced before the Medical Officer by the police. The doctor examining the injured gave probable duration in-between the injuries and examination as to 2 to 3 hours. This speaks volume about the misconduct on the part of police and also the mischievous conduct of the complainant.

If the injured was before the police even at least on 31.12.2011 and he was medically examined with the complaint of victim of criminal offence that criminal offence was to be registered forthwith and when it was registered the Investigating Officer has closed his eyes from the position that injuries which allegedly sustained by the injured on 1.12.2011 were declared by the doctor to have been sustained on 31.12.2011 from 4.00 p.m. to 7.00 p.m. This should be a sufficient ground for proceeding by the police to recommend discharge of the case but nevertheless the arrest was made, investigation was conducted and still the person allegedly involved in the crime was kept behind the bars.

6. D.I.G., Faisalabad is directed to probe and conduct inquiry or to arrange some inquiry at the level of an officer of Superintendent of Police to ascertain the actual position in view of the facts narrated in para 4 above and the outcome of such inquiry would be intimated to this Court through the Deputy Registrar (Judicial) of this Court for perusal by the Court in Chamber.

Bail after arrest allowed.

2013 CLC 74
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD JAMEEL----Petitioner
Versus
ABDUL MAJEED and another----Respondents

Writ Petition No.6574 of 2012, decided on 21st May, 2012.

Punjab Rented Premises Act (VII of 2009)---
---S. 21(8)---Constitution of Pakistan, Art. 199---Constitutional petition---Restoration application for petition to leave to contest---Limitation---Scope---Ejectment of tenant on ground of default in payment of rent and expiry of tenancy agreement---Tenant's petition for leave to contest was dismissed for non-appearance and restoration application after said dismissal was also dismissed as being beyond the period of 30 days---Contention of the tenant was that his application for restoration of petition was within time, as the same was within the period of thirty days from the date when he became aware of the dismissal---Validity---For a petition to be moved under section 21(8) of the Punjab Rented Premises Act, 2009, no date of knowledge was made basis as a starting point for counting limitation to enable a person to move restoration application---Limitation started on the date when the petition for leave to contest was dismissed---Constitutional petition was dismissed, in circumstances.

Muhammad Ramzan Qadri for Petitioner.

ORDER

IBAD-UR-REHMAN LODHI, J.--- The ejectment petition was filed by respondent No.1 on 22-4-2009 on the ground of default in payment of rent and expiry of tenancy agreement. The tenant, when appeared, failed to apply for leave to contest within the prescribed period of limitation and, therefore, the learned Special Judge (Rent) ceased of the matter at the relevant time refused to grant such leave.

2. The appeal preferred against such refusal of leave was allowed and the matter was remanded back to the learned Special Judge (Rent) for proceeding with the ejectment petition on merits.

3. Even such remand order was not accepted by the tenant, whose appeal was allowed and he challenged the findings of the same in constitutional jurisdiction of this Court by way of Writ Petition No.11853 of 2011, which was dismissed on 10-11-2011.

4. It is pertinent to mention here that during pendency of appeal before the learned First Appellate Authority and the constitutional petition here in this Court, the proceedings before the learned Special Judge (Rent) were never stopped by any order.

5. The learned Special Judge (Rent), who continued with the proceedings, has taken up the leave petition on 13-5-2011 and when no-body appeared to prosecute the said leave petition, the same was dismissed for want of prosecution. The tenant/petitioner by means of a petition dated 29-6-2011 applied for restoration of the same by taking a plea that he only became aware of dismissal of his leave petition on 13-6-2011 and thus within a period of 30 days, as provided in section 21(8) of New Rent Laws, the petition was within time. The learned Special Judge (Rent), before whom such petition was moved seeking restoration of leave petition, proceeded to dismiss the same on 22-11-2011 being barred by limitation.

6. Learned counsel for the petitioner impugns such findings of the learned Special Judge (Rent) arrived at on 22-11-2011, mainly on the ground that with regard to order dated 13-5-2011, he only became aware on 13-6-2011 and, therefore, from such date of knowledge the petition moved on 29-6-2011 was within time.

7. I have gone through the relevant provisions of law. Only one starting point from where the limitation to file an application for restoration of the earlier dismissed application in default is given as the date when dismissal order was passed and from that point of time a period of 30 days was provided to the person seeking restoration. Unlike other matters, for a petition to be moved under section 21(8) of Rent Laws, no date of knowledge is made basis as a starting point for counting limitation to enable a person to move restoration application. Therefore, in the present case the limitation started on 13-5-2011 and it was incumbent upon the petitioner to move application for restoration of his dismissed petition within 30 days of such dismissal. The application moved on 29-6-2011 is, therefore, on the face of it filed beyond such period of limitation. Even if the date of 13-6-2011 is taken when according to the petitioner he acquired the knowledge for the first time regarding dismissal of his leave petition, the petitioner in that case was bound to give plausible explanation of each and every day falls in between 13-6-2011 and 29-6-2011, which explanation is conspicuously missing.

8. The conduct adopted by the tenant in this case and noted in a number of rent cases to the effect that by deviating the proceedings they succeeded in getting time beyond one prescribed in Special Law, which is a clear negation of section 27 of The Rent Ordinance/Act, which provides that Special Judge (Rent) shall pass a final order on an application as expeditiously as possible, but not later than 4 months from the date of filing of the application and in case of failure by the Rent Tribunal in observing such time limit, it is then a duty of the Tribunal to conduct the proceedings on day-to-day basis. Neither the applications moved under the Rent Laws are decided within a period of 4 months nor in case of failure on the part of the Tribunal to adhere to such time limits, the subsequent proceedings are carried out on day-to-days basis.

9. The District Judges in their supervisory jurisdiction are supposed to look into the matters as to why the mandatory provisions of law are not being complied with in their letter and spirit.

10. The result is that the petition having no force is dismissed.

11. A copy of this order be transmitted to the learned Member Inspection Team of this Court, who will take up this matter with all the District Judges and to report compliance of the said directions to this Court.

KMZ/M-206/L Petition dismissed.

2013 C L C 414
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
LUBNA SHUJA----Petitioner
Versus
RENT CONTROLLER and another----Respondents

Writ Petition No.23801 of 2012, decided on 28th September, 2012.

(a) Punjab Rented Premises Act (VII of 2009)---
----Ss. 22, 24 & 28(4) --- Constitution of Pakistan, Art.199---Constitutional petition---Rent Controller granting leave to contest ejectment petition---Deposit of arrears of rent---Scope---Ejectment petition---Default in payment of rent by tenant, ground of---Denial of relationship of landlord and tenant between parties by respondent---Order of Rent Tribunal granting respondent leave to contest ejectment petition---Petitioner's plea that while passing impugned order, Rent Tribunal was obliged to direct respondent to deposit arrears of rent or furnish surety therefor---Validity---Rent Tribunal would be competent to pass final order including order for deposit of arrears of rent only after refusing to grant tenant leave to contest---Rent Tribunal while granting leave to contest could only direct a "tenant" to deposit rent due, but not anybody else not having attained status of tenant---Respondent after denying such relationship had not been declared as tenant, thus, he could not be directed to deposit arrears of rent---Person being treated as tenant by petitioner had been impleaded as respondent in the ejectment petition---Petitioner had not placed on record any material to show respondent to be tenant either under previous owner or the petitioner, who claimed to be new owner of property---No provision existed in Punjab Rented Premises Act, 2009, whereby respondent or tenant could be compelled to furnish a surety or security as a substitute to the deposit of arrears of rent---Impugned order was interlocutory in nature, whereagainst remedy of appeal was not provided under Punjab Rented Premises Act, 2009---Constitutional jurisdiction against interim order would not ordinarily be exercised without showing same to be either perverse or without jurisdiction/lawful authority---Impugned order did not suffer from any such defect---High Court dismissed constitutional petition in limine.

(b) Punjab Rented Premises Act (VII of 2009)---
----Ss. 22 & 30---Ejectment petition---Default in payment of rent by tenant, ground of---Denial of relationship of landlord and tenant between parties by respondent---Petitioner's plea that her status as new owner of property had been admitted by respondent in presence of witnesses---Validity---Petitioner claiming to be new owner of property without first complying with mandatory provision of S.30 of Punjab Rented Premises Act, 2009 could

not allege such default on part of respondent who was impleaded as tenant---Plea of petitioner was repelled---Principles.

(c) Constitution of Pakistan---
----Art. 199---Interim order not appealable under relevant statute---Interference in such order by High Court in its constitutional jurisdiction---Scope---Such jurisdiction could not be exercised ordinarily without first showing such order to be either passed without jurisdiction/lawful authority or perverse---Illustration.

Abdul Sami Khawaja for Petitioner.

ORDER

IBAD-UR-REHMAN LODHI, J.--- The petitioner filed an ejectment petition before the learned Special Judge (Rent), Lahore seeking eviction of respondent No.2 herein from property measuring 2-Marlas bearing No.S-64-R-47/RH, stated to have been commonly known as "Barry Sons " situated in New Anarkali, Lahore, mainly on the ground of default in payment of rent, as also the expiry of tenancy.

2. Respondent No.2 appeared on notice and filed an application under section 22 of the Punjab Rented Premises Act, 2009 denying the existence of any relationship of landlord and tenant in between the parties to the ejectment petition and secondly his own status has been denied as a tenant in the property by asserting that he is in business being carried out in the premises in question as a partner of Aqeel Ahmed and that he has never entered into any rent agreement with any person with regard to the premises in question.

3. Learned Special Judge (Rent), Lahore, on 12-6-2012 granted leave to respondent No.2 to contest the ejectment petition holding that the application filed by him discloses sufficient grounds for production of oral evidence.

4. The order, as was passed by the learned Special Judge (Rent) on 12-6-2012, has been challenged by the petitioner in this Constitutional petition questioning the competence of the learned Special Judge (Rent), firstly in matter of grant of leave to contest and secondly that if the leave was granted, it was obligatory for the said Rent Tribunal to direct the "tenant" in view of the provisions of section 24 of the Punjab Rented Premises Act, 2009 to deposit the rent due from him or in alternate to ask for any solemn surety.

5. I have heard the learned counsel for the petitioner at length and perused the available record.

6. In section 22 of the Punjab Rented Premises Act, 2009 it is not the duty of a "tenant" to pray for leave to contest the petition rather keeping in view the wording used in such statutory provision it is pertinent to note that a "respondent" is required to file a petition for leave to contest and the learned Rent Tribunal on the strength of the affidavits annexed with the leave petition would consider the grounds for grant of leave or otherwise in favour of or against a "respondent". If the leave to contest is refused only in that event in view of section 22(6) of the said Act, learned Rent Tribunal is made competent to pass the "final order". The

term "final order" is defined in section 2(b) of the said Act, which for the sake of convenience is reproduced herein below:---

> "Final order" means a final order passed by a Rent Tribunal culminating the proceedings including an order in respect of adjustment of pagri, advance rent, security, arrears of rent, compensation or costs but shall not include an order passed in an execution proceedings".

The power to order for deposit of arrears of rent is a part of such final order to be passed by the learned Rent Tribunal in case of refusal to grant leave to contest.

7. In case of grant of leave to contest, the learned Rent Tribunal is competent to direct for deposit of rent due and this direction can be issued to a "tenant". Here again for the sake of convenience, the term "tenant" as is defined for the Special Law in section 2(l) of the Punjab Rented Premises Act, 2009 is reproduced here-under:---

> "tenant" means a person who undertakes or is bound to pay rent as consideration for the occupation of a premises by him or by any other person on his behalf and includes;
> (i) a person who continues to be in occupation of the premises after the termination of his tenancy for the purpose of a proceeding under this Act;
> (ii) legal heirs of a tenant in the event of death of the tenant who continue to be in occupation of the premises;
> (iii) a sub-tenant who is in possession of the premises or part thereof with the written consent of the landlord;

From the above, it is clear that once a leave is refused to a respondent in the ejectment petition in that event only the learned Rent Tribunal would be competent to pass a final order including the direction with regard to deposit of arrears of rent but once a leave is granted and the respondent as impleaded in the ejectment petition is treated a tenant, only then the order for deposit of rent due can be passed directing him for compliance of section 24 of the Punjab Rented Premises Act, 2009. But where the respondent in ejectment petition notwithstanding the fact of grant of leave has not attained the status of tenant, he cannot be asked to deposit the arrears of rent unless first he is declared as a tenant. In case of refusal on the part of the respondent in ejectment petition with regard to existence of relationship of landlord and tenant with the ejectment petition the status of "tenant" cannot be attached with person of respondent and, as such, a direction in terms of section 24 of the said Act, which ought to have been passed to a tenant cannot be given to such respondent, who has refused the existence of relationship of landlord and tenant in between the parties to the ejectment petition.

8. In this particular case, except the fact that the person, who has been treated as a tenant by ejectment petitioner, has been impleaded as a respondent in the ejectment petition, no material has been placed by the petitioner before the learned Rent Tribunal establishing the status of respondent as that of a tenant either under previous owner or the petitioner, who claims herself to be a new owner of the property.

9. The claim of the petitioner is that after stated purchase of the property, her such status was admitted by the respondent in presence of some witnesses but the alleged acceptance of the respondent with regard to the status of the petitioner as a new landlady would not absolve the petitioner claiming herself to be a new owner of the property to act in accordance with the mandatory provision as contained in section 30 of the Punjab Rented Premises Act, 2009, which requires the issuance of written intimation of transfer of title by registered post or a courier service to the tenant and at the same time to the Rent Registrar for entering the name of new owner in the register as the landlord of the premises and then the Rent Registrar shall inform the tenant through a notice, at the expense of the landlord, about the transfer of ownership of the premises and the tenant shall not be deemed to have been defaulted in payment of rent if the rent due is paid or tendered to the new landlord within a period of thirty days from the date when the notice should in normal course has reached the tenant. In absence of any such notice, the person claiming himself to be a landlord would be debarred to allege any default on the part of the person impleaded as a tenant.

10. Learned counsel for the petitioner as an alternate relief has prayed for a direction to respondent No.2 to furnish a reasonable security for protection of her interest by imposing a condition with leave granting order.

I am afraid, in Punjab Rented Premises Act, 2009, which is a Special Law no such provision has been enacted by the law givers whereby a respondent or tenant can be compelled to furnish a surety or security as a substitute to the deposit of rent and in absence of any such provisions, such direction, which has been prayed for as a substitute also cannot be granted.

11. There is another aspect of the matter that the order passed by the learned Special Judge (Rent) is interlocutory in nature and even the remedy of appeal is not provided against such order in view of provisions of section 28(2) of the Punjab Rented Premises Act, 2009. From interim order of such nature, which is under challenge in these Constitutional proceedings, the Constitutional jurisdiction ordinarily is not exercised unless the order is shown to have been passed without jurisdiction or without lawful authority and a perverse order. No such deficiency can be attached with the order passed by learned Special Judge (Rent), Lahore on 12-6-2012.

12. For what has been discussed above, the order passed by learned Rent Controller is just, proper and within the fours of law and no interference is called for in Constitutional jurisdiction.

13. Resultantly, this petition fails and is dismissed in limine.

SAK/L-11/L Petition dismissed in limine.

2013 C L C 1121
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD KHALIL AHMAD----Petitioner
Versus
SHABBIR AHMAD----Respondent

Civil Revision No.1078 of 2012, decided on 5th December, 2012.

(a) Civil Procedure Code (V of 1908)---
----O. XXXVII, Rr. 1, 2, 4, O. IX, R. 13, O. V, Rr. 6, 18 & 19---Suit upon bills of exchange---Ex parte decree, setting aside of ---Setting aside of a decree passed in a suit under provisions of O.XXXVII, C.P.C. ---Scope---"Special circumstances" as used in O.XXXVII, R.4, C.P.C.---Connotation---Suit for recovery of money was decreed ex parte against defendant, and defendant's application for setting aside ex parte decree was dismissed---Contention of the defendant was that there was a defect in the service effected upon the defendant and requirements of O.V, Rr.18 and 19, C.P.C. were not complied with---Validity---Requirements for effecting service upon the defendant had been duly fulfilled in the present case and the reliance of the defendant on O.V, R.19, C.P.C. was misplaced as the examination of serving officer was only required if the summons was returned under O.V, R.17, C.P.C. which provision dealt with the circumstances as to what procedure was to be adopted when the defendant refused to accept service or when he could not be found---Refusal to accept service or non-finding of the defendant did not happen in the present case---Term "special circumstances" as used in O.XXXVI, R.4, C.P.C. was stricter than the terms "good cause" and "sufficient cause" as used in O.IX, R.13, C.P.C. and a person seeking setting aside of ex parte decree passed under O.XXXVII, C.P.C. had to satisfy the court with regards to existence of "special circumstances"---Petitioner, had failed to demonstrate such v special circumstances for setting aside of ex parte decree---Revision was dismissed.

Nouroz Khan v. Haji Qadoor 2005 SCMR 1877 and Mehmuda Sultana v. Naseem Mumtaz and another 1990 MLD 1028 rel.

(b) Civil Procedure Code (V of 1908)---
----O. XXXVII R. 4, O.IX, R.13, O.XLIII, R.1(d) & S.115---Setting aside of ex parte decree passed in a suit under O.XXXVII, C.P.C.---Revisional jurisdiction of High Court---Scope---In view of provisions of O.XLIII, R.1(d), C.P.C, proceedings culminated under provisions of O.IX R.13, C.P.C. were appealable and any final verdict as had been given under O.XXXVII, R.4, C.P.C. primarily was to be considered as an order passed within purview of O.IX, R.13, C.P.C. and revisional jurisdiction against such order would not be available.
Ahmed Raza for Petitioner.

ORDER
IBAD-UR-REHMAN LODHI, J.--- Through this civil revision, the petitioner called in question the findings arrived at by learned Additional District Judge, Sahiwal on 23-10-2012, when a petition filed by him for setting aside the ex parte decree passed on 10-4-2012 was dismissed.

2. The facts relevant for the purposes of the present petition are that Shabbir Ahmed respondent filed a suit on 6-2-2012 for recovery under the provisions of Order XXXVII, Civil Procedure Code. The learned trial Court ordered issuance of summons in the prescribed Form and on the report of process server that the defendant/petitioner has duly been served and on the event of his non-appearance on 23-2-2012, he was proceeded against ex parte. After recording statement of the plaintiff/respondent in ex parte evidence, the suit was decreed vide judgment and decree dated 10-4-2012.

3. On 23-6-2012 a petition for setting aside the ex parte decree, as was passed on 10-4-2012, was filed by the present petitioner, which was contested and by means of the impugned order dated 23-10-2012, the same was dismissed.

4. Learned counsel for the petitioner has mainly placed reliance on the provisions of Order V, Rules 18 and 19, C.P.C. by maintaining that there was a defect in service upon the defendant in the suit and requirements as are provided in such rules have not been fulfilled, which, according to learned counsel, would vitiate all the subsequent proceedings including passage of ex parte decree. In support of his contentions, learned counsel has placed reliance on the reported cases titled as "Nouroz Khan v. Haji Qadoor" (2005 SCMR 1877), "Mehmuda Sultana v. Naseem Mumtaz and another" (1990 MLD 1028) and an unreported order passed by a learned Bench of this Court on 29-8-2012 in Civil Revision No.319 of 2011.

5. From the perusal of record, one thing is clear that on the summons issued under Order XXXVII, C.P.C.; the process server has reported that on 19-2-2012 service of the same was effected upon the defendant in the suit and in acknowledgment to such service the defendant/present petitioner put his signatures on the original notice. At the time of service, the defendant receiving the notice was identified by Muhammad Ilyas son of Bagh Ali, a witness, who also has signed such event. The effect of service has duly been supported by an affidavit of the process server available on the original notice returned to the Court.

6. In view of provisions of Order IX- Rule 6(1)(a), C.P.C., if it is proved that the summonses were duly served upon the defendant and at the time when the suit is called on for hearing, only the plaintiff appears and the defendant does not appear and from the summons it is proved that same has been duly served, the Court is competent to proceed ex parte against defaulting defendant.

7. Learned counsel for the petitioner has argued with some vehemence that requirements of Order V, C.P.C. have not been fulfilled and thus the order directing ex parte proceedings against the defendant and subsequent ex parte decree are not sustainable. In view of Order V, Rule 10, C.P.C., service of summons shall be made by delivering or tendering a copy thereof signed by the judge or such officer as he appoints in this behalf, and sealed with the seal of the Court. Rule 16 of the said Order provides that where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered through an acknowledgement of service endorsed on the original summons.

8. In this case, the requirements for effecting service upon the defendant have duly been fulfilled as noted herein above. Reliance of learned counsel for the petitioner on the provisions of Order V, Rule 19 is misplaced, for, the examination of serving officer is only required if summons is returned under Order V, Rule 17, C.P.C. which deals with the circumstance as to what procedure is to be adopted when defendant refuses to accept service, or cannot be found. Refusal to accept service or non-finding of the defendant is not the case. The summons issued under Order V, Rule 10, C.P.C. in this case was duly served upon the defendant in view of Rule XVI thereof. As such, procedure to be adopted in case of refusal on the part of the defendant to accept service was not required to be adopted.

9. Examining from another angle, although in application moved for setting aside ex-parte decree no provision of law is quoted as to under which the same is being moved, but such like application in ordinary course is to be treated as an application moved under Order IX, Rule 13, C.P.C. This was a case filed under the provisions of Order XXXVII, C.P.C. and by virtue of Rule 4 of that Order, a power to the Court granting a decree has been provided to set aside the same "under special circumstances". The term "special circumstances" as used in Rule 4 of Order XXXVII, C.P.C. is stricter than the terms "good cause" and "sufficient cause" as used in Order IX, Rule 13, C.P.C. and a person seeking setting aside of an ex parte decree passed under Order XXXVII, C.P.C. has to satisfy the Court with regard to the existence of special circumstances for setting aside the decree passed by Court under the said provisions of law. In the case in hand, the petitioner has failed to demonstrate as to what were those special circumstances which necessitate setting aside of ex parte decree passed on 23-10-2012 after proceeding ex parte against the defendant who opted not to appear after accepting service by way of summons duly issued and served upon such defendant and therefore, the only plea that service was not effected was neither believable nor the alleged non-fulfilment of the procedural requirement would vitiate the subsequent proceedings.

10. In case of "Nouroz Khan v. Haji Qadoor" (2005 SCMR 1877), service upon the defendant in the suit was not effected and on account of such non-service provisions of Order V, Rule 19, C.P.C. were taken into consideration by the Hon'ble Supreme Court of Pakistan. As such, in the circumstances of the present case, where service was duly effected by fulfilling all requirements of Order V, C.P.C., the judgment as referred is not applicable. Similar is the case in "Mehmuda Sultana v. Naseem Mumtaz and another" (1990 MLD 1028). The unreported view of a learned Bench of this Court in Civil Revision No.319 of 2011 as noted above would also not be of any help for the present petitioner as in said case out of a number of defendants only one was served and service upon one defendant was considered as valid and due. Again reliance on the provisions of Order V, Rules 18 and 19, C.P.C. would not be available in the case in hand where report on the summons issued was not to the effect that service could not have been effected upon the defendant. The provisions of Order V, Rules 18 and 19, C.P.C. would only come into play if the summonses are returned under Order V, Rule 17, C.P.C. and not otherwise.

11. In view of the provisions of Order XLIII, Rule 1(d), C.P.C., the proceedings culminated under the provisions of Order IX, Rule 13, C.P.C. are appealable. Any final verdict as have been given under Order XXXVII, Rule 4, C.P.C. primarily is to be considered an order

passed within the purview of Order IX, Rule 13, C.P.C. and thus, the revisional jurisdiction against such order would not be available.

12. For what has been discussed above, I see no merit in this revision petition, which, otherwise, is not competent in view of availability of a remedy of appeal as indicated above, thus the same is dismissed.

KMZ/M-14/L Petition dismissed.

2013 C L C 1501
[Lahore]
Before Ijaz Ahmad and Ibad-ur-Rehman Lodhi, JJ
JAMSHED AHMED KHAN DASTI----Appellant
Versus
THE STATE and another----Respondents

Criminal Appeal No.176 of 2013, heard on 10th April, 2013.

(a) Representation of the People Act (LXXXV of 1976)---
----Ss. 94(2), 78(3)(d) & 82---Criminal Procedure Code (V of 1898), Ss.265-C & 265-F---Constitution of Pakistan, Art.10A---Fake educational qualification presented at time of contesting general elections---Appreciation of evidence---Procedural illegalities in conducting of trial---Violation of right to "fair trial" and "due process"---Effect---Setting aside of conviction---Accused was alleged to have presented a fake and bogus educational qualification at the time of contesting general elections held in the year 2008---Private complaint was filed against accused by the Regional Election Commissioner---Trial Court convicted accused under S.82 of Representation of the People Act, 1976 and sentenced him to 3 years' imprisonment with a fine of Rs.5000, while he was acquitted of the charges under Ss.200, 468 and 471, P.P.C.---Validity---Trial Court proceeded with the trial on a day to day basis in order to decide the trial by not later than a fixed date---Proceedings carried out during the trial seemed to be a result of panic and sense of fear and the Trial Judge decided not to follow any statutory law and ignored all settled principles of a fair and just trial---For offences triable under the Representation of the People Act, 1976, the requirement of a "trial" was mandatory in view of S.94(2) of the said Act---Neither complainant got his statement recorded in the present case nor any witness had been produced by the complainant to prove the assertion of the complaint---Only the statement of counsel for complainant was recorded, where-under said counsel produced certain documents in evidence and the Trial Judge got exhibited all such documents without looking into the fact whether such documents were admissible in evidence---Counsel for complainant appeared in the witness box and placed on record all exhibited documents despite the fact that he was not formally given the status of a witness---If the statement of counsel for complainant was not considered as a statement of a witness, then present case was a case of no evidence on behalf of the complainant---Some of the documents inducted in the record were certified copies which were certified by the complainant himself, despite the fact that he had no authority under law to certify them---Most of the documents were private documents and neither their author nor their signatory or

custodian were ever permitted to be called to appear in evidence to prove existence of such documents---Right to "fair trial" and "due process" had been completely violated in the present case---Impugned judgment of Trial Court also suffered from self-contradiction, as on one hand accused was convicted of the corrupt practice of presenting a forged educational qualification, whereas for the charges under Ss.200, 468 & 471, P.P.C., i.e. using as true a documents knowing it to be false, forgery for purpose of cheating, and using as genuine a forged document, accused was not only acquitted by Trial Court, but the complainant also seemed to be satisfied with such acquittal and had not preferred any appeal against it---Impugned judgment of Trial Court suffered from illegalities and irregularities---Appeal was allowed and accused was acquitted of the charge.

(b) Evidence---
----"Judicial evidence"---Scope---Judicial evidence included all evidence given by the witnesses in the court.

Rafiq's Law Dictionary by Mohammad Abdul Basit ref.

(c) Words and phrases---
----"Evidence"---Definition---Evidence was a process, by which all the statements were made before the court, which statements the court permitted or which were required to be made before it by the witnesses.

"Law Terms and Phrases" by Sardar Muhammad Iqbal Khan Mokal ref.

(d) Words and phrases---

----"Evidence"---Meaning---Word evidence signified the relevant facts, which were brought before the court through witnesses and documents.

Judicial Dictionary by Daulat Ram Prem ref.
Sheikh Jamshed Hayat for Appellant.
Muhammad Saeed Ahmed Mumtaz, Additional Prosecutor-General for the State.
Javed Iqbal Hashmi, Standing Counsel for the Complainant.
Date of hearing: 10th April, 2013.

JUDGMENT
IBAD-UR-REHMAN LODHI, J.---Once in 2008 as a result of the General Elections held in the country, the present appellant was declared as a returned candidate from the Constituency of NA-178, Muzaffargarh. Although during scrutiny process, no objections were filed to call-in-question the eligibility or qualification of the appellant to be a valid candidate before the Returning Officer and naturally no appeal was preferred before the Election Tribunal constituted for the said purposes. Also after the appellant was notified as being returned candidate, his such election was not challenged by means of any election petition. However, a rival candidate of the appellant in the said elections filed a Constitutional petition in this Court viz. Writ Petition No.607 of 2008, which was dismissed in limine on 26-2-2008 and the findings so arrived at were called in-question before the

august Supreme Court of Pakistan through Civil Petition No.287 of 2008, in which detailed proceedings were taken, but before final verdict was yet to come in the said petition, the appellant opted to resign from his membership in the Parliament and, thus, the petition was not finally decided on merits by the Hon'ble Supreme Court of Pakistan. For ready reference, which would be relevant for the present purposes, some extracts from the judgment dated 25-3-2010 rendered in Civil Petition No.287 of 2008 are re-produced hereinbelow:---

"15. However, on account of his confessing repentance shown through the resignation tendered by him and also on account of the fact that we are not called upon, in these proceedings, to punish him for his above-noticed acts, we have decided to exercise restraint in the said connection. This would, however, not preclude anyone else from moving in the matter if it is so desired.

20. Since, as has been mentioned above, Jamshed Dasti respondent had resigned his seat in the National Assembly, therefore this petition is converted into an appeal and allowed as a result whereof all the orders and decisions rendered in the matter by the concerned authorities and even the impugned judgment of the Lahore High Court are set aside as being of no legal consequences. It may be added that the legal questions raised in this petition are being left unanswered as having been rendered only of academic nature."

On having been resigned by the appellant from his Constituency, the electors of the same were again called for by the Election Commission for a by-election in which the appellant again contested and again declared as a returned candidate.

2. Since the appellant again attained the status of a Parliamentarian, he became under attack of a campaign rendered by the Election Commission of Pakistan to verify the alleged fake/invalid degrees of the Parliamentarians, which resulted in filing of a Private Complaint No.1 of 2013 by the Regional Election Commissioner, Multan, on the directions of the Election Commission of Pakistan under the provisions of section 94(2) of the Representation of the People Act, 1976, complaining the commission of crime by the appellant under section 78(3)(d), which is punishable under section 82 and cognizable under section 94 of the Representation of the People Act, 1976 read with sections, 199, 200 and 471 of the Pakistan Penal Code, 1860. Paras-v to vii of the complaint are of significance for the present purposes, which are re produced herein-below:---

"(v) That Jamia Rizwia, Multan is not an approved degree/sanad awarding Islamic Institute and Asnad issued by the said Jamia are not recognized by the Higher Education Commission.

(vii) That the Asnad were got scrutinized by the Nazim, Tanzeem-ul-Madaris Ahl-e-Sunnat Pakistan and reported vide his certificate dated 23-2-2008 that all the above mentioned Asnad with the name of respondent had never been issued by Tanzeem-ul-Madaris. Copy of letter of Nazim, Tanzeem-ul-Madaris. Copy of certificate at Annex-F.

(vii) That the Hon'ble Supreme Court of Pakistan in its judgment passed on 25-3-2010 in C.P. No.287 of 2008 titled "Nawabzada Iftikhkar Ahmad Khan Babar versus Chief Election Commissioner, Islamabad and others" has held that the respondent--

....managed to sneak into it by making a false statement on oath and by using bogus, fake and forged documents polluting the piety of this pious body... He is guilty, inter alia, of impersonation ----posing to be what he was not i.e. a graduate. He is also guilty of having been a party to the making of false documents and then dishonestly using them for his benefit knowing them to be false ."

3. From the interim orders maintained by the Sessions Judge, Muzaffargarh, which is the trial Court in the present case, it is evident that the complaint was filed on 19-3-2013 and it was fixed for preliminary arguments on 26-3-2013, when the complainant sought an adjournment and again for the purposes of advancing preliminary arguments, the matter was ordered to be adjourned for 3-4-2013. It seems that the file was placed before the Sessions Judge on 29-3-2013, a date which was not fixed for any proceeding and the trial Judge passed the following order on 29-3-2013:---

"Present:--- None.

The complaint is put up before me today in view of telefax dated 28-3-2013 received at 10-14 p.m., conveying the order of their Lordship of the august Supreme Court of Pakistan, Islamabad, passed in Suo Motu Review Petition No.36 of 2013 in Civil Petition No.287 of 2008 titled "Jamshed Ahmad Dasti versus Chief Election Commissioner, Islamabad and others". The operative part of the Order reads as under:---

"2. . we direct the learned Sessions Judge, Muzaffargarh, who is now seized with the matter to decide to proceed his case on day to day basis as early as possible but not later than 4th of April, 2013. In this view of the matter, the instant petition is disposed of.

2. In view of said order of their Lordship, follow-up notice be issued to the complainant and he be also informed telephonically for 30-3-2013.
Dated 29-3-2013."

As is evident from the above, the file was taken up by the Sessions Judge on 29-3-2013 in absence of any concerned party and even the complainant was ordered to be issued follow-up notice telephonically for the next day i.e. 30-3-2013. On which date, as per the showing of the order after hearing the preliminary arguments, bailable warrants of arrest were ordered to be issued for summoning the accused-appellant for 1-4-2013 and the matter was not fixed for 31-3-2013 (Sunday a close holiday). In addition to issuance of bailable warrants for appearance of the accused in the complaint, trial Court also directed the complainant to furnish requisite attested copies of the documents relied upon and annexed with the complaint on 1-4-2013 (the stage, when even the charge was not framed, but the evidence of the complainant was summoned). In pursuance of the warrants issued, the accused-appellant appeared on 1-4-2013 and copies of relevant documents were delivered and he was granted a time of one hour before framing of charge and, after expiry of that one

hour, charge was framed under the provisions of section 82 of the Representation of the People Act, 1976 and sections 200, 468 and 471 of the Pakistan Penal Code, 1860. By means of interim order on 1-4-2013, it is noted by the trial Judge that evidence of the complainant was recorded and thereafter on the same day, the statement of the accused as contemplated under section 342 of the Criminal Procedure Code, 1898 was recorded. It did not end here: The statement of D.W.1 was also recorded on the same day i.e. 1-4-2013, and after getting the documents in defence evidence, on 3-4-2013, the arguments from both the sides were shown to have been heard by the trial Judge and the impugned judgment was passed on the following day i.e. 4-4-2013, whereby, the appellant was convicted under section 82 of the Representation of the People Act, 1976 and sentenced to 3 years' R.I. with a fine of Rs.5,000/- and in default in payment thereof he shall suffer one month S.I. With regard to other charges viz. under sections, 200, 468 and 471 of P.P.C., it were the findings of the trial Court that the prosecution has failed to prove the guilt against the accused with regard to such offences, therefore, he was ordered to be acquitted in such offences.

4. We have only one appeal before us, whereby, the appellant has challenged his conviction and sentence as was announced by the Sessions Judge, Muzaffargarh, on 4-4-2013, in Private Sessions Complaint No.352-7SJ of 2013 and Private Complaint Trial No.7 of 2013. The complainant of the case has not challenged the findings of the trial Court acquitting the accused-appellant in offences under sections, 200, 468 and 471 of P.P.C.

5. After hearing the learned counsel for the appellant, as well as, the learned Standing Counsel for Federation of Pakistan and the learned Additional Prosecutor-General, we have announced the acceptance of appeal' and ordered the release of the appellant by means of a short order on 10-4-2013. Hereinbelow are the reasoning of said order:---

(a) For criminal trial initiated on the basis of a complaint, procedure, has been provided in case of Magisterial trial under sections 241 to 247 of Cr.P.C. and if the trial is before the Sessions Judge, the samewould be conducted under sections 265-A to 265-H of Cr.P.C. We would be concentrating on the procedure provided in Chapter XXII-A of Cr.P.C. Within the meaning of section 265-C of Cr.P.C., the complainant shall within three days of the order of the Court for issuance of the process to the accused is obliged to file in the Court for supply to the accused as many copies of the complaint and any other document of the file with the complaint, as the number of the accused and such copies shall be supplied free of cost to the accused not later than seven days before the commencement of the trial. Under section 265-F of Cr.P.C., in case the accused does not plead guilty or the Court in its discretion does not convict him on his plea, the Court shall proceed to take all such evidence as may be produced in support of the prosecution and here even if the complainant is a public servant, he is not absolved of such duty in producing the evidence and hearing the complainant by the Court, which exemption has been provided only to a "Court", if complaint has been made by a Court or public servant in discharge of his official duties.

(b) In the present case, the proceedings, which were started on 19-3-2013, when the complaint was filed, at one stage, were ordered to be fixed for 3-4-2013, but the period in between 26-3-2013 and 3-4-2013 experienced a turbulence, when it is evident from the interim order passed by the trial Court on 29-3-2013, which started to proceed with the

complaint on day to day basis in order to decide it by not later than 4-4-2013. The proceedings carried out thereafter definitely seem to be result of a panic and sense of fear with the Sessions Judge, Muzafarrgarh, who presumably decided not to follow any statutory law and to ignore all settled principles of a fair and just trial and tried to accomplish the task.

(c) By, way of Constitution (Eighteenth) Amendment Act, X of 2010, Article 10A was inserted in the Constitution. The supreme law of the country provides a right of fair trial to a person for the determination of his civil rights and obligations or in any criminal charge against him entitling him to a fair trial and due process. The words "fair trial" and "due process" are of much significance, which both have completely been violated in the trial under question.

(d) Necessary components of a trial are, framing of charge, recording of evidence, statement of accused, defence evidence, arguments and the announcement of final verdict. The term "trial" was although defined in Criminal Procedure Code, 1898- by giving the meaning to the trial as "the proceedings taken in Court after a charge has been drawn up and includes punishment of the offender", but in Criminal Procedure Code, 1898, this definition has been omitted and from such omission, we, at the most, can say that the expression of trial has no fixed meanings. Nevertheless we cannot deviate from the settled principles of law providing different stages and process of a trial including recording of evidence of the witnesses. Article 2(c) of the Qanun-e-Shahadat Order, 1984 provides the definition of "evidence", which means that all statements, which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. In Rafiq's Law Dictionary by Mohammad Abdul Basit, the judicial evidence includes all evidence given by the witnesses in the Court. Sardar Muhammad Iqbal Khan Mokal in his book "Law Terms and Phrases" has provided a definition of the evidence as a process, where all statements, which the Court permits or requires to be made before it by the witnesses, and in Judicial Dictionary by Daulat Ram Prem, the word "evidence" signifies the facts relevant, which are brought before the Court through witnesses and documents.

(e) During the trial of the offences triable under the provisions of the Representation of the People Act, 1976, the trial Court cannot avoid the "trial" as in section 94(2) of the Act, the requirement of trial is a mandatory one. In the trial of the present case, neither the complainant got his statement recorded nor any witness has been produced by the complainant to prove the assertion of the complaint. Only the statement of the learned counsel representing the complainant was recorded, whereunder he has produced certain documents in evidence and the trial Judge got exhibited all such documents without looking into the fact as to whether same were admissible under the provisions of Qanun-e-Shahadat Order, 1984 or not.

(f) In view of the definition of evidence as hereinabove provided the statement of a witness or at least the statement of the complainant as his own witness was necessary to give the proceedings carried out before the trial Court a colour of a trial, but strangely no evidence of any witness was recorded and some documents were entertained in the statement of a learned counsel representing the complainant.

(g) An Advocate is basically an officer of the Court and the first and foremost duty of an Advocate is towards the Court, towards the clients, and towards the public-at-large. After promulgation of the Legal Practitioners and Bar Councils Act, 1973, the Pakistan Bar Council, the supreme body to regulate the affairs of Bar Associations and its Members has provided Canons of Professional Conduct and Etiquette providing that it is an indispensable condition of protection of the rights of the citizens is the existence in society of a community of Advocates and in order to effectively discharge these high duties, Advocates were expected to conform to certain norms of correct conduct in their relations with the members of the profession, their clients, with the Courts and the members of the public generally. Chapter 1, clause (13) of the said Canons provides that when an Advocate is a witness for his client except in formal matters, such as the attestation or custody of an instrument and the like, he should; leave the trial of the case to the other Advocates. Except when essential to the ends of justice, an Advocate should avoid testifying in Court on behalf of his client.

(h) What happened in the trial of the present case was, that the learned counsel representing the complainant has in fact appeared in the witness-box and placed on record all the exhibited documents, but in spite of that he was formally not given the status of a witness the accused denying the prosecution allegations levelled against him was not afforded any opportunity to cross-examine the said witness. If the statement of learned counsel for the complainant is not considered as a statement of witness, then this is a case of no evidence on behalf of the complainant. Even the documents, which were inducted in the record do not qualify to be of any worth for their inclusion in the evidence without some permissible mode. Some documents are shown to have been certified copies, but when probed as to which authority put a certificate on the said documents, it reveals that it was the complainant, who certified such documents. The complainant had no authority whatsoever under any law to certify the documents. Most of the documents are private documents. Neither their author nor signatory nor custodian were ever permitted to be called to appear in evidence to prove the existence of such documents.

(i) The findings of the Hon'ble Supreme Court of Pakistan arrived at on 25-3-2010 have been mainly made the basis of the trial and conviction ignoring the findings of the apex Court itself in para-20 of the said judgment as re-produced herein-above.

(j) All what happened did require a full-fledged trial, which was never conducted and by ignoring all such settled principles, which could lead to an impression that just and fair trial was to be afforded to the accused in a criminal proceedings, have been avoided.

(k) If the impugned judgment is allowed to remain in field, it would not add any good to the repute of an independent judiciary.

(l) The prosecution has failed to prove its case and to bring home guilt to the accused/appellant.

(m) The impugned judgment suffers from self-contradiction as on one hand, the appellant has been convicted in the corrupt practices committed as envisaged under section 78(3)(d) of the Representation of the People Act, 1976, whereas, under the charges of offences under

sections 200 468 and 471 of P.P.C., using as true a document knowing it to be false, forgery for the purpose of cheating and using as genuine a forged document not only the appellant was acquitted, but a1so the complainant seems to be satisfied with such acquittal and has not preferred any appeal.

(n) From whatever angle the impugned judgment analyzed, it suffers from illegalities, irregularities and, thus, is not sustainable.

6. These are the reasons of our short order announced on 10-4-2013.

MWA/J-10/L Appeal allowed.

2013 C L C 1837
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
WALI MUHAMMAD and 2 others----Petitioners
Versus
JAVED MUKHTIAR and 4 others----Respondents

Writ Petitions Nos.2004 to 2007 of 2013, decided on 26th April, 2013.

Civil Procedure Code (V of 1908)---
----O. XXIII, R. 3---Compromise of suit---Scope---Procedure---Regular inquiry---Summary decision---Plaintiffs filed pre-emption suit wherein they submitted agreement between the parties to the suit and prayed for the decision of the same on the basis of settled terms of agreement and in alternative prayed for additional evidence---Factum of execution of settlement was denied by the defendants-respondents and plaintiffs-petitioners moved another application for comparison of signatures and thumb-marks and by means of another application, the agreement purported to have been arrived at in between the parties before a `Jirga' was prayed to be put to the defendant for its admission and in addition to such applications, another application under Art.163 of Qanun-e-Shahadat, 1984, was also moved for decision of the suit on special oath---Applications were dismissed concurrently---Validity---When application intimating the settlement in between the parties was brought before the court in any suit, then it was incumbent upon the court to satisfy itself as to the execution and existence of compromise and when question arose as to whether or not , there had been a compromise in between the parties, the same had to be decided after regular inquiry by taking evidence and rejection of such application summarily was not proper and refusal to enter into such inquiry would in fact militate against the letter and spirit of the provisions contained in O.XXIII, R.3, C.P.C. as under the said provision of law, recording of compromise was not a formality but a mandatory one, as such, order had been made appealable in terms of O.XLIII, R.1(m) C.P.C.---Courts below had not exercised their jurisdiction vested in them and had committed illegality in dismissing the applications moved by the plaintiffs-petitioners---Order of the Trial Court, as well as, the judgment of the Appellate Court were declared illegal and the same were set aside---Appellate Court before whom application for decision of the suit on the basis of settlement was moved, was directed to hold regular inquiry as to the execution and

existence of the compromise in between the parties by granting ample opportunities to both the parties to produce their version and then to decide the same by means of speaking order.

Syed Abdul Baqi v. Syed Nisar Ahmad Shah and others NLR 1981 UC 642; Messrs Muhammad Ilyas and Sons Ltd. v. Abu Ahmad Khan and 2 others 1981 CLC 1257; Rana Abdul Ghafoor v. Government of Sindh and others PLD 1994 Kar. 52; Farid Gul and others v. Gul Mast 1997 MLD 2180 and Mst. Khurshid Begun v. Mir Muhammad and 8 others 1990 CLC 1614 rel.

Muhammad Akbar Sajid for Petitioners.
Muhammad Javed Iqbal Thaheem for Respondents.

ORDER

IBAD-UR-REHMAN LODHI, J.--- By means of single order, I intend to dispose of the instant writ petition and the other three writ petitions viz. Writ Petition Nos.2005, 2006 and 2007 all of 2013, as common question is involved in all the matters.

2. In a suit for pre-emption, the plaintiffs-appellants by filing an agreement in between the parties to the suit prayed for the decision of the same on the settled terms of that agreement. In alternate, it was prayed that the plaintiffs-appellants may be allowed to produce additional evidence. The facture of execution of such settlement was straightaway denied by the respondents-defendants, which resulted into filing another application by the plaintiffs for getting the comparison of signatures and thumb-marks of Hakeem Malik Haqnawaz and by means of another application, the documents viz. agreement purported to have been arrived at in between the parties before a `Jirga' was prayed to be put to the relevant defendants for its admission. In addition to such petitions, another petition under Article 163 of Qanun-e-Shahadat Order, 1984 was also moved seeking decision of the suit on special oath.

3. The learned trial Court on 21-6-2012 dismissed all the petitions, which findings were maintained in revision which was dismissed by the learned Additional District Judge, Multan, on 7-2-2013; hence, this petition.

4. The learned counsel for the petitioners by making reference to the provisions of Order XXIII, Rule 3 of the Civil Procedure Code, 1908, has contended that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit. According to the learned counsel for the petitioners, the words "satisfaction of the Court" used in the said provision of law do create a necessity of some inquiry by the Court and such plea cannot be brushed aside summarily. The learned counsel further contends that the agreement placed before the courts-below for disposal of the suit on the basis of the terms arrived at therein was already acted upon in some other proceedings and the said proceedings were, decided by the forums, where these were pending in view of the terms of settlement arrived at in between the parties through the said

agreement. The refusal on the part of the respondents-defendants with regard to the existence of such document is, thus, termed as mischievous and contumacious.

5. The learned counsel for the respondents has controverted the arguments raised by the petitioners' learned counsel and is of the view that the suit for pre-emption has to be decided on its own merits ignoring what has been allegedly arrived at in between the parties through the document purported to be introduced on record by way of additional evidence. The request for comparison of the signatures/thumb-impression of Hakeem Malik Haqnawaz with his admitted signatures/thumb-impression is also controverted by the respondents.

6. After hearing the learned counsel for the parties and going through the record, I am of the view that in view of the language used in Order XXIII, Rule 3 of the Civil Procedure Code, 1908, in any suit, when application intimating the settlement in between the parties is brought before the court, it is incumbent upon the court to satisfy itself as to the execution and existence of compromise. In any suit, when a question arises as to whether or not, there had been a compromise in between the parties, the same had to be decided after a regular inquiry by taking evidence and rejection of such application summarily is not proper. Refusal to enter into such inquiry would in fact militate against the letter and spirit of the provision contained in Order XXIII of Rule 3 of the Civil Procedure Code, 1908. Under the said provision of law, recording of compromise was not a mere formality but a mandatory one, as such, order has been made appealable in terms of Order XLIII Rule 1(m) of the Civil Procedure Code, 1908.

7. The learned counsel for the petitioners in support of his contentions has rightly placed his reliance on Syed Abdul Baqi v. Syed Nisar Ahmad Shah and others (NLR 1981 UC 642), Messrs Muhammad Ilyasand Sons Ltd. v. Abu Ahmad Khan and 2 others (1981 CLC 1257), Rana Abdul Ghafoor v. Government of Sindh and others (PLD 1994 Karachi 52), Farid Gul and others v. Gul Mast (1997 MLD 2180) and Mst. Khurshid Begun v. Mir Muhammad and 8 others (1990 CLC 1614).

In all such cited cases, holding of a regular inquiry in such circumstances has been held a mandatory step to be taken by the court moved in this regard.

8. In the instant case, the courts-below have not exercised their jurisdiction vested in them and have committed illegality in dismissing the applications moved by the petitioners. The order dated 21-6-2012, passed by the learned Civil Judge, as well as, the judgment dated 7-2-2013 are, therefore, declared as illegal and the same are set aside.

9. The learned first appellate court before whom application for decision of the suit on the basis of a settlement was moved, is directed to hold a regular inquiry as to the execution and existence of the compromise in between the parties by granting ample opportunities to both the sides in order to produce their respective versions and then to decide the same by means of a speaking order.

10. Writ petition stands accepted.
AG/W-5/L Petition accepted.

2013 M L D 1312
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD AZHAR---Petitioner
Versus
MEMBER JUDICIAL-VII, BOARD OF REVENUE and 5 others---Respondents

Writ Petition No.1700 of 2010, decided on 21st January, 2013.

West Pakistan Land Revenue Rules, 1968---
----R. 17---Constitution of Pakistan (1973), Art.199---Constitutional petition---Appointment of Lambardar / headman---Points to be considered---Petitioner had been appointed Lambardar by District Officer (Revenue), however on appeal of the respondent before the Revenue hierarchy, said appointment was cancelled and the respondent was appointed as Lambardar / headman---Contention of the petitioner was that he was a better choice as compared to the respondent---Validity----In addition to hereditary claim of a candidate, the extent of property in the estate, services rendered to the Government by him or his family, his personal influence, character, ability and freedom from indebtedness, the strength and importance of the community from which selection of a headman was to be made, and the ability to undergo training in Civil Defence, were main considerations for appointment of Lambardar---Educational qualification and holding of sufficient land to meet requirements of Zar-e-Bharat were also relevant considerations for a person to be appointment as headman in order to cope with the demands of the said office---Nobody had a vested right to be appointment as a Lambardar, and if the revenue authorities selected a person best suited for the purpose with a view to facilitate performance of administrative functions entrusted to a headman, the appointment could not be disturbed under the constitutional jurisdiction of High Court---High Court observed that the authorities in revenue hierarchy had decided the matter after taking into consideration the relevant facts and law, and in absence of any jurisdictional error or illegality on part of such authorities, the impugned orders could not be interfered with---Constitutional petition was dismissed, in circumstances.

Abdul Jabbar Khan for Petitioner.
Muhammad Zafarullah Khan Khakwani, Assistant Advocate-General for Respondents Nos. 1 and 3.
Tariq-ur-Rehman Hashmi for Respondent No.4.
Nemo for Respondents Nos. 5 and 6.

ORDER

IBAD-UR-REHMAN LODHI, J.---Notices issued to respondents Nos.5 and 6 viz. Din Mohammad and Abdul Qayyum have been received back with the report of the Process Server that both have refused to accept the service of notices. There is consensus in between the parties present that both are pro forma respondents and in fact they are not practically interested in the proceedings of the present writ petition. They are, therefore, proceeded against ex parte.

2. The Member (Judicial-VII), Board of Revenue Punjab, while exercising the revisional jurisdiction under section 164 of the West Pakistan Land Revenue Act, 1967, proceeded to dismiss the revision, filed by the present petitioner, against the judgment passed by the Executive District Officer (Revenue), Layyah, accepting the appeal of respondent No. 4 on 10-9-2008, which was filed against the original findings of the District Officer (Revenue), Layyah, arrived at on 24-8-2005, appointing the petitioner as Lambardar/headman of Chak No.219/TDA, Tehsil Karor, District Layyah.

3. The learned counsel for the petitioner has argued that the District Officer (Revenue), who is Collector, in fact, acted on the reports of the field staff and ultimately appointed the petitioner as permanent Lambardar/headman. He further maintained that the petitioner is also a member of Zakat and Ushr Committee of the village and being an ex-Army Personnel, is a better choice as compared to respondent No.4.

4. As against this, the learned counsel appearing for contesting respondent No.4 has argued that although the rule of primogeniture has been declared repugnant to the Injunctions of Islam by the Shariat Appellate Bench of the Hon'ble Supreme Court of Pakistan, nevertheless the same is yet the first consideration for appointment of headman of a village as provided in Rule 17 of the West Pakistan Land Revenue Rules, 1968. In addition to such qualification, being son of the deceased Lambardar, respondent No.4 is owner of a much more chunk of land than that of the petitioner. With regard to social status of the petitioner, it is argued that he is facing criminal proceedings in case registered under sections 379 and 411 of P.P.C., and a person implicated in an offence of theft, which is, no doubt, a crime of moral turpitude, cannot claim to be considered for appointment as headman of the village. The age difference in between two contestants is also claimed to be in favour of respondent No.4. According to the learned counsel for respondent No.4, the petitioner is an old man of 70 years and is a feeble person, whereas, respondent No.4 is not only 40 years of age but also a stout and active person.

5. I have heard the learned counsel for the parties and perused the record with their able assistance.

6. Keeping in view the provision of Rule 17 of the West Pakistan Land Revenue Rules, 1968, in addition to hereditary claims of the candidate, the extent of property in the estate, services rendered to the Government by him or by his family, his personal influence, character, ability and freedom from indebtedness, the strength and importance of the community from which selection of a headman is to madeand the ability to undergo training in Civil Defence, are the main considerations.

7. In case of Abdul Majeed v. Member (Judicial-II), Board of Revenue Punjab, Lahore and 2 others (2006 YLR 1730), this Court while dealing with the same question, has considered a young man to be more suitable to be appointed as a headman and a person having previous history of anti-social activities, was not held to be considered against such appointment. The educational qualification and holding of sufficient land to meet the requirement of Zar-e-Bharat are also held relevant considerations for a person to be appointed as headman in order to cope with the demands of the said office.

8. In another judgment reported as Noor Ahmad v. Member (Judicial-VI), Board of Revenue, Punjab, Lahore and 2 others (2008 CLC 1141), it has been held that no one has a vested right to be appointed as a Lambardar and if the authorities in revenue hierarchy selects a person best suited for the purpose with a view to facilitate performance of administrative functions entrusted to such headman, that appointment cannot be disturbed in Constitutional Jurisdiction of this Court. In the reported matter, the considerations for appointment of Lambardar in addition to the earlier one are included as strength of character, education, knowledge, engagement in nation building activities and capacity to discharge rights and obligations towards his fellow-beings.

9. The learned counsel for the petitioner has placed his reliance on a view expressed by a Member Board of Revenue in case reported as Fazal Din v. Bashir Ahmad (PLD 1961 W.P (Rev.) 98) to contend that age is not an important factor as against experience and understanding of social and human relationship.

10. After going through the record and hearing the arguments of the parties, I am of the view that the authorities in revenue hierarchy have decided the matter after taking into consideration of the case and the law on the subject and in absence of any jurisdictional error or any illegality on the part of the authorities, who decided the issue of appointment of Lambardar, the order impugned herein is not liable to be interfered with in Constitutional Jurisdiction of this Court.

11. Resultantly, the petition having no force is dismissed and the findings passed by the learned Member (Judicial-VII), Board of Revenue Punjab, Lahore in R.O.R. No.1048 of 2008 by means of order dated22-12-2009 are maintained.

KMZ/M-74/L Petition dismissed.

2013 M L D 1441
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Messrs HONDA BREEZE through Managing Partner---Petitioner
Versus
CITY DISTRICT GOVERNMENT, MULTAN and 3 others---Respondents

Writ Petitions Nos.3210, 4657, 4687 of 2006, 2148 of 2007 and 6251 of 2011, decided on 18th December, 2012.

Constitution of Pakistan---
----Art. 199---Constitutional petition---Commercialization of property by municipal authority---Commercialization fee---Petitioners contended that certain properties had attained the nature of commercial properties and they became aggrieved when the Municipal Authority put checks on the nature of such properties and on the illegal sanction of commercial site plans and over activates being carried out at such properties---High Court observed that it was not clear as to which commercialization policy was in vogue in the

relevant area and whether such policy could be imposed retrospectively---High Court directed the District Coordination Officer to undertake consolidated efforts by associating representatives from Housing and Environment Planning Department, Development Authority, petitioners, City District Government, Chamber of Commerce and all other stake holders and recommend a uniform policy and get sanction for the same from the Provincial Government and then to apply such policy in letter and spirit---High Court further directed that the commercialization fee or site plan sanctioning fee, deposited by some petitioners would be retained by the authorities in favour of the purpose for which the same were deposited, but the said amount would be subject to final outcome of the new policy and until the final policy, no property in the city would be sealed.

Malik Muhammad Tariq Rajwana for Petitioner.
Syed Muhammad Ali Gillani for Petitioner (in Writ Petitions Nos.3210, 4657 of 2006 and 2148 of 2007).
Talib Hussain for Petitioner (in Writ Petition No. 6251 of 2011).
Haji Muhammad Aslam for Respondent No.1.
Abdul Salam Alvi for TMA.

ORDER

IBAD-UR-REHMAN LODHI, J.---While hearing Writ Petition No.4687 of 2006, Writ Petition No. 3210 of 2006, Writ Petition No.4657 of 2006, Writ Petition No.2148 of 2007 and Writ petition No.6251 of 2011 certain facts, which emerges for consideration, are that in the City area of Multan whether it is within the Municipal Control of Multan Development Authority, Tehsil Municipal Administration (four in number), City District Government or the Housing, Physical and Environmental Planning Department, there are certain properties which either after sanction of the concerned authority or without any such permission attained the status of commercial nature. With regard to some of the properties, even the site plans for commercial construction have been sanctioned but in number of cases the property underneath the commercial building had not yet been formally commercialized and for want of such sanction, neither any formalities were completed nor the owners of such buildings were required to meet with any formal requirements. The petitioners in writ petitions, however, became aggrieved when the relevant Municipal Authority put a check either on the nature of the property or illegal sanction of commercial site plans and the commercial activities being carried out over such properties were being questioned seriously rather in cases of Writ Petition No.4687 of 2006 and Writ Petition No.2148 of 2007, the concerned properties were sealed by one of the above noted authorities.

2. After some partial arguments from both the sides, it transpired that the agencies/authorities are not clear as to which commercialization policy is in vogue in the relevant area and whether any such policy could have been imposed retrospectively and what would be the criteria for charging for commercialization of the landed properties. A number of policies/notifications/rules have been referred by learned counsel appearing either for TMA or City District Government. Neither of such policy, etc. has an effect of over all coverage to the controversy raised in these petitions and in any view even authorities which should be empowered to enforce the policy of the Government in this regard are not clear as

to which extent they are competent to get the policy enforced in their respective areas of Municipal control. It is the duty of the Government to formulate a uniform policy free from any sort of discrimination by laying down the principles for commercialization in all the urban areas and niceties thereof and also as to what is to be charged from the citizens intending to get their properties commercialized and to get site plans sanctioned for construction of such commercial buildings.

3. District Coordination Officer, Multan is directed to undertake consolidated efforts by associating representatives from Housing, Physical and Environmental Planning Department, Multan Development Authority, Town Municipal Authorities of Sher Shah Town and Bosan Town, Shah Rukan-e-Alam Town and Musa Pak Shaheed Town, City District Government, writ petitioners, Chamber of Commerce and Industry of Multan and all others stake holders and to recommend a uniform policy to meet with the requirements as noted herein above and to get sanction of Government of the Punjab in this regard and then to apply such policy in its letter and spirit. The writ petitioners in Writ Petition No 4687 of 2006 and Writ Petition No.2148 of 2007, according to them, were forced and coerced to deposit some exorbitant amounts in the garb of commercialization fee or the site plan sanctioning fee which would be retained by the authorities in favour of which the same were deposited but the same will be subject to final outcome of such policy, which would be affirmed and also the present writ petitions, however, building subject matter of Writ Petition No.2148 of 2007 is ordered to be de-sealed forthwith and no property whatsoever situated in Multan City will be sealed by any of the named agencies till the conclusion of the exercise which District Coordination Officer is directed to take in near future.

4. District Coordination Officer, Multan will take effective measures to fulfil the assigned job and conclude the same by 31-1-2013, whereafter the policy so formulated and sanction of the Government of Punjab in this regard would be placed before this Court and further hearing of all these petitions will be taken on any date during 2nd week of February, 2013.

KMZ/H-3/L Order accordingly.

2013 P Cr. L J 23
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
ASHIQ HUSSAIN alias AKHTAR---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.6286-B of 2012, decided on 18th May, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 337-A(iii)/34---Shajjah-i-hashimah, common intention---Bail, grant of---Incorrect medical opinion---Police having knowledge of such opinion---Misconduct of police and complainant in regard to the case---F.I.R. had been recorded after a lapse of about thirty four (34) days---Injured was examined after about thirty (30) days of the incident but the doctor opined that probable duration between the

injuries and examination was two to three hours, which should have been a sufficient ground for recommending the discharge of the case, but the police made the arrest and conducted investigation---Such conduct of the police spoke volumes about the misconduct on its part and also the mischievous conduct of the complainant---Even if the injured was presented for medical examination on the day alleged, the police should have registered the F.I.R. forthwith---In view of the conduct of the police and the complainant, bail petition of the accused was accepted and he was released on bail.

Haji Khalid Rehman for Petitioner.
Ch. Karamat Ali, Deputy Prosecutor-General Punjab and Inayat Ullah Khan, S.-I. along with record for the State.

ORDER

IBAD-UR-REHMAN LODHI, J.---Through this petition, the petitioner seeks post-arrest bail in case F.I.R. No.3 of 2012 dated 4-1-2012 registered under sections 337-A(iii), 34, P.P.C. at Police Station Sahianwala District Faisalabad.

2. The occurrence according to the complainant took place on 1-12-2011 which was reported on 4-1-2012. According to Medico-legal Report available on record, the injured Faheem Ahmad Shahzad was produced before the Medical Officer on 31-12-2011 and after examining the person before him, the doctor opined with regard to the probable duration in between the injuries and examination as 2 to 3 hours.

What is missing on the part of complainant or prosecution in this case, is the veracity.

3. Keeping in view the above conduct of the prosecution and the complainant, the petitioner, who has been arrested in this case and behind the bars is entitled to be released on bail.

4. In view of what has been discussed above, this petition is accepted and petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of trial Court.

5. While examining the record of the case, I have noticed that offence which according to the prosecution's own showing was committed on 1-12-2011 and was entered under section 154, Cr.P.C. with the police on 4-1-2012. The injured Faheem Ahmad Shahzad, however, got medically examined on 31-12-2011 and he was produced before the Medical Officer by the police. The doctor examining the injured gave probable duration in between the injuries and examination as to 2 to 3 hours. This speaks volume about the misconduct on the part of police and also the mischievous conduct of the complainant.

If the injured was before the police even at least on 31-12-2011 and he was medically examined with the complaint of victim of criminal offence that criminal offence was to be registered forthwith and whenit was registered the Investigating Officer has closed his eyes from the position that injuries which allegedly sustained by the injured on 1-12-2011 were declared by the doctor to have been sustained on 31-12-2011 from 4-00 p.m. to 7-00 p.m.

This should be a sufficient ground for proceeding by the police to recommend discharge of the case but nevertheless the arrest was made, investigation was conducted and still the person allegedly involved in the crime was kept behind the bars.

6. D.I.-G. Faisalabad is directed to probe and conduct inquiry or to arrange some inquiry at the level of an officer of Superintendent of Police to ascertain the actual position in view of the facts narrated in para 4 above and the outcome of such inquiry would be intimated to this Court through the Deputy Registrar (Judicial) of this Court for perusal by the Court in Chamber.

MWA/A-99/L Bail granted.

2013 P Cr. L J 630
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
SADAQAT ALI---Petitioner
Versus
ADDITIONAL SESSIONS JUDGE/JUSTICE OF PEACE, GUJRANWALA and 6 others---Respondents

Writ Petitions Nos.27238, 27303, 27307, 27194 and 27406 of 2012, decided on 5th November, 2012.

(a) Criminal Procedure Code (V of 1898)---
----S. 22-A(6) [as added by Criminal Procedure Code (Amendment) Ordinance (CXXXI of 2002) w.e.f. 21-11-2002]---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Complaint to Ex-Officio Justice of Peace---Issuance of directions by Ex-Officio Justice of Peace to Police authorities---Ex-Officio Justice of Peace under S.22-A(6), Cr.P.C., had power to look into complaint of any neglect, failure or excess committed by police authorities in relation to their functions and duties and could pass appropriate orders in case of finding such neglect etc. on part of police---High Court was not an Executing Court with regard to orders passed by Ex-Officio Justice of Peace---Constitutional petition in case of availability of alternate remedy would not be maintainable, thus, complaint of any such neglect must be made to Ex-Officio Justice of Peace---High Court dismissed constitutional petition being not maintainable.

(b) Criminal Procedure Code (V of 1898)---
----S. 22-A---Constitution of Pakistan, Art. 199(1)(a)(i)---Constitutional petition---Complaint to Ex-Officio Justice of Peace---Issuance of directions by Ex-Officio Justice of Peace to Police authorities to act in accordance with law---Constitutional petition for setting aside such directions/orders---Maintainability---Necessary implication of granting of such prayer of petitioner would be that High Court was directing police authorities not to act or proceed in accordance with law, which was not its constitutional mandate---High Court could not restrain any authority from doing or acting in accordance with law nor was same its constitutional mandate--- Person aggrieved with findings of investigating agency could avail independent

remedies---Ex-Officio Justice of Peace must guard jealously his orders and directions---Police officer/official, if found responsible for any such neglect etc., must be dealt with severely and initiation of departmental proceedings against him under Police Order, 2002 be alsorecommended---High Court dismissed constitutional petition being not maintainable.

(c) Constitution of Pakistan---

----Art. 199--- Constitutional petition--- Alternate remedy, availability of--- Effect--- Constitutional petition would not be maintainable.

Ch. Majid Hussain for Petitioner.

Ch. Karamat Ali, Additional Prosecutor-General Punjab and Muhammad Nasir Chohan, Assistant Advocate-General Punjab (On Court's Call).

ORDER

IBAD-UR-REHMAN LODHI, J.---By means of this single order, I intend to dispose of Writ Petitions Nos.27238, 27303, 27307, 27194 and 27406 of 2012, as almost daily this Court is to deal with the petitions involving the following position:--

(i) The orders passed by learned Ex-Officio Justice of Peace in view of section 22-A of Criminal Procedure Code are sought to be implemented through this Court in view of its Constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

(ii) In some petitions, the order passed by learned Ex-Officio Justice of Peace directing the police authorities to proceed in accordance with law is sought to be set aside.

There is an increasing tendency in filing the Constitutional petitions of the nature as has been noted above and the petitions under reference are separated to pass a detailed order after examining the requirements of relevant law and the jurisdiction of the different forums to get implemented the orders passed by learned Ex-Officio Justice of Peace or to deal with the orders wherein directions to the police are issued for performance of their certain duties assigned under law.

2. When subsection (6) was added in section 22-A, Cr.P.C. through Ordinance No.CXXXI of 2002 on 21-11-2002, the institution of Ex-Officio Justice of Peace was made competent to issue appropriate directions to the police authorities concerned on a complaint filed before it. For ready reference section 22-A(6) of Criminal Procedure Code is reproduced hereinbelow:--

"An Ex-Officio Justice of the Peace may issue appropriate directions to the police authorities concerned on a complaint regarding.--

(i) non-registration of criminal case;

(ii) transfer of investigation from one police officer to another; and

(iii) neglect, failure or excess committed by a police authority in relation to its functions and duties.

This clearly shows that in case of any neglect, failure or excess committed by a police authority in relation to its functions and duties, can appropriately be looked into by learned Ex-Officio Justice of Peace, who has passed the directions in view of the preceding provisions of section 22-A of Criminal Procedure Code.

The rush to this Court seeking implementation of the orders passed by learned Ex-Officio Justice of Peace is, thus, in complete negation of Sub-Clause (iii) thereof. This Court cannot be expected to be anexecution Court with regard to the orders passed by learned Ex-Officio Justice of Peace. When the law givers have provided a jurisdiction to the same forum to pass appropriate direction in case of such neglect, etc., on the part of police, then the same forum is to be approached for said purpose.

The Constitutional petitions even on the principle of availability of alternate remedy to the persons concerned are not maintainable. It is, thus, held that if learned Ex-Officio Justice of Peace has issued any direction to the police authorities and there is a complaint of neglect, failure or excess committed by said police authority in relation to its functions and duties, it must be placed before learned Ex-Officio Justice of Peace and Constitutional petition under Article 199 of the Constitution of the Islamic of Pakistan, 1973 in this Court would not be maintainable.

3. In certain cases where learned Ex-Officio Justice of Peace has issued directions to the police authorities to perform the statutory function in accordance with law, the persons feeling themselves aggrieved of such orders or directions file the Constitutional petitions seeking setting aside of the said directions/orders of learned Ex-Officio Justice of Peace.

4. This Court in view of Article 199 (1)(a)(i) is authorized to make an order directing a person performing within the territorial jurisdiction of the Court, functions in connection with affairs of Federation or a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do. If the request made in Constitutional petition seeking setting aside of the directions of learned Ex-Officio Justice of Peace directing the police authorities to do in accordance with law is granted, the necessary implication would be that this Court is in fact directing the police authorities not to proceed in accordance with law. This is not the Constitutional mandate of this Court. The performance of function in accordance with law can be ordered but restraining any authority fromdoing in accordance with law is not the mandate of this Court, as such, the prayers, which have been made in such like petitions are in fact outside the scope of jurisdiction vested in this Court under the Constitution.

While performing the functions under law, the police authorities are bound to adhere to all the legal provisions enabling it to proceed with the matter of commission of crime and the person complained against has every right to place his version before the police authorities and it is for the investigating agency to give any findings on the collected material. Against such findings of the police, no doubt, the person, who feels himself aggrieved, has independent remedies to avail again, but at pre-mature stage restraining the police

authorities and that too from proceeding in accordance with law would be a negation from the Constitutional mandate of this Court. As such, the petitions seeking setting aside of the directions passed by learned Ex-Officio Justice of Peace directing the police authority to proceed in accordance with law are held to be not maintainable and violative to the Constitutional mandate of this Court.

5. Before parting with this order, I would like to observe that there is general impression that whenever the cases of neglect, failure or excess are brought into the notice of learned Ex-Officio Justice of Peace, it always dealt with in a casual manner and thus delinquent police authorities are not being dealt with in a proper way. Needless to observe that the orders passed by learned Ex-Officio Justice of Peace must be jealously guarded and if once it is established that any police official/officer is responsible for such neglect, failure or excess, he must be dealt with severely by learned Ex-Officio Justice of Peace itself and also departmental proceedings be also recommended under the provisions of Police Order, 2002.

6. Resultantly, these petitions having no force and the same are dismissed.

SAK/S-21/L Petitions dismissed.

2013 P Cr. L J 1880
[Lahore]
Before Muhammad Yawar Ali and Ibad-ur-Rehman Lodhi, JJ
SAIF ULLAH SALEEM and others---Petitioners
Versus
The STATE and others---Respondents

Writ Petition No.2902 of 2013, decided on 23rd April, 2013.

Anti-Terrorism Act (XXVII of 1997)---
----Sched, Ss. 6, 7 & 23---Penal Code (XLV of 1860), Ss. 324, 336-B & 337-F(i)---Constitution of Pakistan, Art. 199---Constitutional petition---Transfer of case from Anti-Terrorism Court to the court of ordinary jurisdiction---Application for transfer of case of the petitioners-accused was dismissed by the Special Court---Validity---Offences mentioned in the Schedule to Anti-Terrorism Act, 1997 should have nexus with the objects mentioned in Ss. 6 and 7 of the Act---Nothing had been brought on record to show that the occurrence created terror, panic or sense of insecurity among people and the society---Even in F.I.R., got registered by the complainant, no allegation of creating terror was levelled---Motive for the occurrence was enmity inter-se the parties and for that reason, the application of S.7 of the Act which primarily required the spread of sense of insecurity and fear in common mind was lacking---Occurrence took place in a room of a hotel which was not a public place and the element of striking terror or creating sense of fear in the people or any section of the people was not made discernible in the F.I.R.---Case registered against the petitioners-accused was triable by the court of ordinary jurisdiction---Constitutional petition was allowed and S.7 of Anti-Terrorism Act, 1997 was ordered to be deleted and petition moved

under S.23 of Anti-Terrorism Act, 1997 was accepted---Proceedings of the trial of the case were ordered to be transferred to the court of ordinary jurisdiction.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Ch. Bashir Ahmad v. Naveed Iqbal and 7 others PLD 2001 SC 521; Basharat Ali v. Special Judge, Anti-Terrorism Court-II, Gujranwala PLD 2004 Lah. 199; Fazal Dad v. Col. (Rtd.) Ghulam Muhammad Malik and others PLD 2007 SC 571 and Bashir Ahmed v. Muhammad Siddique and others PLD 2009 SC 11 rel.

Rana Muhammad Asif Saeed, Muhammad Afzal Jatt and Rana Muhammad Nadeem Kanjoo for Petitioners.
Ch. Faqir Muhammad for Respondents.
Mirza Muhammad Saleem Baig, Additional A.-G. for the State.
Date of hearing: 23rd April, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- After having been involved in a criminal case registered through F.I.R. No.725 of 2012 dated 10-11-2012 under sections 324, 336-B, 337-F(i), P.P.C. and 7 Anti-Terrorism Act, 1997 in Police Station Chehlyak District Multan, the petitioners were put to trial by the Special Court, constituted under Anti-Terrorism Act in Multan. Before the charge was framed by the Special Court, an application under section 23 of Anti-Terrorism Act, 1997 was moved before the learned trial Court seeking transfer of the trial proceedings to the Court of ordinary jurisdiction. The learned Trial Judge after taking up the application on 5-3-2013 proceeded to dismiss the same and directed that the charge be framed against the petitioners.

2. The findings arrived at by the learned Special Judge Anti-Terrorism Court-I, Multan have been challenged through the present proceedings wherein a pre-admission notice to respondents Nos.1 and 3 was ordered to be issued by this Court on 11-3-2013. Today with the consensus of the parties, the petition is being treated as admitted one and final hearing was provided to the parties.

3. In support of the petition, the learned counsel for petitioners after making reference to preamble of Anti-Terrorism Act, 1997 section 6 thereof and section 336-B of P.P.C. have submitted that by no stretch of imagination, the case falls within the ambit of "Terrorism" and therefore, dismissal of application moved under section 23 of Anti-Terrorism Act, 1997 is illegal and impugned order is not sustainable.

4. Controverting the stance taken by the petitioners, it has been argued on behalf of the State and the complainant that for the reason that corrosive substance was used in order to cause injuries to the complainant, therefore, irrespective of the fact that the alleged act come within the definition of "Terrorism" or not; the same is triable by the Special Court constituted under Anti-Terrorism Act, 1997, particularly for the reasons that such penal offence has been included in third Schedule to the said Act.

5. We have heard the learned counsel for the parties and perused the record with their assistance.

6. In exercise of power as provided under section 34 of Anti-Terrorism Act, 1997, Government of the Punjab in Home Department by means of a notification dated 26-9-2012 deleted the Entry No.6 in the third Schedule of the Act by virtue of which section 336-B of P.P.C. was made part of the said Schedule but on the very next day i.e. 27-9-2012 by way of another notification under the same powers, the Provincial Government added paras-IV and V in the third Schedule providing that in case a hurt is caused by corrosive substance, the offence would be triable by the Special Court under the Anti-Terrorism Act, 1997.

Section 6 of Anti-Terrorism Act, 1997 defines "Terrorism" which inter alia means that any act which creates a sense of fear or insecurity in the society or involves grievous violence against a person or grievous bodily injury or harm to a person would be called as "Terrorism". Significant to note that section 336-B of P.P.C. has specifically been deleted from third Schedule of the Anti-Terrorism Act, 1997 whereas subsequently the offence causing hurt by corrosive substance was added in the said Schedule.

Joint reading of preamble of Anti-Terrorism Act, 1997 section 6 thereof and section 336-B, P.P.C. would lead us to conclude that the offences mentioned in the Schedule to Anti-Terrorism Act, 1997 shouldhave nexus with the objects mentioned in sections 6 and 7 of the Act.

7. In the present case, nothing has been brought on record to show that the alleged occurrence created terror, panic or sense of insecurity among people and the society. Even in F.I.R., got registered by the complainant, no allegation of creating terror was levelled. Motive for the occurrence as was shown is enmity inter se the parties and for that reason, the application of section 7 of the Act which primarily required the spread of sense of insecurity and fear in common mind was lacking in the instant case. Admittedly the occurrence took place, in a room of a hotel. It was not a public place and therefore, the element of striking terror or creating sense of fear in the people or any section of the people was not made discernible in the F.I.R. The offences mentioned in the Schedule to the Act should have nexus with the object of the Act and the offence covered by sections 6 and 7 thereof.

8. We are fortified in our such view by the dictum laid down in the cases of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 Supreme Court 1445), Ch. Bashir Ahmed v. Naveed Iqbal and 7 others (PLD 2001 Supreme Court 521), Basharat Ali v. Special Judge, Anti-Terrorism Court-II, Gujranwala (PLD 2004 Lahore 199), Fazal Dad v. Col.(Rtd.) Ghulam Muhammad Malik and others (PLD 2007 Supreme Court 571) and Bashir Ahmed v. Muhammad Siddique and others (PLD 2009 Supreme Court 11).

9. For what has been discussed above, we are of the view that the case as was, registered against the petitioners is triable by the Court of ordinary jurisdiction and therefore, we allow this petition by setting aside the order dated 5-3-2013 passed by the learned Special Judge, Anti-Terrorism Court-I, Multan, section 7 of Anti-Terrorism Act, 1997, as inserted in F.I.R., is ordered to be deleted and resultantly the petition moved under section 23 of Anti-

Terrorism Act, 1997 is accepted, the proceedings of the trial of the case are ordered to be transferred to the Court of ordinary jurisdiction. The learned Special Judge, Anti-Terrorism Court-I, Multan is directed to transmit the record of the same to the learned Sessions Judge, Multan, who shall entrust it to some Court of competent jurisdiction.

AG/S-45/L Petition accepted.

2013 P L C (C.S.) 168
[Lahore High Court]
Before Ibad-ur-Rehman Lodhi, J
Qazi MUNIR AHMED
Versus
SECRETARY HEALTH and 2 others

Writ Petition No.2059 of 2011, heard on 30th August, 2012.

Constitution of Pakistan---

----Art. 199---Constitutional petition---Civil service---Regularization of service---Discrimination---Petitioner was appointed to the post in question on contract basis which was later terminated---Petitioner challenged his termination by making representation before the relevant Authority but it was never decided---Petitioner and some of his colleagues filed writ petitions before High Court---Writ petition filed by petitioner was dismissed on ground of laches while those filed by his colleagues were allowed and directions were given to the Authority to regularize their (colleagues) services---Petitioner filed Intra-Court appeal against dismissal of his constitutional petition and consequently his petition was allowed and Authority was directed to decide representation moved by petitioner in one month---Authority dismissed representation of petitioner on ground that he did not fulfil requirements of regularization---Contentions of petitioner were that when intra-court appeal Bench allowed his constitutional petition, he was placed in the same position as his colleagues when their constitutional petitions were allowed and they were directed by High Court to be regularized---Validity---All similarly placed persons had been regularized and when in intra-court appeal, constitutional petition of petitioner was allowed, he attained the same status and deserved to be regularized---Petitioner fulfilled the requirement of rules and was also entitled to be regularized in accordance with the regularization policy---No dissimilarity existed between petitioner and those, who on the basis of a judicial verdict had been regularized in service---Constitutional petition was allowed, orders passed by Authority were declared to be illegal and without lawful authority as a consequence whereof petitioner was ordered to be reinstated in service with all back benefits and to be regularized in service in his capacity of post, which he held at the time of termination of his service.
Sardar Abdul Raziq Khan for Petitioner.

Syed Raza Abbas Naqvi, Asstt. A.-G. Punjab with Dr. Muhammad Irfan Khilji, DMS, District Headquarters Hospital, Rawalpindi and Tariq Mehmood vice Mian Abdul Rauf for Respondents.
Date of hearing: 30th August, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- The learned Assistant Advocate General Punjab representing all the three respondents in his official capacity. However, a request is received on behalf of Mian Abdul Rauf, Advocate to adjourn the proceedings of the matter on the ground of his non-availability and when asked as to which respondent is being represented by the said learned counsel, it was pointed out that the Board of Management in the Hospital is to be represented by Mian Abdul Rauf, Advocate. Such Board of Management is not a party to the present writ petition. Learned Assistant Advocate General is the Provincial Law Officer and all the three official respondents are to be represented by the said Law officer. Therefore, I deem it proper to decide the petition after hearing the learned Law Officer on behalf of the respondents.

2. The petitioner was initially appointed as ECG Technician in District Headquarters Hospital, Rawalpindi in the year 2005 ,and continued in such capacity, on contract basis. In the year 2009, in negation of the policy of the Government of the Punjab for extension of such service or regularization thereof, the services of the petitioner were terminated. Some other officials, on contract basis, were also met the same fate. Such termination was challenged by the petitioner by making a representation before the Medical Superintendent of the Hospital, which was never decided and on account of long pendency without any action on such representation, the petitioner was constrained to file Writ Petition No.2864 of 2010 before this Court. The other colleagues of the petitioner also filed separate constitutional petitions and Writ Petitions Nos.3413 and 3414 of 2010 from amongst such writ petitions were allowed, whereas, writ petition filed by the petitioner was dismissed on 4-4-2011 only on the ground of laches. The findings so arrived at by the learned Single Bench were challenged by the petitioner in Intra Court Appeal No.40 of 2011, which was allowed by a learned Division Bench of this Court on 23-5-2011 and when writ petition was allowed, the respondents were directed to decide the representation already moved by the petitioner within a period of one month. It is on such direction that the Secretary in Health Department, Government of the Punjab, decided a number of representations pending before him and order conveyed on 6-8-2011. The representation of the petitioner was dealt within in Para.No.11 of the said letter, whereby his representation was dismissed.

3.? The petitioner after dismissal of his representation has filed present petition and learned counsel representing the petitioner has maintained that the dismissal of representation of the petitioner is based on no reasoning and on the basis of a non-speaking order, the dismissal of the representation has been communicated. It is further contended by the learned counsel for the petitioner that when the ICA Bench allowed the writ petition, the petitioner was placed in same position where his other colleagues were placed when their writ petitions were allowed and the respondents were directed to

regularize the service of such petitioners by setting aside the orders of termination of services and all such petitioners are presently serving the department on regular basis.

4. While controverting the stance of the learned counsel for the petitioner, the learned Assistant Advocate General has tried to draw a distinction in the case of the petitioners, who have been regularized and that of the present petitioner, which, according to learned Law Officer, did not fulfill the requirements for regularization.
5.? This distinction is un-substantiated and un-real to hold against the admitted discrimination. All the similarly placed persons have admittedly been regularized and when in ICA the writ petition filed by the petitioner was allowed, he too attained the same status and deserved to be regularized. The petitioner fulfills the requirements of rules and was also entitled to be regularized in accordance with Regularization Policy. I see no dissimilarity in the case of the petitioner with those, who on the basis of judicial verdict, have been regularized in service.

6. Resultantly, this writ petition is allowed the orders passed by Secretary, Health in Government of the Punjab on 6-8-2011 and that passed by the Additional Medical Superintendent on 29-7-2009 are declared as illegal and without lawful authority as a consequence whereof the petitioner is ordered to be reinstated in service with all back benefits and to be regularized in service in his capacity of what post he was holding at the time of termination of service.

MWA/M-280/L Petition allowed.

P L D 2013 Lahore 64
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD SHAHBAZ KHALID---Petitioner
Versus
JUDGE FAMILY COURT, LAHORE and others---Respondents

Writ Petition No.15745 of 2012, decided on 5th October, 2012.

West Pakistan Family Courts Act (XXXV of 1964)---
----Ss. 17A & 12A, proviso---Constitution of Pakistan, Art. 199---Constitutional petition---Interpretation of Ss.17A and 12A, proviso, West Pakistan Family Courts Act, 1964---Interim order fixing maintenance allowance---Time period for which such interim order would remain valid---Scope---Joint reading of Ss.17A and 12A of West Pakistan Family Courts Act, 1964 revealed that when Family Court was made competent to pass an interim order for payment of maintenance allowance, it was also made incumbent upon the Family Court to dispose of the case pending before it within a period of six months from the date of institution---Order passed under S.17A of the West Pakistan Family Courts Act, 1964 would be, at most, effective for a period of six months, which time had been allocated by virtue of S.12A for final disposal of a lis pending before Family Court---When the maximum age of an interim order passed under S.17A of the West Pakistan Family Courts Act, 1964 expired, continuation of proceedingsbefore Family Court, would violate provisions of S.12A of the

said Act---Age of an order passed under S.17A of West Pakistan Family Courts Act, 1964 for interim maintenance would at maximum be six months and if proceedings were not concluded within such time in the main suit wherein interim order was passed, the Family Court should not insist upon the implementation of the order of interim maintenance---High Court observed that Family Court had to report to the High Court for non-implementation of S.12A of West Pakistan Family Courts Act, 1964 or in case of failure of Family Court to do so, either party would have a right to bring to notice of High Court such illegality being continued in the Family Court and High Court shall then, either under proviso to S.12A of the said Act or under Art.199 of the Constitution, pass appropriate order and reconsider quantum of maintenance---Constitutional petition was disposed of accordingly.

Mst. Sitwat Chughtai and another v Judge, Family Court, Lahore and another PLD 2009 Lah. 18 ref.
Sardar Zulfiqar Umar Khan Thaheem for Petitioner.
Rana Nadeem Ahmad for Respondent No.2.

ORDER

IBAD-UR-REHMAN LODHI, J.---Through this Constitutional petition, the petitioner called-in-question the order passed by the learned Judge Family Court on 24-12-2011, whereby, the learned Judge Family Court fixed interim maintenance for the minor, namely, Tahreem in view of the jurisdiction, as was assigned to such Court under section 17-A of the West Pakistan Family Courts Act, 1964, which is re-produced herein below for ready reference:--

"17-A. Interim order for maintenance.---At any stage of proceedings in a suit for maintenance, the Family Court may pass an interim order for maintenance, whereunder the payment shall be made by the fourteenth of each month, failing which the Court may strike off the defence of the defendant and decree the suit".

2. At the time of limine hearing of this petition, it was noted that although this Court ordinarily is reluctant in entertaining a petition against an interlocutory order; however, the financial constraints, which were expressed by the learned counsel for the petitioner, who was burdened by the learned Judge Family Court with payment of interim maintenance at the rate of Rs.3,000 per-month to the minor, which according to the learned counsel for the petitioner, was beyond the financial means of the petitioner, it was considered appropriate to accommodate both the sides, and respondent No.2 be heard, therefore, notice was issued to the said respondent.

3. As expected, the learned counsel for respondent No.2 vehemently opposed the filing of Constitutional petition directly in this Court challenging the interlocutory order, passed by the learned Judge Family Court, and prayed for the dismissal of the Constitutional petition, as being not maintainable.

4. I have experienced that in a number of cases, the father, who has been asked to provide interim maintenance to his minor children challenges the vires of such orders in writ

jurisdiction and normally the Constitutional petitions are dismissed for the reason that interlocutory order on each occasion has been considered as not being challengeable.

5. At the same time, I have noticed that the learned Judges presiding over the Family Courts without taking into consideration some basic factors, which were necessarily to be taken into account, used to pass the interim orders for payment of tentative maintenance to the minors. At times, in case of some probe, it is ultimately proved that the father was heavily burdened beyond his known means.

6. This leads me to go through the earlier view of this Court in such like circumstances as reported in Mst. Sitwat Chughtai and another v. Judge, Famillt Court, Lahore and another (PLD 2009 Lahore 18). The relevant extracts from the reported case, which are necessary for the present purposes are as under:--

(i) Purpose behind insertion of section 17-A in Family Courts Act, 1964 is to ensure that during pendency of proceedings with Family Court, financial constraints faced by minors are ameliorated;

(ii) Family Court should broadly look into social status of parties, earning of defendant, his capacity to pay and requirements of minor is the touchstone on which Family Court should fix interim maintenance;

(iii) For the reason that no right of appeal etc. has been provided against fixation of interim maintenance, such order being tentative and interim in nature, the Family Court should be more careful and precise in such context to ward off any injustice.

From the above, it is manifest that the order for payment of interim maintenance can be a valid order during pendency of proceedings before the Family Court.

7. When this power to grant interim maintenance was extended to the Judges of the Family Courts by means of section 17-A of the West Pakistan Family Courts Act, 1964, which was inserted in Act XXXV of 1964 by virtue of Ordinance No.LV of 2002, at the same time, through the same legislation, section 12-A of the Act was also substituted in the West Pakistan Family Courts Act, 1964 i.e. Family Courts (Amendment) Ordinance, 2002 by virtue of section 8 of the above-mentioned Amending Ordinance, which provides mandatorily that the Family Court shall dispose of a case within a period of six months from the date of institution and by virtue of proviso to such Section, it is provided that where a case is not disposed of within six months, either party shall have a right to make an application to the High Court for necessary direction as the High Court may deem fit.

By joint reading of sections 17-A and 12-A of the West Pakistan Family Courts Act, 1964 (hereinafter to be referred as the Act), what comes out is that when the Family Court was made competent to pass an interim order for payment of maintenance, it was at the same time, made incumbent for the same Court to dispose of the case pending before it within a period of six months from the date of institution, meaning thereby, that the order passed under section 17-A of the Act for payment of interim maintenance would, at the most, be

effective for a period of six months, which time has been allocated by virtue of section 12-A of the Act for final disposal of a lis pending before a Judge Family Court and, when the maximum age of an interim order passed under section 17-A of the Act expires, the proceedings, if continued before the Family Court, the same would be considered violative to the provisions of section 12-A of the Act and this Court by virtue of proviso attached to section 12-A of the Act has been made competent to take notice of pendency of a family suit beyond the period of six months and to pass any direction as deem fit.

8. So if a harsh order is passed by a Family Court under section 17-A of the Act, it can continue to hold field maximum for a period of six months and if the proceedings in the suit before the Family Court, wherein such interim order was passed, continued beyond the stipulated period, this Court would be competent to pass any direction as it may deem fit. Not only the proviso to section 12-A of the Act empowers this Court to take notice of the long pendency of the family suit beyond prescribed period of time, but, if the proceedings in a suit from the date of institution, would continue after the period of six months, it would also be considered as an illegality and violation of statutory provisions of law and under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, even this Court would be competent to declare the act on the part of the Family Court in continuing with the proceedings of a suit beyond the period of six months, as without lawful authority and of no legal effect. It is, thus, held that the age of an order passed under section 17-A of the Act will maximum be six months and if the proceedings are not concluded in the main suit in which the interim order under section 17-A of the Act was passed, the learned Judge Family Court would not insist the implementation upon such interim order, rather the matter will be reported to this Court by the trial Court itself, or in case of failure on its part, to intimate such fact to this Court, either party shall have a right to bring into the notice of this Court such illegality, being continued in the trial of the Family Court and this Court either under proviso to section 12-A of the Act or under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 would pass appropriate orders and then re-consider the quantum of maintenance, which was earlier, granted on interim measures on the basis of the proceedings so far taken by the learned Judge Family Court in shape of evidence of the parties or other material brought on record to evaluate the social/financial status of the parties and also the capacity of the father to pay any maintenance. By this arrangement, not only the mandatory provisions of Section 12-A of the Act can effectively be implemented, but if a defendant in the suit is burdened beyond his financial capacity, his miseries can be redressed to some extent as it should be the intention of law.

9. In the present case, the suit was filed on 26-10-2011, and order for payment of interim maintenance was made on 24-12-2011, but, the mandatory provisions of section 12-A of the Act have not been taken into consideration, thus, it is held that the proceedings beyond six months of the date of institution are being conducted in violation of the mandatory provisions of section 12-A of the Act, without there being any intimation to this Court, and by exercise of powers in view of proviso to section 12-A of the Act, the learned Judge Family Court is directed to conduct the proceedings in this case on day to day basis and try to conclude the same by 25th of this month, positively, without fail and ultimate conclusion of the trial would be intimated to this Court through the Deputy Registrar (Judicial), and in

the meanwhile, till final conclusion of the trial, the petitioner would continue to make payment of interim maintenance, as was fixed by the learned Judge Family Court.

10. With these observations, this petition stands disposed of.

KMZ/M-307/L Order accordingly.

P L D 2013 Lahore 102
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD SHABBIR---Petitioner
Versus
REHANA KAUSAR and others---Respondents

Writ Petition No.7607 of 2012, decided on 24th May, 2012.

(a) Islamic Law---
----Dower, payment of---"Prompt" and "deferred" dower---Principle---According to Islamic Injunctions, there is no split on the dower, whether deferred or prompt---Dower was obligatory on husband, whichwas the entitlement of wife as consideration of marriage.

Saadia Usman and another v. Muhammad Usman Iqbal Jodoon and another 2009 SCMR 1458; Head Note 290 of Muhammadan Law by D.F.Mullah and Holy Qur'an Verse 24 of Surah-e-Nisa distinguished.

Dr. Anees Ahmad v. Mst. Uzma PLD 1998 Lah. 52; Dr. Sabira Sultana v. Maqsood Sulari , Additional District and Sessions Judge, Rawalpindi and 2 others 2000 CLC 1384 and Muhammad Azam v. Additional District Judge and others 2006 YLR 33 rel.

(b) West Pakistan Family Courts Act (XXXV of 1964)---
----S. 5 & Sched.---Muslim Family Laws Ordinance (VIII of `1961), S.6(5)---Deferred dower---Suit for recovery of deferred dower---Husband contracting second marriage without prior permission of existing wife or that of Arbitration Council---Effect---Dower even if termed as deferred, would forthwith become payable by the husband to the wife in such circumstances.

Munazza Noor and 2 others v. Additional District Judge and others 2009 CLC 374 and Mst. Shaheen Begum v. Zakaullah Khan "Ghouri and others 2009 MLD 1124 rel.
Syed Mumtaz Hussain Bukhari for Petitioner.
Zafar Abbas Khan Baloch for Respondents.
Date of hearing: 18th May, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The marriage between the petitioner and respondent No.1 was solemnized against a consideration of dower in shape of gold ornaments weighing

20-tolas and in therelevant columns of Nikahnama the nature of dower was mentioned as " " (deferred).

2. It was not a peaceful and happy matrimonial life of the spouses and respondent wife had to take resort of filing a suit inter alia for recovery of the dower. The learned Judge Family Court, Toba Tek Singh on 2-11-2011 proceeded to dismiss the same. The portion of the suit for maintenance was earlier withdrawn by the plaintiff on 3-11-2010. The suit for restitution of conjugal rights filed by the writ petitioner was decreed through the same judgment.

3. In appeal, findings of the court below with regard to the dower amount was reversed and suit was decreed to the tune of gold ornaments weighing 20-tolas or market value thereof vide judgment and decree dated 8-2-2012.

4. The findings so arrived at by the learned appellate court are subject matter of the present writ petition, mainly on the ground that the deferred dower would be payable in eventuality of dissolution of marriage either by death or divorce.

5. Learned counsel for respondent No.1 has placed before the Court a certified copy of Nikahnama, showing that the petitioner Muhammad Shabbir entered into marriage with one Parveen Akhtar on 4-9-2011. The fact of entering into second marriage by petitioner Muhammad Shabbir is not denied by the learned counsel for petitioner. It is the claim of learned counsel for respondent No.1 that for such second marriage, permission of the first existing wife i.e. respondent No.1 has not been obtained. Even column No.21 of Nikahnama of said second marriage meant for entries as to the presence of any existing wife with the bridegroom have not been filled in and it is not mentioned as to whether there is any existing wife in the wedlock of said Muhammad Shabbir.

6. The main thrust of learned counsel for the petitioner is based on the findings of the Hon'ble Supreme Court of Pakistan in the case of "Saadia Usman and another v. Muhammad Usman Iqbal Jadoon and another" (2009 SCMR 1458) with the contention that if no time was fixed for payment of the deferred dower, it would be payable in eventuality of dissolution of marriage either by death or divorce.

In the reported matter, the male contestant of the litigation never entered into the second marriage and thus the principle laid down in the said judgment is distinguishable keeping in view the peculiar circumstances of the present case.

Learned counsel for the petitioner also placed reliance on Head Note 290 of Mohammadan Law by D.F. Mulla to contend that the amount of dower is usually split into two parts, one called "prompt" which is payable on demand, and the other called "deferred", which is payable on dissolution of marriage by death or divorce.

But the learned counsel after referring head note 290 has not proceeded further and ignored the provisions of Head Note 336(2) of Mohammedan Law which reads that if the marriage was consummated, the wife is entitled to immediate payment of whole unpaid dower, both prompt or deferred.

7. The command of Almighty Allah as ordained in Holy Qur'an in Verse "24" of "Surah-e-Nisa" is to the following effect:--

"And those of whom ye seek content (by marrying them), give unto them their portions as duty"

Thus on such unconditional command one can easily say that according to Quranic injunctions, there is no split in the dower whether deferred or prompt.

8. This point has been considered in detail in some of the judgments by our Superior Courts. In the case reported as "Dr. Anees Ahmad v. Mst. Uzma" (PLD 1998 Lahore 52), it was held that payment of dower, was obligatory on husband which is the entitlement of the wife as consideration of marriage.

In the case of "Dr. Sabira Sultana v. Maqsood Sulari, Additional District and Sessions Judge, Rawalpindi and 2 others" (2000 CLC 1384), this Court is of the view that:--

"There being no classification of the dower as prompt and deferred in the Holy Qur'an and Sunnah, the deferment of the payment of dower for an indefinite period with the consent of the wife is not prohibited, but if a wife makes demand of its payment, the husband being under an obligation to make payment of the same, cannot further defer it on any excuse. The provisions of section 6(5) of the Muslim Family Laws Ordinance, 1961 being not in conflict with Islam, it is mandatory for a husband to pay entire amount of dower, whether prompt or deferred, in case of entering into contract of second marriage in presence of first wife without her permission."

In the case of "Muhammad Azam v. Additional District Judge and others" (2006 YLR 33), this Court is of the view that the dower whether prompt or deferred is an inalienable right of a wife and after consummation of marriage same would become vested right of a wife at any time.

This Court in the case of "Munazza Noor and 2 others v. Additional District Judge and others" (2009 CLC 374) while dealing with the provisions of section 6(5) of Muslim Family Laws Ordinance, 1961 has held that husband on contracting the second marriage without permission of the first wife or the Arbitration Council, becomes liable to pay to the first wife entire dower amount either prompt or deferred. Same was the view of Karachi High Court in the case of "Mst. Shaheen Begum v. Zakaullah Khan Ghouri and others" (2009 MLD 1124).

10. Section 6(5) of Muslim Family Laws Ordinance, 1961 would be relevant piece of legislation for the present purposes:--

"(5) Any man who contracts another marriage without the permission of Arbitration Council shall:

(a) Pay immediately the entire amount of dower, whether prompt or deferred, due to the existing wife or wives, which amount if not so paid shall be recoverable as arrears of land revenue"

11. As discussed above, it is now abundantly clear that the amount of dower fixed at the time of marriage in between the parties to the present litigation was 20 tolas gold ornaments or value thereof and the same has not yet been paid as according to the petitioner, the stage of its payment has not yet come. But he is mistaken. At least by entering into the second marriage without getting prior permission either of the existing wife viz respondent No.1 herein or the Arbitration Council, the dower even if it is termed as deferred has forthwith become payable by the petitioner to the respondent and thus this petition is dismissed. Decree passed by the first appellate court is maintained by reversing the judgment and decree passed by the Judge Family Court on 2-11-2011. The dower i.e. 20-tolas of gold ornaments or value thereof according to today's market value be paid to the respondent wife within a period of one month from the passing of this judgment, otherwise it will be open to the Executing Court to proceed against the petitioner/judgment-debtor for its recovery under the Land Revenue Act as arrears of land revenue.

KMZ/M-318/L Petition dismissed.

P L D 2013 Lahore 173
Before Ibad-ur-Rehman Lodhi, J
ABDUL SATTAR---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous Nos.16117-B, 16118-B, 16510-B, 15931-B and 15932-B of 2012, decided on 15th November, 2012.

(a) Criminal Procedure Code (V of 1898)---
----S. 497---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Bail, grant of---Accused allegedly issued a cheque to the complainant, which was dishonoured on presentation---Complainant contended that there were five other cases similar to present one registered against the accused, which established the fact that accused was a habitual offender in issuing cheques, and that unless recovery of amount was effected from accused, he was not entitled to be released on bail---Validity---Although different F.I.Rs. had been registered against accused for issuing cheques, which got dishonoured on presentation, but he was not convicted in any one of them---Complainant in a criminal case under S.489-F, P.P.C. could not ask criminal court to effect any recovery of amount involved in the cheque---Accused was released on bail in circumstances.

Shameel Ahmed v. The State 2009 SCMR 174 ref.

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

----S. 489-F & Chaps. XVII [Ss.378 to 462] & XVIII [Ss.463 to 489-F]---Dishonestly issuing a cheque---Recovery of cheque amount---Scope---Complainant in a criminal case under S.489-F, P.P.C could not ask a criminal court to effect any recovery of amount involved in the cheque---Cheque amount involved in the offence under S.489-F, P.P.C was never considered as stolen property---Had the same been treated as stolen property, the investigating agency would certainly have been equipped with a power to recover said amount as provided under Chap. XVII, P.P.C---Section 489-F, P.P.C had been inserted in Chap. XVIII, P.P.C, under which only remedy provided for the prosecution was the conviction of accused and no process for recovery could be effected.

(c) Criminal Procedure Code (V of 1898)---
----S. 497---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Bail---Cheque issued for a huge amount---Recovery of cheque amount---Complainant opposing grant of bail to accused on the ground that huge amount was involved and recovery was yet to be effected---Police requesting physical remand of accused and cancellation of bail in order to facilitate process of recovery of amount in investigation---Validity---No such process could be allowed to be adopted either by courts dealing with matter of remand or trial of the offence under S.489-F, P.P.C, or the investigating agency to effect recovery.

(d) Penal Code (XLV of 1860)---
----Ss. 489-F & 384---Dishonestly issuing a cheque---Bail---Cheque issued as guarantee/security---Recipient of the cheque using the same to exert pressure on the issuer to force him to surrender to his illegal demands---Such misuse of S.489-F, P.P.C for the purpose of securing money would be termed as extortion.

Malik Saleem Iqbal Awan for Petitioner.
Chaudhary Karamat Ali, Addl. Prosecutor-General for the State with Hamid Ullah ASI.
Ghulam Hussain Malik for the Complainant.
Bashir Abbas Khan for the Complainant in Crl.Misc.No.15931-B of 2012.

ORDER

IBAD-UR-REHMAN LODHI, J.---This order shall dispose of the following bail petitions:-

(i) Crl.Misc.No. 16117-B of 2012.
(ii) Crl.Misc.No. 16118-B of 2012.
(iii) Crl.Misc.No. 16510-B of 2012.
(iv) Crl.Misc.No. 15931-B of 2012.
(v) Crl.Misc.No. 15932-B of 2012.

as the same are filed on behalf of one person.

2. In Crl.Misc.No.15931-B of 2012 and Crl.Misc.No.16117-B of 2012, the complainants of the case opposed the concession of bail to the petitioner.

3. The allegation against the petitioner is that he issued a cheque to the complainant, which on presentation was dishonoured and, therefore, a criminal case under section 489-F, P.P.C. was registered against him, and he as arrested on 1-12-2011 in Criminal Miscellaneuos No. 16117-B of 2012.

4. The petition is opposed on the ground that these are five cases of similar nature against the petitioner, which establishes the fact that the petitioner is a habitual offender in issuing cheques, which would subsequently on presentation dishonoured. The learned counsel for the complainant called the petitioner as a record-holder and history sheeter.

He was asked to show any conviction of the petitioner in any such like case, but the response was that yet there is no conviction and only the F.I.Rs. have been lodged against the petitioner by mentioning the amounts involved in the cases.

5. The learned counsel for the complainant attempted to make the case of grave nature and expressed his views that unless the recovery of the amount, in question, is not affected, the petitioner is not entitled to be released on bail.

6. Section 489-F, P.P.C. was originally inserted in Pakistan Penal Code, 1860 by Ordinance LXXII of 1995, providing conviction for counterfeiting or using documents resembling National Prize Bonds or unauthorized sale thereof and while the same was part of the statute, again by virtue of Ordinance LXXXV of 2002, another Section under the same number viz. 489-F of P.P.C. was inserted on 25-10-2002 providing conviction and sentence for the persons guilty of dishonestly issuing a cheque towards repayment of loan or fulfillment of an obligation, which is dishonoured on its presentation. In that newly inserted section 489-F of P.P.C., the maximum relief for the complainant of the case is the conviction of the responsible person and punishment as a result thereof, which may extend to 3 years or with fine or with both. The cheque amount involved in the offence under such section is never considered as a stolen property. Had this been treated as a stolen property, the Investigating Agency would certainly have been equipped with a power to recover the amount also as is provided in Chapter XVII of P.P.C. relating to offences against property. The offence under section 489-F, P.P.C. is not made part of the said Chapter providing the offences and punishments of offences against property, rather in fact the same has been inserted in Chapter XVIII of P.P.C., regarding offences relating to documents and to trade of property marks.

7. In the cases registered under Chapter XVII, the police in case of theft, extortion, dacoity, robbery and breach of trust is empowered to even get recovery of the subject-matter of crime, but in the cases registered under Chapter XVIII, the only remedy provided for the prosecution is the conviction of the accused and no process of recovery can be effected for the offences relating to documents or trade of property marks.

8. When on 25-10-2002, Section 489-F, P.P.C. was inserted in P.P.C., Order XXXVII, C.P.C. was already a part of statute book providing the mode of recovery of the amounts subject-matter of negotiable instruments and a complete trial is available for the person interested in recovery of the amounts of a dishonoured cheque, therefore, not only that the

complainant in criminal case under section 489-F, P.P.C. cannot ask a Criminal Court to effect any recovery of the amount involved in the cheque, but also the amount whatsoever high it is, would not increase the volume and gravity of the offence. The maximum punishment provided for such offence cannot exceed from 3 years. Even this conviction of 3 years is not an exclusive punishment. By using word "or" falling in between the substantive sentence and the imposition of fine, the Legislature has provided the punishment of fine as an independent conviction and this type of legislation brings the case of such nature outside the scope of prohibitory clause of section 497, Cr.P.C. The possibility cannot be ruled out and it would remain within the jurisdiction of trial Court that ultimately the sentence of fine independently is imposed and in such eventuality, nobody would be in a position to compensate the accused for the period he has spent in incarceration during trial of offence under section 489-F, P.P.C.

9. I have experienced that in almost every case, where an accused applies for the concession of bail in case under section 489-F, P.P.C., it is oftenly opposed on the ground that huge amount is involved and it is yet to be recovered. The police agency also request for the physical remand of the accused and the cancellation of bail in order to facilitate the process of recovery of the amount, in question, in criminal investigation. No such process can be allowed to be adopted either by the Courts dealing with the matter of remand or trial of the offence under section 489-F, P.P.C. or the Investigating Agency to effect recovery.

10. In business circles, the issuance of cheques for security purposes or as a guarantee is a practice of routine, but this practice is being misused by the mischief-mongers in the business community and the cheques, which were simply issued as surety or guarantee are subsequently used as a lever to exert pressure in order to gain the unjustified demand of the person in possession of said cheque and then by use of the investigating machinery, the issuer of cheque is oftenly forced to surrender to their illegal demands and in the said manner, the provisions of this newly inserted section of law are being misused. Securing the money in such manner would be termed as extortion.

11. The learned counsel for the complainant by placing reliance on the case of SHAMEEL AHMED v. THE STATE (2009 SCMR 474) has further argued that the accused of such like cases are not entitled to be released on bail merely on the ground that the maximum punishment provided for such offence is 3 years.

12. The learned counsel for the complainant has not gone into details of the cited judgment of the apex Court. It is held in the cited case that it is discretion of every Court to grant the bail, but such discretion should not be arbitrary, fanciful or perverse. It was a case of cancellation of bail and the bail allowed to a person was cancelled, who remained fugitive from law for a long period and during almost one year after registration of the case, neither he applied for pre-arrest bail nor surrendered before any Court and in the said matter, the High Court had already directed the trial Court to conclude the trial within four months and in such background, apex Court found it proper not to interfere in the findings of the High Court. The other factors, which have been discussed above were not raised before the Hon'ble Supreme Court of Pakistan while dealing with Shameel Ahmed's case.

13. For what has been discussed above, the petitioner, who is behind the bars since 1-12-2011 is entitled to be released on bail and, therefore, this petition is allowed and the petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

MWA/A-5/L Bail granted.

P L D 2013 Lahore 228
Before Ibad-ur-Rehman Lodhi, J
NASIR AHMAD---Petitioner
Versus
Dr. FAIZA BASHIR and 3 others---Respondents

Writ Petitions Nos.11182 and 21093 of 2011, decided on 25th October, 2012.

(a) Words and phrases---
----"Maintenance"---Defined and explained.

Muhammadan Law, by D.F. Mulla, para.369 and Black's Law Dictionary, (8th Edn.) ref.

(b) West Pakistan Family Courts Act (XXXV of 1964)---
----S. 5, Sched. Entry No.3---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance allowance of minor daughter---Decree of Family Court awarding maintenance to minor with 10% annual increase therein upheld by Appellate Court---Father's plea was that in absence of any provision in West Pakistan Family Courts Act, 1964, Family Court on its own could not grant such increase in maintenance to minor---Validity---Nothing was available in S.5 of West Pakistan Family Courts Act, 1964 or its Sched. to prohibit Family Court from granting maintenance to needy minor with annual increase therein---Basic requirements of life of a minor would grow with his growing age---Family Court would always be deemed to exercise its parental jurisdiction and supposed to look into future needs of minor while granting maintenance in its age of infancy---Maintenance would never be considered as charity---Forcing minor to stand in attendance before father or appear before Family Court every year with folded hands for annual increase in maintenance would be violative to his/her dignity---Legislature had not provided any fixed rate of maintenance, thus, Family Court could fix its rate while keeping in view financial and social status of parties and requirements of minor and evidence of parties in support thereof---Family Court could grant annual increase in maintenance of minor---High Court by virtue of S.5(3) of West Pakistan Family Courts Act, 1964 had power to add annual increase in already existing Entry at Sr. No.3 of Sched., thereof---High Court dismissed constitutional petition filed by father and directed the Registrar of the Court to place present judgment before Chief Justice for adding suitable entry against Column No.3 of Sched. to the Act by exercising powers provided in S.5(3) thereof---Principles.

Khadeeja Bibi and others v. Abdul Raheem and others 2012 SCMR 671 ref.

Muhammad Anwar v. Nadia Nasreen and others PLD 2012 Lah. 110 and M. Umar Fraz v. Additional District Judge and others PLD 2012 Lah. 170 fol.
Mehr Umar Hayat for Petitioner.
Muhammad Rashid Mirza for Respondents.
Date of hearing: 19th September, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.----Through this common judgment, W.P. No.11182 of 2011 and W.P. No.21093 of 2011 are to be disposed of as both arise from one judgment in between the same parties.

2. The petitions are still at pre-admission stage, thus with the concurrence of learned counsel for the parties, the above said petitions are being heard as Pacca case today.

3. Originally Dr. Faiza Bashir, on her own behalf and for the benefit of her real minor daughter Isha Nasir, filed suit before the learned Judge Family Court, Gujranwala, seeking dissolution of marriage and for recovery of maintenance for both plaintiffs and also for dowry articles or in lieu thereof value @ Rs.2,08,000/-.

4. On account of failure of reconciliation proceedings, the suit to the extent of dissolution of marriage was decreed on 5-9-2009 and against that decree in lieu of "Khula", the right of dower was forgone by the lady, whereas with regard to the remaining claim in suit, the learned Judge Family Court proceeded to pass a decree on 30-10-2010 in the manner that the claim of dowry articles was declined, however the expenses, incurred on the birth of minor, were granted at the rate of Rs.35,000/- and Rs.39,000/- were further granted to Dr. Fiaza Bashir as expenses over her treatment.

To minor Isha Nasir, maintenance at the rate of Rs.3000/- per month for the period from 20-11-2008 to March, 2010 and onwards till her marriage at the rate of Rs.9000/- per month with 10% annual increase with an option to review the rate of maintenance keeping in view the academic requirements of the minor.

5. Both the sides preferred separate appeals which came up for hearing before the learned Addl. District Judge, Gujranwala on 26-4-2011 and by means of a consolidated judgment the view taken by the learned Judge Family Court was upheld by dismissing both the appeals

Nasir Ahmad and Dr. Faiza Bashir and minor baby Isha Nasir called in question the findings of the courts below to the extent as to what they felt the level of deprivation.

6. The main contention of learned counsel for Nasir Ahmad is that not only that the monthly maintenance allowance for the minor was fixed at much exorbitant rate but he has seriously questioned the levy of annual increase at 10% in the granted maintenance. The learned counsel, in support of his contention challenging the annual automatic increase in the grant of maintenance to the minor, has placed reliance on the cases of Muhammad Anwar v. Nadia Nasreen and others (PLD 2012 Lahore 110), M. Umar Fraz v. Additional District

Judge and others (PLD 2012 Lahore 170) and Khadeeja Bibi and others v. Abdul Raheem and others (2012 SCMR 671) and contends that unless the legislature by way of some amendment in the relevant laws, provide such annual increase in the maintenance to the minor, the courts at their own cannot extend such relief to any party in the suit tried under Family Laws.

7. In comparison whereof, the learned counsel for Dr. Faiza Bashir and Isha Nasir has not only supported the grant of maintenance but also prays for the increase in already fixed maintenance. He has also supported 10% annual increase in the maintenance granted to the minor.

8. I have gone through the record and after hearing the arguments, am of the view that reading of the material available on record do prove that apparently, Nasir Ahmad is a man of means and not only that he can easily afford the payment of maintenance as has been fixed by the courts below but also the annual increase therein would not be a burden beyond his capacity and known means.

To some extent the learned counsel for Nasir Ahmad is justified in challenging the findings of the learned first appellate court on issue No.2 wherein with reference to Exh.P.18, the school fee of the minor has been shown as Rs.7725/- per month. The perusal of document Exh.P.18, a fee challan for tuition fee issued by the Educators Pre-School, Model Town Campus, Gujranwala reveals that total dues against tuition fee etc. per month were charged through said document as Rs.3500/- whereas an amount of Rs.3945/- has been shown as arrears and total payable through said challan form was shown as Rs.7725/- which has been taken as a monthly fee payable with regard to the minor by the learned first appellate court. To that extent, the view taken needs modification and it is accordingly modified and the monthly fee of the minor for the year 2010 is ordered to be presumed as Rs.3500/-. The learned trial court by presuming the monthly school fee of the minor as Rs.7725/- has maintained the rate of maintenance at Rs.9000/- which by consideration of the admitted monthly income of Nasir Ahmad at Rs.25,000/- seems to be at some higher scale and when 10% annual increase has also been imposed, there is a justification in reducing such rate of maintenance and as such the rate of maintenance from April, 2010 onwards is ordered to be reduced to Rs.9000/- per month to Rs.6000/- per month with 10% annual increase therein. With regard to remaining findings both the sides have failed to convince the Court with regard to their respective claims and as such the remaining findings of the courts below are affirmed.

9. Now this Court is going to deal with issue of validity and legality of annual increase as is being granted by the family courts, particularly, when the maintenance is being granted to the minors. The learned counsel for Nasir Ahmad has relied upon the above mentioned three judgments, two from this Court and one from the Hon'ble Supreme Court of Pakistan. This Court in Muhammad Anwar's case (Supra) is of the view that annual increase in the payment of maintenance to the minors is not provided in any provision of Family Courts Act, 1964 and that it is for the legislature to take into consideration, the growing prices of articles of daily use where after the same could legislate the law for imposing the annual increase but by the time such amendment is not made through some legislation, the courts have no jurisdiction to impose or levy any increase which lacks the statutory sanction.

In M. Umer Fraz's case (Supra), again this is the view of the same Bench of this Court that annual increase in the maintenance has no statutory sanction and that duty of the court is to implement the law as has been enacted and that the courts are not to be allowed to challenge the wisdom of legislature. In the same report the learned Judge is of the view that in such cases the courts are being used as tool to impose the penalty over the father.

The Hon'ble Supreme Court of Pakistan, in Khadeeja Bibi's case (supra), when the question of imposition of annual increase was raised before, has held that in absence of any evidence on the point of annual increase, the courts should refrain from imposing such annual increase in the payment of maintenance to the minors and further observed that parties in suit for maintenance are to be allowed to produce evidence on the point of annual increase and then the court should proceed to decide as to the quantum of annual increase.

10. The maintenance as is defined in paragraph 369 of Muhammadan Law by D.F. Mulla includes food, raiment and lodging and by virtue of paragraph 370 of the same collection, a father is bound to maintain his sons until they have attained the age of puberty and their daughters until they are married.

The term "maintenance" is defined in Black's Law Dictionary (Eighth Edition) as financial support given by one person to another.

11. In Pakistan for expeditious settlement and disposal of disputes relating to marriage and family affairs and matter connected therewith, Act XXXV of 1964 known as West Pakistan Family Courts Act, 1964 was promulgated. Section 5 whereof provides jurisdiction to the Family Court to entertain, hear and adjudicate upon matters specified in Part-1 of the Schedule. In the Schedule at serial No.3 subject of maintenance is provided. It is pertinent to note that while giving the jurisdiction to the Family Courts to hear, entertain and decide the matters relatable to the maintenance, no limitations are provided either in Section 5 of the West Pakistan Family Courts Act, 1964 or Schedule provided thereunder as to, to what extent the rate of maintenance can be fixed. It is left open for the courts to determine and it is always the financial and social status of the parties, the requirements of the persons to whom the maintenance is to be granted and the evidence of the parties proving such requirements that the Family Courts are independently allowed to fix the rate of maintenance. This is the reason that in every case the rate of maintenance varied for the reason that this has been left upon the discretion of the courts that at whatever rate they deem appropriate the rate of maintenance can be fixed. Then in conspicuous absence of any prohibition in the statutory provisions providing the maintenance to the needy minors, how a restriction can be imposed as to the power of the court to order annual increase in the already fixed maintenance. So with respect, the view taken in "Muhammad Anwar and M. Umar Fraz's case (Supra)" is not being followed, particularly, on account of the fact that the view in Muhammad Anwar's case (supra) was taken on 26-9-2011 and in M.Umar Fraz's case (Supra), it was on 11-10-2011 and the Hon'ble Supreme Court of Pakistan in Khadeeja Bibi's case (Supra) observed on the subject on 21-2-2012 and further that the Hon'ble Supreme Court of Pakistan has not negated the concept of annual increase but only require

that before levy of annual increase in the maintenance the parties were to allow the production of evidence on such point.

12. The amendments carried out in the West Pakistan Family Courts Act, 1964 by means of Ordinance LV of 2002 i.e. Family Courts (Amendment) Ordinance, 2002 are of much significance for the present purposes. The view taken in the earlier two judgments of this Court to the effect that only legislatures are competent to provide an annual increase and in absence of any statutory sanction, the courts are not competent to grant such increase, is answered in the said amending Ordinance. By means of section 2 of the Ordinance, 2002, section 5 of West Pakistan Family Courts Act, XXXV 1964 was amended and sub-section (3) was added in section 5 in the following manners:--

"Section 5(3). The High Court may with approval of the Government, amend the schedule so as to alter, delete or add any entry thereto".

Thus keeping in view the dictum laid down in Khadeeja Bibi's case (Supra) by the Hon'ble Supreme Court of Pakistan, the power to grant annual increase in the maintenance to the minors will be available to the Family Courts but with a condition that evidence on the point must be available on the record and secondly no reference is required to legislature in presence of power available to this Court as was granted by the legislature itself by means of section 5(3) of West Pakistan Family Courts Act, 1964 as amended up to date.

A recommendation to the Administration Committee or Full Court would be justified to add an entry at serial No.3 of the Schedule to West Pakistan Family Courts Act, 1964 by addition of annual increase in the already existed entry of maintenance.

13. The concept of annual increase in the maintenance would further get strength from the fact that no fixed rate of maintenance is provided by the legislature and as noted earlier, it was always dependant on the circumstances of each case that the Judges, hearing the family cases in their own wisdom and on the basis of available material they fix the rate of maintenance, for the reasons that every year the minor grows elder by at least one year and with growing age the basic requirements of life are also grown and during near past, we have experienced that on every year the prices in open market raised. The rate of inflation is increasing day by day. The price hike indicators are always on higher scale and the persons having their emoluments from public sector are benefited every year with increase in their financial home carries.

14. The Family Courts are always deemed to exercise their parental jurisdiction and are supposed to look into the future needs of the minors to whom they are giving maintenance in their age of infancy or tender age. The maintenance should not be considered as a charity and the dignity of minors is to be maintained which every citizen under the Constitution of Pakistan has a right that he should be respected. The minor is not supposed to make a person to stand in attendance before father every year or to appear before the Family Courts with folded hands for annual increase of maintenance. This would be violative to the dignity of a person as is guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973.

15. Hence while disposing of both the writ petitions, the decrees granted by both the learned courts below are modified as indicated in para. 8 above. It is further observed that annual increase in the payment of maintenance to the minors by the father can lawfully be imposed by the Judges in Family Courts.

16. The Registrar of this Court is directed to place this judgment before the Hon'ble Chief Justice with a view to add suitable entry against column No.3 of the Schedule provided in Family Courts Act, 1964 by exercising the powers provided in section 5(3) of the Act.

SAK/N-9/L Petition dismissed.

P L D 2013 Lahore 473
Before Ibad-ur-Rehman Lodhi, J
GHULAM RAZA---Petitioner
Versus
THE STATE and another---Respondents

Criminal Revision No.431 of 2012, decided on 11th January, 2013.

(a) Criminal Procedure Code (V of 1898)---
----S. 514---Bail bond, forfeiture of---Order for attachment of property---Non-issuance of show cause notice---Effect---Petitioner stood surety for accused who was allowed bail---Accused absented himself from a date of hearing as a result of which Trial Court issued notice to the petitioner for appearance and proceeded to impose a penalty of Rs.10,000 upon him and also issued warrant for attachment of moveable property belonging to petitioner, in case he failed to deposit the said amount within one week---Legality---No show cause notice was available on file and simply notice for appearance was issued to petitioner, which was treated as a show cause notice---Petitioner did appear before the Trial Court but despite such fact he was shown as someone who was playing hide and seek with the court---Nothing existed on record to substantiate such a finding of the Trial Court---Trial Court passed the impugned order without observing the necessary steps, which had to be taken prior to imposing a penalty upon the surety---Impugned order of Trial Court was set aside---Revision petition was allowed accordingly.

(b) Criminal Procedure Code (V of 1898)---
----S. 514---Bail bond, forfeiture of---Procedure---Scope---For proceeding under S.514, Cr.P.C. court was bound to establish that the bond under Cr.P.C. furnished by surety had been forfeited; to record grounds of proof of such forfeiture, and to call upon the person bound by such bond (i.e. surety) to pay the penalty thereof, or to show cause why it should not be paid---Where sufficient cause was not shown and penalty was not paid, the court might proceed to recover the same by issuing a warrant for the attachment and sale of movable property belonging to such person (i.e. surety) or his estate, if he was dead---Where such penalty was not paid and could not be recovered by attachment or sale (of property), the person so bound (i.e. surety) should be liable to imprisonment in civil jail for a term, which might extend to 6 months.

Muhammad Bilal v. State 2000 YLR 2676 ref.
Ch. Zia-ur-Rehman Abid for Petitioner.
Muhammad Abdul Wadood, Deputy Prosecutor-General for the State.

ORDER

IBAD-UR-REHMAN LODHI, J.---The present petitioner, stood surety for Mohammad Ishaq-accused in case F.I.R No. 162, dated 26-6-2012, registered under section, 365-B of P.P.C., at Police Station, Haveli Koranga, District Khanewal, who was allowed ad interim bail by this Court in Criminal Miscellaneous No.3837-B of 2012. However, on 20-9-2012, the accused-Mohammad Ishaq absented on the date of hearing in said Criminal Miscellaneous and not only his petition was dismissed but also the learned Sessions Court concerned was directed to proceed against the surety (the present petitioner) as envisaged under section 514 of Cr.P.C.

2. In compliance of said direction, the learned Sessions Judge, Khanewal, issued notice to the petitioner for his appearance and proceeded to pass an order dated 3-12-2012, whereby, a penalty of Rs.10,000 (rupees ten thousand only), which was deemed as equal to the amount of surety bond was imposed upon the petitioner (In fact the amount of surety was Rs.1,00,000). It was further directed that in case of failure to deposit the said amount within one week, warrant for attachment of the moveable property belonging to the surety was, issued to the District Officer (Revenue), Khanewal, and in case of non-payment of amount of bail bonds, the imprisonment of 3 months was announced.

3. The vires of the order as was passed by the learned Sessions Judge, Khanewal, on 3-12-2012, is called-in-question through the present proceedings.

4. I have heard the learned counsel for the parties and have gone through the record.

5. No Show Cause Notice is available on the file and simply a notice for appearance issued to the petitioner, has been treated as a Show Cause Notice. In response to the said notice for appearance, the petitioner appeared before the Court, but by marking his presence, he was still shown an accused of playing hide and seek with the Court on an imaginary plea with regard to the ailment of the accused person. There is nothing on record to substantiate such findings of the trial Court.

6. This Court in the case of Muhammad Bilal v. State 2000 YLR 2676 has dealt with the steps of proceedings to be taken against sureties under section 514 of Cr.P.C. and para-6 of the reported judgment would be relevant for the present purposes, which is reproduced herein-below:--

"6. Section 514 of the Cr.P.C. is not to be interpreted in such a grammatical way. It must be remembered that grant of bail is an essential part of the system of administration of justice. It avoids punishing someone in advance and ensures liberty until a case is duly enquired into and adjudged. Whereas, the release of accused persons on bail helps in preventing overcrowding in the already overcrowded prisons. People come forward to stand surety for the accused out of

ordinary fellow-fellings and invariably without any ambition for gain or benefit, rather for mere benevolence. Therefore, in dealing with cases of sureties who may be in default, a judicial mind is supposed to maintain a balance between undue leniency, which may be leading to abuse of the procedure and interference with the course of justice. Whereas, on the other hand, undue severity may lead to unwillingness on the part of neighbours and friends to come forward and give bail for persons under accusation. While maintaining this balance, the Courts are not supposed to act in a mechanical way. They are required to hold some sort of balance while determining to what extent a bond is to be forfeited. Some matters to be considered are: whether the sureties have any direct interest through financial or blood connection with the accused, whether they had connived with or procured the absence of the accused, and finally whether they have endeavoured sufficiently to secure the attendance of the accused".

7. In order to proceed under section 514 of Cr.P.C., a Court is bound to adopt the following procedure:--

(i) To get establish the fact that the bond under this Code furnished by the surety has been forfeited;

(ii) To record the grounds of the proof of such forfeiture;

(iii) To call upon the person bound by such bond to pay the penalty thereof; or

to show cause why it should not be paid;

(iv) If sufficient cause is not shown and penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of moveable property belonging to such person, or his estate, if he is dead (as endorsed by the District Officer (Revenue).

(vi) If such penalty is not paid and cannot be recovered by such attachment or sale, the person so bound shall be liable to imprisonment in Civil Jail for a term, which may extend to 6 months.

8. Examining the impugned order on the touchstone of the above requirements of law, it is but clear that the learned Sessions Judge, Khanewal, has acted in a rush and without observing the necessary steps to be taken prior to the order of imposing a penalty upon the surety, passed the impugned order.

9. As a result of the above discussion, it is held that the Sessions Judge adopted a self-styled procedure not warranted by law and the same is not sustainable. The impugned order passed on 3-12-2012 is set aside. The Sessions Judge, Khanewal, may proceed afresh against the surety-petitioner strictly in accordance with law and in view of the findings as have been given above.

10. This petition stands allowed.

MWA/G-14/L Petition allowed.

2013 P T D 821
[Lahore High Court]
Before Ibad-ur-Rehman Lodhi, J
Messrs YASIR ENTERPRISES through Ch. Basher Ahmed
Versus
FEDERATION OF PAKISTAN through Secretary and 7 others

Writ Petition No.6435 of 2009, heard on 21st January, 2013.

Customs Act (IV of 1969)---
----Ss. 179 & 169---Criminal Procedure Code (V of 1898), S. 265-K---Constitution of Pakistan, Art. 199---Constitutional petition---Alternate remedy----Import of goods---Prevention of smuggling---Quashing of F.I.R.---Consignment of petitioner was seized, show-cause notice was issued, and simultaneously a criminal F.I.R. in relation to smuggling was registered against the petitioner---Order-in-original was passed against the petitioner which was set aside by Customs Appellate Tribunal on the ground that the same was in violation of S. 179(3) of the Customs Act, 1969 and entire proceedings against petitioner were declared void ab inito---Said order having not been assailed by filing of Reference within prescribed period of limitation had attained finality---Petitioner, inter alia, sought quashing of the F.I.R. registered against him whereas the Department contended that petitioner had an alternate remedy available under S. 265-K Cr.P.C., therefore Constitutional petition was not maintainable---Held, that when the show cause notice had lost any relevance and efficacy, it could not be expected that the criminal court, on the same facts and material, could take some other view---Proceedings under S. 265-K of Cr.P.C. could only be pressed if challan was pending and trial had commenced; which had not happened in the present case---Since trial had not commenced there was no occasion with the Trial Court to frame a charge, therefore, it could not be said that remedy under S. 265-K Cr.P.C. was available to the petitioner---Since matter had become redundant, it would be an illusion to send the petitioner to face trial and the case was fit and proper for exercise of Constitutional jurisdiction of High Court---High Court directed that F.I.R. against the petitioner be quashed as there was no possibility of conviction, since the matter had become redundant---Constitutional petition was allowed, in circumstances.

Mian Abdul Ghaffar for Petitioner.
Muhammad Akhtar Qureshi with Syed Muhammad Ali Rizvi, Deputy Superintendent for Respondents Nos.2 to 8.
Date of hearing: 21st January, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The petitioner imported a consignment of 25 containers declared to be petroleum residue consisting of 3400 drums having net weight of 527000 kilograms from Jeddah Kingdom of Saudi Arabia. After taking samples from such consignment, the Customs authorities found the same as comparable with the High Speed Diesel. This resulted in the issuance of show cause notice dated 27-5-2009, by the Additional Collector in Customs Model Collectorate, Multan and simultaneously

registration of a criminal case by means of F.I.R No.01, dated 3-4-2009 in Investigation and Prosecution Branch of Model Customs Collectorate, Customs House, Multan. On the basis of show cause notice, the proceedings on original side were initiated, which culminated into passing of an Order-in-Original No.43 of 2010, dated 4-4-2011.

2. Being aggrieved of the said order, the present petitioner filed an appeal before the Collector of Customs (Appeals), Lahore, which was partly accepted so far as it relates to 14 containers, examined, assessedand cleared by the Customs authorities while the order-in-original in respect of rest of the consignment consisting of 11 containers was maintained vide order dated 10-11-2011, passed in appeal.

3. Such findings were challenged in Custom Appeal No.312-LB of 2011 before the Customs Appellate Tribunal Bench-II, Lahore and vide judgment dated 19-5-2012, the adjudication proceedings, as well as, the superstructure built thereon was declared to be infested with legal infirmities and in violation of the provisions contained in section 179(3) of the Customs Act, 1969, and according to the findings of the Appellate Tribunal, the subsequent proceedings were, thus, declared as void ab-initio and as a consequence thereof, the impugned order in appeal, as well as, order-in-original were set aside.

4. Through the present Constitutional Petition, not only the original proceedings, but also the steps taken in the meanwhile, including the auction of the seized material, registration of a criminal case etc., were called-in-question, and the act of registration of the criminal case against the petitioner without waiting the final outcome of the adjudication proceedings, was sought to be declared as illegal and mala fide on the part of respondents Nos.3 to 8, besides the same being premature.

5. Today, when the parties appeared with reference to the judgment dated 19-5-2012, passed by the Customs Appellate Tribunal Bench-II, Lahore, in Custom Appeal No.312/LB/2011, it has been pointed out that the orders passed in original, as well as, appeal in the adjudicating proceedings, have been set-aside and the remedy as provided under section 196 of the Customs Act, 1969, by filing a reference before this Court, has not been availed within the prescribed period of limitation and, thus, the same attained finality.

6. The adjudicating proceedings were initiated on the basis of a show cause notice dated 27-5-2009 and as noted earlier, the same ended into findings of the Tribunal, wherein such proceedings were declaredvoid ab initio. The findings so arrived at have attained finality.

7. The perusal of F.I.R. No.01, dated 3-4-2009, when considered in juxtaposition with the show cause notice, it comes out that both contain the same allegations and when in adjudicating proceedings within the departmental hierarchy, the proceedings have been declared as null and void ab initio, how on the same allegations, criminal proceedings could have been allowed to be continued, which in fact were initiated at some premature stage without waiting the result of adjudicating proceedings. The stance of the Department has been proved to be without substance and when the show cause notice has lost its any relevance and efficacy, it cannot be expected from the Criminal Court that on the same facts and same material, it can take some other view.

8. The learned counsel for the respondent-Department has half-heartedly conceded to the position that the findings arrived at by the learned Tribunal have not further been challenged and limitation provided for filing a reference before this Court has also elapsed, yet argued that the petitioner has an alternate remedy by moving an application under section 265-K, of Cr.P.C. before the Criminal Court and on account of availability of such alternate remedy, the petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, is not competent.

9. While entertaining this writ petition in this Court, it was ordered on 29-6-2010 that proceedings against the petitioner under F.I.R No.01, dated 3-4-2009, shall remain stayed and today I have been told that even the challan in the Criminal Court has not yet been filed. The proposed proceedings under section 265-K of Cr.P.C. can only be pressed, if the challan is pending before a Court and trial has commenced. There is no denial of the fact that trial in the criminal matters commences from the stage, when copies of prosecution documents are supplied to the accused facing trial, which stage had never reached in the trial on the basis of F.I.R No.01 of 2009. As noted above, the requirement of section 265-K of Cr.P.C. is that if the accused facing trial or inquiry, is/are not to be ultimately convicted in view of the trial Judge, then he/they can be acquitted of the charge/charges at any stage. In order to apply the provision of section 265 of Cr.P.C, there must be some charge and as noted earlier, when the trial is not commenced, there was no occasion with the trial Court to frame any charge; thus, it cannot be said that remedy under section 265-K of Cr.P.C. is available to the petitioner before the trial Court. Even otherwise, after final adjudication by the learned Tribunal with regard to the adjudication proceedings, it would be an illusion to send the petitioner to face trial of almost a redundant matter. This is a proper and fit case, where Constitutional Jurisdiction of this Court is to be exercised.

10. Resultantly, by allowing this writ petition, it is ordered that F.I.R No.01 of 2009, dated 3-4-2009, is liable to be quashed, as there is no possibility of any conviction on the basis of such F.I.R, particularly, keeping in view the outcome of the original proceedings, which culminated in the judgment dated 19-5-2012, passed by the Customs Appellate Tribunal.

11. This petition stands allowed and F.I.R. No.01 of 2009, dated 3-4-2009 is hereby quashed.

KMZ/Y-3/L Petition allowed.

2013 Y L R 2345
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
IFTIKHAR SALEEM---Appellant
Versus
SHAFA-UL-HAQ and 5 others---Respondents

Regular Second Appeal No.15 of 1993, decided on 8th March, 2013.

(a) Words and Phrases---
----"Agreement"---Definition.

(b) Specific Relief Act (I of 1877)---
----S.9---Suit for specific performance of agreement to sell---Valid agreement---Requirements---Defendant promises to sell part of his estate to plaintiff---Suit was decreed and Appellate Court upheld the judgment and decree---Non-presence of plaintiff's (promisee's) signature on the agreement---Effect---Agreement to sell, did not show the presence of plaintiff at the time of alleged execution of the document---Element of mutual under-standing in between two or more persons, which was a sine qua non for a valid agreement, was conspicuously missing---Agreement to sell did not show creation of any corresponding obligation of plaintiff to commit themselves to buy the property on certain terms and conditions---Document of agreement to sell lacked the basic requirements, which were necessary to constitute a document as a valid agreement---Judgment and decree passed by Trial Court was dismissed.

(c) Specific Relief Act (I of 1877)---
----S.9---Qanun-e-Shahadat (10 of 1984), Art.17(2)(a)---Suit for specific performance of agreement to sell---Suit filed by plaintiff was decreed and Appellate Court upheld the judgment and decree---Non-production of two marginal witnesses of agreement before the trial Court---Effect---In matters pertaining to financial or future obligations, if reduced in writing, the instrument should be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence should be led accordingly---Document introduced in the litigation as agreement to sell, pertained to financial and future obligations, which necessarily were to be proved by production of at least two marginal witnesses, as it was a mandatory requirement that evidence was to be led accordingly---Document had been shown witnessed by two persons but only one appeared and there was no explanation as to why the second one was not produced---Judgment and decree of trial Court was dismissed and appeal was allowed by High Court.

(d) Specific Relief Act (I of 1877)---
----Ss. 9 & 12(c)---Suit for specific performance of agreement to sell---Agreement containing uncertain terms---Unenforceable contract---Agreement to sell property did not mention description and boundaries of land---Effect---Total measurement of the estate, in the present case, had been shown as 1.57 acres and out of the whole estate, one kanal was shown to have been subject-matter of the agreement, but no description or boundaries of the said one kanal of land had been provided---Terms of agreement not having reasonable

certainty, could not be specifically enforced---Findings of two courts below were not in accordance with law---Appeal was allowed.

(e) Specific Relief Act (I of 1877)---
----S. 9---Limitation Act (IX of 1908), Art.113---Suit for specific performance---Limitation---No time period was fixed for performance of agreement---Suit was filed almost four years after the refusal of defendant from performance---Effect---Limitation for filing a suit for specific performance was three years either from the date fixed for the performance, or, if no date was fixed, from the time when the plaintiff had notice that performance was refused---Suit filed after four years from refusal of defendant was hit by limitation---Court below fell in error while holding the suit within time---Appeal was allowed.

(f) Civil Procedure Code (V of 1908)---
----Ss.100 & 101---Second Appeal---Scope--Additional grounds taken at appellate stage---Law provides a specific bar to consider any additional ground to determine the second appeal.

Ch. Mushtaq Ahmad Khan for Appellant.
Muhammad Ilyas Sheikh for Respondent.
Date of hearing: 6th March, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Earlier this Court on 7-10-2004 proceeded to dismiss this R.S.A. on stated non-compliance of the provisions of Order XLII Rule 2 of C.P.C., which findings were challenged before the Hon'ble Supreme Court of Pakistan, where on 2-11-2006, Civil Appeal No.2626 of 2006 was allowed and the judgment passed by this Court on 7-10-2004, as noted above, was set aside and the appeal was remanded back to this Court for its decision afresh on merits.

2. On 22-7-1984, a suit titled "Shafa-ul-Haq and another v. Iftikhar Salim and 4 others" was filed before the Civil Court seeking specific performance of an agreement to sell statedly arrived at on 9-6-1979 in between the plaintiffs of the suit and one Salim-ud-Din Ahmad Siddiqui, predecessor-in-interest of the defendants in the suit. It was the case of the plaintiffs that by means of such agreement, late Salim-ud-Din Ahmad Siddiqui promised to transfer a part of his estate known as Rink Estate/ Salim Estate, situated in Murree to the extent of 1-kanal. The consideration amount, according to the plaintiffs, was settled as Rs.60,000, out of which as earnest money, an amount of Rs.15,000 was paid by the plaintiffs and received by said Salim-ud-Din Ahmad Siddiqui and with regard to remaining Rs.45,000, it was settled that the same will be paid at the time of getting the sale-deed registered. According to the plaintiffs, the possession of the promised land was handed over to the plaintiffs in part performance of such agreement.

3. Defendants Nos.2 to 5 never contested the suit and it was only defendant No.1-Iftikhar Salim, who by filing a written-statement, contested the suit by specifically denying any alleged agreement on the basis of which the suit was filed. Filing of the suit was attacked on the point

of limitation and on the ground that in fact property vests in the Central Government, and it was only leasehold rights, which late Salim-ud-Din Ahmad Siddiqui was holding and unless there is No Objection Certificate issued by the Cantonment Board, Murree, which in the relevant area represents the Central Government, the transaction could not have been materialized. In the first round of litigation, in order to prove the execution of "agreement to sell", Raja Imtiaz Ahmad Taj, Advocate, a Member of Murree Bar, was produced as P.W.1, whose statement was recorded without administering oath to the said witness and he was introduced in the evidence sheet as counsel representing the plaintiffs, whereas, plaintiff No.1 appeared as P.W.2, who deposed to the effect that before entering into agreement to sell with Salim-ud-Din Ahmad Siddiqui (deceased), he never attempted to see the title deed of said Salim-ud-Din Ahmad Siddiqui and it was only on the satisfaction of Raja Imtiaz Ahmad Taj, Advocate, with regard to the title of Salim-ud-Din Ahmad Siddiqui that the said witness accepted the same as valid and entered into agreement. The contesting defendant appeared as DW.3.

4. The learned Civil Judge, seized of the matter, proceeded to decree the suit of the plaintiffs vide judgment and decree dated 4-5-1988 and accepted the agreement Ex.P.1 as a valid document for the simple reason that Raja Imtiaz Ahmad Taj, Advocate, a Senior Member from Murree Bar, appeared as P.W.1 and his statement cannot be disbelieved. Such findings were arrived at by the learned Civil Judge notwithstanding the fact that the statement of P.W.1 was recorded without any oath.

5. The learned first appellate court has appreciated this fact that the statement of P.W.1, as was recorded, has no value under the law and, thus, on 24-3-1991 allowed the appeal, set aside the judgment and decree passed by the learned trial Court and remanded the matter back with a direction to record the statement of P.W.1 on oath and then to decide the case afresh. To the extent of the direction to decide the suit afresh by the learned trial Court, the judgment of the learned first appellate court was challenged before this Court in FAO No.40 of 1991 and the same was allowed on 6-8-1991, when it was directed that the learned trial Court would only record the statement of P.W.1 on oath and then transmit the file of the matter to the learned first appellate court, which will be deciding the appeal afresh on merits. Afterrecording the statement of P.W.1 on oath on 27-10-1981, the file was placed before the learned first appellate court, where again on 27-7-1992, the appeal was dismissed maintaining the decree passed by the learned trial Court; hence, this present appeal.

6. The document on the basis of which whole of the matter is to be decided is Exh.P.1, which has been termed as an "agreement" by the plaintiffs and on refusal on the part of the defendants to accept the validity of the same and to act according to the settled terms therein, the specific performance was prayed for by filing the suit before the court of civil jurisdiction.

7. Exh.P.1 is before this Court. Although the names of the plaintiffs are mentioned in the title of this document as promisees, whereas, Salim-ud-Din Ahmad Siddiqui is mentioned in the said document as promisor, but the fact remains that this document contains apparently the signatures of Salim-ud-Din Ahmad Siddiqui, the promisor, and two witnesses only. The plaintiffs, who have been shown as promisees in Exh.P.1 have never put their respective hands on the said document.

8. The term "agreement" for disposal of the present appeal would be of much significance. According to the Black's Law Dictionary, Ninth Edition, the agreement means "A mutual under-standing between two or more persons about their relative rights and duties regarding past or future performances", whereas, "agreement of sale" is defined as "An agreement that obligates someone to sell and that may include a corresponding obligation for someone else to buy".

9. As noted above, Exh.P.1, which has been treated as an agreement to sell, does not show the presence of the plaintiffs at the time of alleged execution of the said document and, thus, the element of mutual understanding in between two or more persons, which is a sine qua non for a valid agreement, is conspicuously missing. Similarly, Ex.P.1 does not show to create any corresponding obligation for the plaintiffs to commit themselves to buy the property on certain terms and conditions. The document, therefore, lacks the basic requirements, which are necessary to constitute a document as a valid agreement.

10. Even if, for a moment, it is presumed that Exh.P.1 was a document arrived at in between the parties and witnessed by two persons, the same again would lose its any relevance and validity, if tested on the touchstone of Article 17 of the Qanun-e-Shahadat, 1984, which in view of Article 17(2)(a), require that in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly. This clearly means that a document introduced in the litigation as agreement to sell, pertains to financial and future obligations, which necessarily to be proved by production of at least two marginal witnesses, as it is a mandatory requirement that evidence is to be led accordingly.

11. In this case, the document Exh.P.1 has been shown to have been witnessed by two persons i.e. Raja Imtiaz Ahmad Taj, Advocate and Zahid Zaman, out of them, only the first one appeared as P.W.1 and there is no explanation as to why Zahid Zaman was not produced. This has also not been the case of the plaintiffs that at the time of recording evidence, said witness Zahid Zaman was not alive. Not only the best evidence, which should have been produced to prove the execution of document Exh.P.1 has been withheld but also no explanation of its non-production has been placed before the courts.

12. Although P.W.1 has stated in his statement that the document Ex.P.1 was got typed by plaintiff No.1 Shafa-ul-Haq, but no Typist was named, nor any one was produced. Similarly, no stamp vendor from whom the stamp paper for execution of Exh.P.1 was purchased, appeared in the witness-box.

13. It is also noted that the total measurement of the estate has been shown as 1.57 acres and out of whole of the estate, 1-kanal was shown to have been subject-matter of the agreement, but no description or boundaries of the said agreed 1-kanal of land have been provided. In view of section 12(c) of the Specific Relief Act, 1877, a contract is not specifically enforceable, terms of which are not available with reasonable certainty; hence, findings of

the courts-below on Issue No.7 are not in accordance with law and are liable to be reversed, which are held accordingly.

14. On the point of limitation, which is reflected in Issue No.5, the courts-below again fell in an error while holding the suit within time. According to the plaintiffs' own showing, the agreement was arrived at on 9-6-1979 and in the month of June 1980, defendant No.1 was confronted by the plaintiffs with their entitlement, when the defendants refused to accept their any such status. Article 113 of the Limitation Act, 1908 provides a limitation for filing a suit for specific performance as three years either from the date fixed for the performance, or, if no date is fixed, from the time, when the plaintiff has notice that performance is refused.

15. In the present case, for the reason that in Exh.P.1, no time was fixed for performance of said agreement, the second part of the last column of Article 113 will be applicable and the limitation for filing a suit for specific performance would deem to be started from June, 1980, when the intention of the defendants in not accepting the agreement as valid one was expressed and performance of the same was refused by defendant No.1, as such, the suit filed on 22-8-1984 was certainly hit by limitation.

15. Although the parties have addressed their arguments touching the merits of the case on factual aspects, but this Court is conscience of the fact that R.S.A. is being heard, under section 100 of C.P.C., which provides the yardstick as to what is to be considered and decided in second appeal, which include the grounds as under:-

(a) the decision being contrary to law;

(b) the decision having failed to determine some material issue of law; and

(c) a substantial error or defect in the procedure.

and in view of section 101 of C.P.C., there is specific bar to consider any additional ground to determine the second appeal, therefore, I would restrict myself to such legal aspects of the matter and would not go in deep touching the factual aspects of the case.

16. The result of the above discussion is the judgments and decrees dated 4-5-1988 and 27-7-1992, passed by the courts-below respectively are contrary to law and the decision on the issues of law arrived at through the said impugned judgments and decrees, are not sustainable. This appeal is, therefore, allowed and the judgments and decrees passed by the courts-below, as noted above, are set aside and the suit filed by respondents Nos.1 and 2 stands dismissed, leaving the parties to bear their own costs.

JJK/I-19/L Appeal accepted.

PLJ 2013 Lahore 358
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD ISMAEEL--Petitioner
versus
S.H.O., POLICE STATION GULGASHT, DISTRICT MULTAN and another—Respondents

W.P. No. 5380 of 2012, decided on 3.12.2012.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code (V of 1898), S. 561--Prohibition (Enforcement of Hadd) Order, 1979, Arts. 3 & 4--Quashing of FIR--Allegation of recovery of liquor and raw material for preparation of liquor--Only offending material was recovered and not the accused--Failed to connect accused with premises--Validity--No justification to continue with registered F.I.R. against petitioner, which was to be culminated with no positive result for prosecution--It will be a sheer wastage of time of Court to put case on trial--Such like cases must be buried in their inception--FIR was quashed. [P. 359] A

Rana Khalid Mahmood, Advocate for Petitioner.

Mr. Muhammad Aurangzeb Khan, Asstt. A.G. for Respondents.

Date of hearing: 3.12.2012.

Order

The petitioner seeks quashment of F.I.R No. 221, dated 27.03.2012, registered under Articles 3/4 of the Prohibition (Enforcement of Hadd) Order, 1979, at Police Station, Gulgasht, District Multan.

2. The case has been registered on the allegation of recovery of liquor and raw material for preparation of said liquor under Articles 3/4 of the Prohibition (Enforcement of Hadd) Order, 1979.

3. From the contents of F.I.R., the petitioner has nowhere found participating either in any offence under Article 3 or Article 4 ibid. It is an admitted position that when the police raided the premises regarding which a spyinformation was available with the police, only some offending material was recovered and not the petitioner. The prosecution has failed to connect the petitioner with the premises from-where allegedly the contraband items were recovered.

4. The petitioner has completely refused his any connection with the premises raided and from where the material allegedly recovered. Even if the police prepare a challan under Section 173 of Cr.P.C, there is no remote possibility of conviction of the petitioner in the above given background. There is no justification to continue with the registered F.I.R against petitioner, which is otherwise to be culminated with no positive result for the prosecution. It will be a sheer wastage of time of the Court to put the present case on trial. Such like cases must be buried in their inception.

5. Resultantly, this petition is allowed and F.I.R No. 221, dated 27.03.2012, registered under Articles 3/4 of the Prohibition (Enforcement of Hadd) Order, 1979, at Police Station, Gulgasht, District Multan, is hereby quashed.

(R.A.) Petition allowed.

PLJ 2013 Lahore 377
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
FIDA MUHAMMAD--Petitioner
versus
PROVINCE OF PUNJAB through Collector Muzaffargarh & 4 others—Respondents

C.R. No. 535-D of 1999 and C.M. Nos. 898-C and 108C of 2011, decided on 10.12.2012.

Civil Procedure Code, 1908 (V of 1908)--

----O. XLI, R. 27 & S. 151--Additional evidence--Concept of--If Court from whose decree the appeal was preferred had refused to admit evidence which ought to had been admitted or appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, appellant might be allowed to produce such additional evidence or to cause production of witnesses to be examined and Court allowing such additional evidence was bound to record reasons for such admission of additional evidence--Although all documents intended to be produced in additional evidence relate to period prior to date of decision by First Appellate Court, neither any effort was made by petitioner nor First Appellate Court felt any requirement to ask for production of additional evidence--No mechanism to enable any party in such revision petition to pray for production of additional evidence in revisional jurisdiction. [Pp. 379 & 380] A, B & C

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Civil revision--Correction of order--Production of additional evidence--Revisional Court can revise and correct the orders passed by sub-ordinate Courts, but cannot correct the errors made by parties to the case. [P. 380] D

Additional evidence--

----Documents intended to be produced in additional evidence, came to knowledge of petitioner but neither any particular point of time had been given as to when petitioner gained such knowledge nor any source of such information was provided--It was a vague assertion and errors, if made by a party to appeal, cannot be corrected by revisional Court. [P. 380] E

Civil Procedure Code, 1908 (V of 1908)--

----S. 115 & O. XLI, R. 27--Civil revision--Production of additional evidence--Scope of--Revisional Court is denuded from taking into consideration import of documents, new intended to be produced in additional evidence for first time at revisional stage--Production of additional evidence was required in order to arrive at just decision for exercising suo

motu power and it was no party right to agitate in order to fill-up gaps of its case. [P. 381] F & G

Malik Muhammad Rafiq Rajwana, Advocate for Petitioner.

Mr. Muhammad Aurangzeb Khan, Asstt. A.G. for Respondent.

Date of hearing: 10.12.2012.

Order

C.M. No. 898-C and 108-C of 2011

I propose to dispose of C.M. No. 898-C of 2011 in Civil Revision No. 535-D of 1999 and CM No. 108-C of 2011 in Civil Revision No. 536-D of 1999, as in both these petitions, production of additional evidence is prayed for.

2. First appeal i.e. Civil Appeal No. 7-13 of 1999 was decided by a learned Additional District Judge, Kot Addu, camp at Muzaffargarh, on 09.07.1999. The findings arrived at by the said first appellate Court were challenged in Civil Revision No. 535-D of 1999. Once it was heard and the judgment was reserved, but before the judgment was announced, C.M.No. 898-C of 2011 was filed from petitioner's side under the provisions of Order XLI Rule 27 read with Section 151 of CPC for additional evidence and rehearing of the case.

3. It is the contention of the petitioner in the CM that after completion of arguments in the revision petition in this Court, the issuance and existence of under-mentioned documents, which in his opinion, have material bearing upon the facts of the case, came to his knowledge :--

"1. Application of the contractor of Trimmu Barrage (Indical/Same).

2. The letter of the S.E to the Chief Engineer Irrigation dated 27.01.1998 recommending the rebate.

3. The Notification dated 16.7.1998 (which further clarifies the position)

4. Decision of S.E Heveli Canal Circle Multan dated 14.8.1998 in Arbitration."

and, thus, the acceptance of such documents in additional evidence was prayed.

4. The contention, as has been raised by the petitioner, has seriously been opposed by the learned Law Officer with the assertion that the concept of production of additional evidence as provided under Order XLI Rule 27, CPC is not meant for revisional jurisdiction as it is provided only in Order XLI, which regulates the proceedings of appeals from original decrees.

5. In support of the CM., the learned counsel for the petitioner has reiterated the version taken in the CM and with the help of the cases reported as Haji Muhammad Zaman vs. Zafar Ali Khan and others (PLD 1986 Supreme Court 88), Ghulam Muhammad and another vs. Muhammad Aslam and others (PLD 1993 Supreme Court 336) and Ghulam Muhammad vs. Mian Muhammad and another (2007 SCMR 231), has contended that even in revisional jurisdiction, this Court has ample powers to allow production of additional evidence.

6. I have considered the arguments of the learned counsel for the petitioner, as well as, the learned Law Officer and after going through the record, I am of the view that the contention of the petitioner has no force.

7. In view of the provisions of Order XLI Rule 27, CPC, only if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellant may be allowed to produce such additional evidence or to cause the production of witnesses to be examined, and the Court allowing such additional evidence is bound to record the reasons for such admission of additional evidence.

8. In the case, in hand, although all the documents intended to be produced in additional evidence relate to the period prior to the date of decision by the learned first appellate Court, which is 09.07.1999, but till such date, when the first appeal was pending before the first appellate Court, neither any effort was made by the petitioner nor the first appellate Court felt any requirement to ask for production of any additional evidence,

9. Even otherwise, the provisions of Order XLI Rule 27, CPC are strictly applicable to the proceedings to be carried out in appeals against original decrees. Section 115, CPC, itself is a complete code, which provide no mechanism to enable any party in such revision petition to pray for the production of additional evidence in revisional jurisdiction.

Keeping in view the contents of Section 115, CPC, it can safely held that the revisional Court can revise and correct the orders, passed by the subordinate Courts, but cannot correct the errors made by the parties to the case. CM, under discussion, is essentially intended to put a cover on the omission of the revision petitioner before the First appellate Court in not moving that Court for production of additional evidence.

10. Although in the CM., it has been noted that after the arguments in the revision petition, the documents intended to be produced in additional evidence, came to the knowledge of the petitioner, but neither any particular point of time has been given as to when the petitioner gained such knowledge nor any source of such information has been provided. It is a vague assertion and the errors, if made, by a party to appeal, cannot be corrected by the revisional Court. The revision petition is not meant to fill up the lacunae left by the parties to the lis.

11. In Ghulam Muhammad's case (PLD 1993 Supreme Court 336), para-9 of the same would be relevant for the present purposes, which is reproduced herein-below:--

"9. Upshot of the discussion on the point briefly stated is that under Order XLI, Rule 27, CPC appellate Court is competent to record additional evidence but if that Court acts illegally or with material irregularity and on that account factual error is committed then in revision additional evidence can be admitted in a fit and proper case for clarification if that is essential for just decision of the case".

From the perusal of the above findings of the apex Court, it is thus clear that if in exercise of the jurisdiction vested in the first appellate Court under the provisions of Order XLI Rule 27, CPC, the appellate Court acts illegally or with material irregularity and on that account some factual error is committed only then in revisional jurisdiction, additional evidence can be admitted in a fit. and proper case for clarification if that is essential for just decision of the case.

12. As noted earlier, the revision petitioner has never opted before the first appellate Court to invoke its jurisdiction under the enabling provisions for additional evidence, thus, no question of any illegality or irregularity on the part of the first appellate Court in dealing

with such prayer arises, therefore, the revisional Court is denuded from taking into consideration the import of the documents, now intended to be produced in additional evidence, for the first time, at revisional stage. I am fortified by holding this by an authoritative judgment of the Hon'ble Supreme Court of Pakistan in the case of Mohabbat v. Asadullah Khan etc. (PLD 1989 SC 112).

13. Similarly, in Ghulam Muhammad's case (2007 SCMR 231), it was held with regard to only public documents, authenticity and genuineness of which could not be doubted to be brought on record even in revisionaljurisdiction. The documents intended to be produced in the case, in hand, are not public documents of such character, which can per-se be entertainable in evidence without first introduction of the relevant witnesses to be in the witness-box. I am afraid this practice cannot be permitted in revisional jurisdiction to allow the examination of witnesses and then through such witnesses, the production of documents.

14. With reference to the case of Mst. Fazal Jan vs. Roshan Din and 2 others (PLD 1992 Supreme Court 811), it is the contention of the learned counsel for the petitioner that suo motu exercise of power as provided in Section 115, CPC are justified in circumstances.

Again the argument of the Learned counsel for the petitioner is not convincing one, as for exercise of suo motu power under Section 115 of, CPC, it is always the opinion of the Court to be based on some reasoned order that some extraordinary direction can be issued, whereas, in the present case, it was never felt by the Court itself that in the case, production of additional evidence is required in order to arrive at just decision for exercising the suomotu power and it is no party's right to agitate in order to fill up the gaps of its case.

15. The peroration of the above discussion is that the applications, under consideration, are not maintainable and the same are dismissed.

16. The office is directed to fix Civil Revision No. 535-D of 1999, as well as, Civil Revision No. 536-D of 1999 for arguments on any date according to the convenience of the schedule.

(R.A.) Applications dismissed.

PLJ 2013 Cr.C. (Lahore) 730
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD ASHFAQ--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 1316-B of 2013, decided on 24.4.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 397, 412--Bail, grant of--Allegation of murder--This was a blind murder and according to the complainant on the following day of death of his wife, the body of the deceased was found lying in the washroom of the house--Initially suspicion was raised against one and one unknown person--By means of a supplementary statement, the present petitioner was implicated again on suspicion and at that point of time two prosecution witnesses were introduced by assigning them a role that they

had seen the accused, present petitioner, while coming out the house of the deceased at the relevant time when probably the occurrence was committed--The extra judicial confession of the present petitioner had also been shown before his maternal uncle, a private person--On his arrest, the recovery of some gold ornaments and cash had also been shown but such recovery was nothing but a padding on the part of the police, as in originally registered FIR, the complainant never complained against any theft or missing of any item including jewelry or cash--In such like unwitnessedcases, heavy burden lies on the prosecution to bring home guilt in the accused person, which is not possible without regular trial the same reportedly has not yet commenced--In such like cases of weak evidence, for present, the petitioner cannot be kept behind the bars for an indefinite period--Bail allowed. [P. 731] A

Mr. James Joseph, Advocate for Petitioner.
Mr. Ayaz Ali Khanzada, Advocate for Complainant.
Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General Punjab for State.
Date of hearing: 24.4.2013.

Order

Through this petition, the petitioner seeks post arrest bail in case FIR No. 70/2012 dated 29.02.2012 registered under Sections 302, 397, 412, PPC at Police Station Alpa District Multan.

2. This was a blind murder and according to the complainant on the following day of death of his wife, the body of the deceased was found lying in the washroom of the house. Initially suspicion was raised against one Nasir and one unknown person. However, on 03.03.2012 by means of a supplementary statement, the present petitioner was implicated again on suspicion and at that point of time two prosecution witnesses Muhammad Maqsud and Javedwere introduced by assigning them a role that they have seen the accused, present petitioner, while coming out the house of the deceased at the relevant time when probably the occurrence was committed. The extra judicial confession of the present petitioner has also been shown before his maternal uncle, a private person. On his arrest, the recovery of some gold ornaments and cash has also been shown but such recovery is nothing but a padding on the part of the police, as in originally registered FIR, the complainant never complained against any theft or missing of any item including jewelry or cash. In such like unwitnessed cases, heavy burden lies on the prosecution to bring home guilt in the accused person, which is not possible without regular trial, the same reportedly has not yet commenced. In such like cases of weak evidence, for present, the petitioner cannot be kept behind the bars for an indefinite period.

3. In view of what has been discussed above, this petition is allowed and petitioner Muhammad Ashfaq is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail allowed.

PLJ 2013 Lahore 481 (DB)
[Multan Bench Multan]
Present: Muhammad Yawar Ali and Ibad-ur-Rehman Lodhi, JJ.
SAIF ULLAH SALEEM ARSHAD and another--Petitioners
versus
STATE and 2 others--Respondents

W.P. No. 2902 of 2013, heard 23.4.2013.

Constitution of Pakistan, 1973--

----Art. 199--Anti-Terrorism Act, 1997, Ss. 7 & 23--Pakistan Penal Code, (XLV of 1860), Ss. 324, 336-B & 337-F(i)--Transfer of trial proceedings to Court of ordinary jurisdiction--Lacking of spread of sense of insecurity and fear in common mind--Validity--Occurrence took place in a room of Hotel--It was not a public place and, therefore, element of striking terror or creating sense of fear in the people or any section of people was not made discernible in FIR--Offences would have nexus with object of Act proceedings of trial of case were ordered to be transferred to Court of ordinary jurisdiction. [P. 483] A & B

M/s. Rana Muhammad Asif Saeed, Muhammad Afzal Jatt and Rana Muhammad Nadeem Kanjoo, Advocates for Petitioners.
Ch. Faqir Muhammad, Advocate and Mirza Muhammad Saleem Baig, Addl. A.G. for Respondents.
Date of hearing: 23.4.2013.

Judgment

Ibad-ur-Rehman Lodhi, J.--After having been involved in a criminal case registered through FIR No. 725/12 dated 10.11.2012 under Sections 324, 336-B, 337-F(i), PPC and 7 Anti-Terrorism Act, 1997 in Police Station Chehlyak District Multan, the petitioners were put to trial by the Special Court, constituted under Anti-Terrorism Act in Multan. Before the charge was framed by the Special Court, an application under Section 23 of Anti-Terrorism Act, 1997 was moved before the learned trial Court seeking transfer of the trial proceedings to the Court of ordinary jurisdiction. The learned Trial Judge after taking up the application on 05.03.2013 proceeded to dismiss the same and directed that the charge be framed against the petitioners.

2. The findings arrived at by the learned Special Judge Anti-Terrorism Court-I, Multan have been challenged through the present proceedings wherein a pre-admission notice to Respondents No. 1 and 3 was ordered to be issued by this Court on 11.03.2013. Today with the consensus of the parties, the petition is being treated as admitted one and final hearing was provided to the parties.

3. In support of the petition, the learned counsel for petitioners after making reference to preamble of Anti-Terrorism Act, 1997 Section 6 thereof and Section 336-B of PPC have submitted that by no stretch of imagination, the case falls within the ambit of "Terrorism" and therefore, dismissal of application moved under Section 23 of Anti-Terrorism Act, 1997 is illegal and impugned order is not sustainable.

4. Controverting the stance taken by the petitioners, it has been argued on behalf of the State and the complainant that for the reason that corrosive substance was used in order to cause

injuries to the complainant, therefore, irrespective of the fact that the alleged act come within the definition of "Terrorism" or not; the same is triable by the Special Court constituted under Anti-Terrorism Act, 1997, particularly for the reasons that such penal offence has been included in third Schedule to the said Act.

5. We have heard the learned counsel for the parties and perused the record with their assistance.

6. In exercise of power as provided under Section 34 of Anti-Terrorism Act, 1997, Government of the Punjab in Home Department by means of a notification dated 26.9.2012 deleted the Entry No. 6 in the third Schedule of the Act by virtue of which Section 336-B of PPC was made part of the said Schedule but on the very next day i.e. 27.09.2012 by way of another notification under the same powers, the Provincial Government added paras-IV & V in the third Schedule providing that in case a hurt is caused by corrosive substance, the offence would be triable by the Special Court under the Anti-Terrorism Act, 1997.

Section 6 of Anti-Terrorism Act, 1997 defines "Terrorism" which inter alia means that any act which create a sense of fear or insecurity in the Society or involves grievous violence against a person or grievous bodily injury or harm to a person would be called as "Terrorism". Significant to note that Section 336-B of PPC has specifically been deleted from third Schedule of the Anti-Terrorism Act, 1997 whereas subsequently the offence causing hurt by corrosive substance was added in the said Schedule.

Joint reading of preamble of Anti-Terrorism Act, 1997 Section 6 thereof and Section 336-B, PPC would lead us to conclude that the offences mentioned in the Schedule to Anti-Terrorism Act, 1997 should have nexus with the objects mentioned in Sections 6 and 7 of the Act.

7. In the present case, nothing has been brought on record to show that the alleged occurrence created terror, panic or sense of insecurity among people and the society. Even in FIR, got registered by the complainant, no allegation of creating terror was levelled. Motive for the occurrence as was shown is enmity inter-se the parties and for that reason, the application of Section 7 of the Act which primarily required the spread of sense of insecurity and fear in common mind was Licking in the instant case. Admittedly the occurrence took place in a room of a hotel. It was not a public place and therefore, the element of striking terror or creating sense of fear in the people or any section of the people was not made discernible in the FIR. The offences mentioned in the Schedule to the Act should have nexus with the object of the Act and the offence covered by Sections 6 and 7 thereof.

8. We are fortified in our such view by the dictum laid down in the cases of Mehram Ali and others versus Federation of Pakistan and others (PLD 1998 Supreme Court 1445), Ch. Bashir Ahmad versus Naveed Iqbal and 7 others (PLD 2001 Supreme Court 521), Basharat Ali versus Special Judge. Anti-Terrorism Court-II, Gujranwala (PLD 2004 Lahore 199), Fazal Dad Versus Col. (Rtd.) Ghulam Muhammad Malik and others (PLD 2007 Supreme Court 571) and Bashir Ahmed Versus Muhammad Siddique and others (PLD 2009 Supreme Court 11).

9. For what has been discussed above, we are of the view that the case as was registered against the petitioners is triable by the Court of ordinary jurisdiction and therefore, we allow this petition by setting aside the order dated 05.03.2013 passed by the learned Special Judge, Anti-Terrorism Court-I, Multan, Section 7 of Anti-Terrorism Act, 1997, as inserted in FIR,

is ordered to be deleted and resultantly the petition moved under Section 23 of Anti-Terrorism Act, 1997 is accepted, the proceedings of the trial of the case are ordered to be transferred to the Court of ordinary jurisdiction. The learned Special Judge, Anti-Terrorism Court-I, Multan is directed to transmit the record of the same to the learned Sessions Judge, Multan, who shall entrust it to some Court of competent jurisdiction.

(R.A.) Petition allowed.

PLJ 2013 Lahore 468
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD YASIR ANWAR--Petitioner
versus
VICE CHANCELLOR, BZU and 3 others--Respondents

W.P. No. 4259 of 2013, decided on 30.5.2013.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional Petition--Jobs in University including lecturer with qualification of M.A./B.Sc--Petitioner was appointed as lecturer on contract basis--Request to regularize in service was not responded--Added some more qualifications for obtaining by Semester Implementation Committee--Question of eligibility criteria for appointment of lecturer--Validity--Subsequent change in eligibility criteria and that too by completely irrelevant committee which was alient to scheme provided in rules cannot be relied upon in order to defeat right which already been accrued in favour of petitioner--Petitioner was eligible to be regularized in service of university as lecturer in computer engineering and university authorities had acted in illegality is not accepting his such status--Petition was allowed. [Pp. 471 & 472] A & B

2008 SCMR 598, ref.

Mr. Khadim Nadeem Malik, Advocate for Petitioner.

Malik Muhammad Tariq Rajwana, Advocate/Legal Advisor for Respondent/University.

Date of hearing: 30.5.2013.

Order

By means of an advertisement dated 24.07.2008, the respondent-Baha-ud-Din Zakariya University, Multan invited the applications from Pakistani Nationals for different jobs in the University including four vacancies of Lecturer in Computer Engineering with qualification of Master's Degree/B.SC.(Engineering) (First Class) in the relevant filed with no 3rd Division in the academic career, from HEC recognized University/Institution. No experience was required for the said job. The petitioner applied for the said job and by means of office Order No. PF/Cont.C Engg/Admin-1824, dated 11.02.2010, the Vice-Chancellor on the recommendations of the Director Academcis approved the recommendations of Selection Board arrived at in its 01/2009 meeting held on 10-11 January, 2009 and appointment of the petitioner was ordered as Lecturer in Computer Engineering in University College of

Engineering & Technology, on contract basis initially for a period of one year. A condition amongst others was imposed upon the petitioner in case of his acceptance of said job was to withdraw the earlier filed writ petition praying therein for the said job, which petition was withdrawn. The petitioner joined services of the University. By means of office Order No. PF/18/Cont.C.Engg./Admin-1250 dated 1.2.2011, the services of the petitioner were extended for a period of further one year from 11.02.2011 to 10.02.2012 in BPS-18. In similar manner, it was further extended vide office Order No. PF/18/Cont.C.Engg. /Admin-1469 dated 10.02.2012 till 10.08.2012 in the same scale.

2. The Registrar of the University, vide Notification No. Univ-597-Admin/8002, dated 12.08.2010 conveyed the decision of the Syndicate arrived at in its 5/2010 meeting held on 17.07.2010 for regularization of the services of contract faculty members who were appointed through Selection Board and completed two years services satisfactorily.

3. The petitioner having been appointed and joined the services in University on 11.02.2010 completed his two years service on 10.02.2012 and even before expiry of said period, he moved the concerned authorities in University for his regularization through application dated 15.11.2011 seeking his regularization w.e.f. 10.02.2012. The office Order No. Admin.UCE&T-22/11809 dated 03.12.2012 indicates that the petitioner even at that point of time was being treated as Lecturer in Computer Engineering in University and in his such capacity assigned the part time duties of Controller of Examination (Personal Computing Examination) for B.Sc. Computer Engineering Session 2011-2012 w.e.f. 01.12.2011 to 31.10.2012 with an additional remuneration for said additional work at the rate of Rs. 2000/- per month.

4. Having no response for his request to regularize him in the service, the petitioner again on 02.04.2013 sought the same relief which although has not been responded to but the petitioner was made to believe that he was not going to be regularized on the strength of a recommendation by Semester Implementation Committee arrived at in its meeting on 25.09.2012 which added some more qualifications for obtaining CGPA under Semester System and also a 1st Division under Annual System.

5. In such background, the petitioner prays for his regularization which prayer is seriously resisted by the University mainly on the plea that firstly the constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is not maintainable with regard to the affairs of the University and secondly that in view of the changed criteria as was recommended by the Semester Implementation Committee the petitioner was not qualified to be considered for regularization.

6. After hearing the learned counsel for the parties and going through the record, I find that in whole scheme of law deal with the affairs of the University and relevant chapter in calendar of University providing a process of selection and allied matters in the University, "Semester Implementation Committee" figures nowhere. It is only Syndicate, Senate and in some emergent situation the Vice Chancellor which are competent to take necessary steps to run the administrative affairs of the University. The addition in eligibility criteria for appointment of Lecturer as was recommended by said Committee is, thus, not sustainable and refusal on the part of University by placing reliance on such recommendations stands nowhere.

7. A right was accrued in favour of the petitioner on 10.02.2012 to be regularized on the strength of eligibility criteria provided by the Syndicate on 17.07.2010 and conveyed on 12.08.2010 which was in existence and holding the field on the relevant date, therefore,

eligibility of the petitioner was to be adjudged on the touchstone of the criteria prevailing on 10.02.2012, the relevant date in case of the petitioner when he completed two years service on contract, satisfactorily. The subsequent change in eligibility criteria and that too by completely irrelevant Committee which is alien to the scheme provided in the relevant rules cannot be relied upon, particularly, in order to defeat a right which has already been accrued in favour of the petitioner. The Hon'ble Supreme Court of Pakistan in a case reported as "Mian Tariq Javed versus Province of Punjab through Chief Secretary, Government of Punjab, Lahore and 2 others" (2008 SCMR 598) has authoritatively held that the principle of locus poenitentiae would not permit even the competent authority to undo any appointment even if found defective after a long time and the incumbent would not liable to be removed from service.

8. Learned counsel for the respondent-University has vehemently stressed for dismissal of the petition having not maintainable within the meaning of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

9. Hon'ble Supreme Court of Pakistan in a case reported us "Rana Aamer Raza Ashfaq and another versus Dr. Minhaj Ahmad Khan and another" (2012 SCMR 6) while dealing with a case relatable to Baha-ud-Din ZakariyaUniversity which incidentally is the respondent in the present petition also and on the question of maintainability of a constitutional petition with regard to affairs of University following was the dictum laid down:

"Adverting to the validity of the judgment under challenge, the submissions of petitioner's learned counsel qua the maintainability of petition before the High Court have been considered by us. However, we find that the impugned judgment even if having some element of jurisdictional defect has been passed in aid of justice and any interference would not be in record with the canons of equity".

10. Even otherwise, learned counsel for the respondent-University himself has placed reliance on the case reported as "University of the Punjab, Lahore and 2 others versus Ch. Sardar Ali" (1992 SCMR 1093) to contend that "normally" a right against a University would not be enforced by maintaining a constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The use of word "normally" in the saidreported judgment do indicate the intention and command of the Apex Court that there is no complete bar in entertaining the constitutional petitions dealing with the affairs of a University which otherwise is creation of a statue. The respondent-University is creation of Baha-ud-Din Zakariya University Act (III) of 1975.

11. For what has been discussed above, I am of the view that the petitioner was eligible to be regularized in service of the University as Lecturer in Computer Engineering w.e.f. 10.02.2012 and the University Authorities have acted in illegality in not accepting his such status.

12. Resultantly, this writ petition is allowed and the respondents are directed to treat the petitioner as a Regularized Lecturer in Computer Engineering w.e.f. 10.02.2012 and issue appropriate orders with all consequential benefits within next fifteen days.

13. I have been informed by the learned counsel for the petitioner that notwithstanding the fact that the petitioner is continuously performing his duties in the University, he is not being paid any salary/remuneration since August, 2012.

14. The University Authorities are also directed to immediately arrange the release of withheld remuneration of the petitioner again within a period of next fifteen days and to continue making payment in future without any break according to his entitlement.

(R.A.) Petition allowed.

PLJ 2013 Lahore 461
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
QAISAR KHAN & 74 others--Petitioners
versus
GOVERNMENT OF PUNJAB & 4 others--Respondents

W.P. No. 184 of 2013, decided on 15.5.2013.

Punjab Local Government Ordinance, 2001--

----Ss. 49(2) & 195--Post remand proceedings--Felt feasible to shift holding of such cattle market in order to avoid nuisance, traffic hazards, sanitation problem--Grievance was public notice issued by Administrator--Establishment of new cattle market--TMA had established a cattle market with all allied facilities and no other place will be permitted to be used as cattle market--Fee of Rs. 135/- per cattle as entry fee had been introduced according to schedule in newly established cattle market--However in addition to such entry fee, no other charges were being claimed either from sellers or purchasers of cattle--Even if one was licenced to establish and run a cattle market in private sector, receipt of commission would again be an action having no legal sanctity and no one can competently ask for decree of the Court--Petitioners or any other individual, if had any claim, as against their stated investments either in establishing cattle market or in providing some facilities there, they had every right to raise such claim in Court of law, where after recording of evidence--Petitioners had no vested right enforceable through constitutional jurisdiction of High Court--They were asking for a relief in negation of statutory provisions, which at no cost, can be granted--Petitions were dismissed. [Pp. 463, 465 & 466] A, D, E & F

Punjab Local Government Ordinance, 2001--

----S. 54--Conditions for grant of licence for private market or slaughter house--Exclusive power of a local government either to establish house or any part--Concept of private markets was although provided in Ordinance, but that had been made conditional with licencing system to be issued to such interested person desirous of establishing a private market within area of local government and without such licence functioning of any individual in business of any private market was nullity in the eyes of laws. [P. 465] B & C

M/s. Khalid Ashraf Khan and Mehmood Ashraf Khan, Advocates for Petitioners.

M/s. Ch. Sagheer Ahmad, Abdul Salam Alvi and Haji Malik Muhammad Aslam, Advocates and Mr. Aziz-ur-Rehman Khan, AAG for Respondents.

Date of hearing: 8.5.2013.

Judgment

With the concurrence of the parties, the hearing of this petition is being considered as a Pacca case.

2. Through this judgment, the instant writ petition, as well as, Writ Petition No. 324 of 2013 are to be disposed of together as similar questions of law and facts are involved in both the matters.

3. The Hon'ble Supreme Court of Pakistan while converting the Civil Petitions No. 223 and 268 of 2013 into appeals and by allowing the same remanded back the Writ Petitions No. 184 and 324 of 2013 to this Court for decision on merits, thus, in such post-remand proceedings, the parties were heard and record has been perused.

4. The background of the controversy pending since long is that from the time immemorial in Multan City, there has been a cattle market adjacent to the Shrine of Shah Shamas Tabraiz near Dolat Gate, Multan and by the passage of time, when such place became a part of almost centre of the city, it felt feasible to shift holding of such cattle market somewhere else in order to avoid the nuisance, traffic hazards, sanitation problem etc., which was started to be confronted to the inhabitants of the areas concerned and, therefore, the cattle market was shifted to an area, which was known as "village Samu Rana" in U.C.No. 48, Sher Shah Town, Multan at Southern Bypass in 2006.

5. Prior to such shifting, there have been deliberations by the local administration, wherein some persons, who were known as `Commission Agents' with regard to such cattle market also participated in the meetings held in order to consider the shifting or relocation of the cattle market and some private persons, including some Commission Agents were also assigned some responsibilities to arrange the purchase of land or to take some rented property on lease for holding such cattle market. After such shifting, there have been some disputes over the point of calculation of commission from sellers and purchasers of the cattle and also entry fee. By then, the Local Government felt its statutory duty to levy and collect such fee, whereas, the persons calling themselves as "Commission Agents" attained a self-styled role of collectors of such fee in their individual capacity and such controversy was either had been pending before this Court or before the Government. Everywhere, however, the status of Commission Agents was never accepted as per their own wishes, of having some claim to collect, what they call the commission, fee, tax or " "

6. Now what has been prompted to the petitioners to raise their grievance is a public notice issued by the Administrator, TMA Sher Shah Town, Multan, on 05.01.2013, under the provisions of Section 195 read with Sixth Schedule and Section 49(2) of the Punjab Local Government Ordinance, 2001, intimating that for onwards use, said Town Municipal Administration has established a cattle market at Shuja Abad Road, Multan with all allied facilities and no other place will be permitted to be used as cattle market. The fee of Rs. 135/- per-cattle as entry fee has been introduced according to the sanctioned schedule in the newly established cattle market. However, in addition to such entry fee, no other charges are being claimed either from sellers or purchasers of cattle.

7. Precisely, grievance raised by the petitioners is that notwithstanding the establishment of new cattle market, where earlier one has been ordered to be relocated, their right to carry out the business of administrating the affairs of cattle market at village Samu Rana would

remain intact and the respondent-authority viz. Local Government has no right whatsoever to cause interference into their such, what they have called "lawful business". In an indirect way, a compensation has been claimed by the petitioners for stated damage caused to some fixtures at previous cattle market at village Samu Rana over which according to petitioners, they have invested on the asking of Local Administration in year 2006. It has further been prayed that the claim of fee by the TMA Sher Shah Town with regard to such cattle market be also declared as illegal.

8. On 02.08.2001, feeling it expedient to devolve political power and decentralize administrative and financial authority to accountable local governments for good governance, effective delivery of services and transparent decision making through institutionalized participation of the people at grass roots level, the Punjab Local Government Ordinance, 2001 was promulgated. In view of Section 195 of the said Ordinance, every Local Government was empowered to perform functions conferred by or under the Ordinance and in performance of such functions was competent to exercise such powers and follow such procedures as are enumerated in the Sixth Schedule, thereof.

9. Section 49 of Sixth Schedule reads as under:--

"49. Public markets and slaughter-houses--(1) A local government may provide and maintain within its own local area public markets and public slaughter-houses, in such number as it thinks fit, together with stalls, shops, sheds, pens and other buildings or conveniences for the use of persons carrying on trade or business in or frequenting such markets or slaughter-houses and may provide and maintain in any such market buildings, places, machines, weights, scales and measures for the weightment or measurement of goods sold therein.

(2). The concerned local government may at any time, by public notice either close or relocate any public market or public slaughter-house or any part thereof."

By virtue of Section 53 of Sixth Schedule, the following provision was made:

"53. Private markets and slaughter-houses.--(1) No place in a local area other than a public market shall be used as a market, and no place in a local area other than a public slaughter-house shall be used as a slaughterhouse, unless such place has been licensed as a market or slaughter-house, as the case may be, by the concerned local government.

(2) Nothing in sub-paragraph (1) shall be deemed to restrict the slaughter of any animals in any place on the occasion of any festival or ceremony, subject to such conditions as to prior or subsequent notice as the concerned local government with the previous sanction of the local council may, by public or special notice, impose in their behalf."

Section 54 of Sixth Schedule provides conditions for grant of licence for private market or slaughter-house.

10. From the above referred scheme of law, it is, thus, clear that it is the exclusive power of a local government either to establish or relocate any public market or public slaughter-house or any part thereof.

11. The concept of private markets is although provided in the Ordinance, but that has been made conditional with a licencing system to be issued to such interested person desirous of establishing a private market within the area of that local government and without such

licence the functioning of any individual/individuals in the business of any private market is nullity in the eyes of law.

12. The petitioners, in both the petitions, have never surrendered to the jurisdiction of licencing authority i.e. Local Government by seeking permission to establish any private market, rather they only want to recognize their status of "Commission Agents" and to permit them to continue with their such illegal practice in an area, which once was being used as a public market and where according to their own claim, they have invested some amount for provision of some facilities felt necessary at the relevant time for establishment of a cattle market. In fact, what the petitioners want is a completely parallel system to that of a public market being legally run by the respondent-Local Administration and without adopting legal procedure to get licence before establishment of a private market, they intend to continue with their illegal practice under the cover of some judicial order.

13. If at any point of time, some individuals were associated in some arrangements of establishing a cattle market in public sector, either by investing some amount in purchasing/taking some property on lease or by providing some allied facilities in the cattle market once established at village Samu Rana, that would not provide any legal status to such individuals to claim that they have attained the right to collect what they have termed the "commission" from the sellers or purchasers of cattle using cattle market for such purpose. Even if, in past, any individual was associated in such like arrangements, that would not confer any right defeating the statutory provisions of law on the subject. One, who intends to involve in the business of cattle market by establishing the same in private sector, he has to undergo the licencing process as introduced in the Ordinance, without which, he has no right to establish or run a cattle market in private sector.

14. The term "commission" is alien to the scheme of law provided for the establishment of a cattle market, thus, even if one is licenced to establish and run a cattle market in private sector, the receipt of commission would again be an action having no legal sanctity and no one can competently ask for a decree of the Court in this regard.

15. The petitioners or any other individual, if have any claim, as against their stated investments either in establishing the cattle market at village Samu Rana or in providing some facilities there, they/he have/has every right to raise such claim in a Court of law, where after recording of evidence, adjudication can be made.

16. The petitioners have no vested right enforceable through the Constitutional Jurisdiction of this Court. They are asking for a relief in negation of the statutory provisions, which at no cost, can be granted.

17. For whatever has been discussed above, the petitions have no force and the same are dismissed.

(R.A.) Petitions dismissed.

PLJ 2013 Cr.C. (Lahore) 799
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
KHIZAR HAYAT--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1132-B of 2013, decided on 3.5.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(1)--Pakistan Penal Code, (XLV of 1860), Ss. 395 & 412--Bail, dismissal of--Allegation of--Offence of dacoity--Stolen truck--Role of the present petitioner from whom not only the stolen truck has been recovered but also 650 bottles of different brands of cold drink were also found in his possession which was subject matter of the said case of dacoity--Present petitioner was correctly identified in the identification parade--Case falls within the prohibitory clause of Section 497, Cr.P.C., thus petitioner was not entitled to bail--Bail dismissed. [P. 800] A

Mr. James Joseph, Advocate for Petitioner.

Mr. Shaukat Ali Ghouri, Addl. Prosecutor General Punjab for State.

Ch. Muhammad Dildar, Advocate for Complainant.

Date of hearing: 3.5.2013.

Order

Through this petition, petitioner seeks post arrest bail in case FIR No. 35/2012 dated 12.2.2012 registered under Sections 395, 412, PPC at Police Station Tibba Sultan Pur District Vehari.

2. Heard. Record perused.

3. The challan in this case has been submitted before the trial Court on 3.2.2013 and according to the learned counsel for complainant, the trial is underway. Keeping in view the role of the present petitioner from whom not only the stolen truck has been recovered but also 650 bottles of different brands of cold drink were also found in his possession which was subject matter of the said case of dacoity. The present petitioner was correctly identified in the identification parade which was held on 26.3.2012. The case falls within the prohibitory clause of Section 497, Cr.P.C., thus petitioner is not entitled to bail.

4. For what has been discussed above, this petition is dismissed. However, as reportedly the trial of the case has yet commenced, therefore, the learned trial Court is directed to expedite the proceedings of trial and preferably conclude the same by the end of July of this year.

(A.S.) Bail dismissed.

PLJ 2013 Lahore 553
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
SHAFIQUE AHMAD--Petitioner
versus
PUBLIC-AT-LARGE and 4 others--Respondents

C.R. No. 119 of 2012, decided on 5.6.2013.

Succession Act, 1925 (XXXIX of 1925)--

----S. 373--Succession was opened--Proceed to decide in summary manner as to right to succession certificate--Minor son through his real mother applied for getting succession certificate of legacy of deceased father before Civil Judge--Brother of deceased intervened in proceeding by putting claim--Matter was seized--Objections were over ruled and succession certificate was granted--Appeal was dismissed by First Appellate Court--Challenge to--While determining shares of legal heirs had come to conclusion that mother of deceased would inherit to extent of 4/24 shares whereas widow of deceased would be entitled to 3/24 shares equal to and son of deceased would be entitled to 17/24 share--Admittedly, mother of deceased had expired during pendency of succession proceeding and a few respondents as also petitioner, being legal heirs of pre-deceased would be entitled to get their respective shares from 4/24 shares of mother (now deceased)--Held: Petitioner had filed a declaratory suit before Civil Court which was still pending--Share of mother of deceased entitled would be exclusive ownership of persons, who were entitled to get same but in case of success of petitioner in civil suit, amount received would be liable to be adjusted accordingly as per final verdict in civil suit. [Pp. 555 & 556] A, B & C

Mr. Muhammad Ali Siddiqui, Advocate for Petitioner.

Mian Ahmad Mehmood, Advocate for Respondents No. 2 and 3.

Mr. M. Aftab Alam Yasir, Advocate for Respondents No. 4.a to 4.f.

Mr. Mumtaz Hassan Awan, Advocate for Respondent No. 5.

Date of hearing: 5.6.2013.

Order

When on 12.04.2009, Rafiq Ahmad, predecessor-in-interest of present Respondents No. 2 to 4 breathed his last, his succession was opened. Said deceased was survived through the following-legal heirs:--

(i) Mst. Allah Bachai mother

(ii) Mst. Shahnaz Bibi widow

(iii) Ahmad Hassan son

Ahmad Hassan, the minor son, through his real mother Mst. Shahnaz Bibi, applied for getting succession certificate of the legacy of his deceased father before the Civil Judge at Rajanpur.

2. Shafique Ahmad, brother of deceased Rafiq Ahmad, intervened in the proceedings by putting his claim against the property owned by the deceased Rafiq Ahmad in his life time, particularly, with regard to the saving certificates obtained by deceased from National Saving Centres.

3. In order to resolve such controversy, the learned Civil Judge, seized of the matter, proceeded to frame the issues reflecting such controversy and by means of order dated 02.11.2011, over-ruled the objections of ShafiqueAhmad and wanted succession certificate under the Succession Act, 1925 in favour of Ahmad Hassan, real son of the deceased Rafiq Ahmad, as also in favour of Mst. Shahnaz Bibi, widow of deceased, and the legal heirs of Mst. Allah Bachai, mother of deceased, who expired during pendency of the proceedings before the Civil Judge.

4. The petitioner Shafique Ahmad feeling himself aggrieved of such findings of the learned Civil Judge, preferred an appeal before the learned District Judge, Rajanpur, which was entrusted to an Additional District Judge at Rajanpur, who vide judgment dated 17.01.2012, proceeded to dismiss the same; hence, this revision petition before this Court.

5. Under Section 373 of the Succession Act, 1925 (XXXIX of 1925), the Court, which entertained the application, is suppose to proceed to decide the same in a summary manner as to the right to said certificate.

6. The Hon'ble Supreme Court of Pakistan in Dr. Saleem Javed and others vs. Mst. Fauzia Nasim and others (2003 SCMR 965) has held that the objector/intervener being not a legal heir of the deceased and that no Court had given any verdict in favour of such objector's claim as a charge on the property of the deceased, the provisions of the Succession Act, 1925, would not be helpful to such person to establish claim either to become a party in the application for grant of succession certificate to the applicants or raise any claim in the estate left by the deceased. Further held that the Court, seized of the matter, relating to the issue of succession certificate could not adjudicate the claim of third person against the deceased for the satisfaction of stated claim from deceased's property. The objector although real brother of deceased, but is considered as a stranger in the proceedings for grant of succession certificate to the legal heirs of the deceased and would have no locus-standi to allow him to join the proceedings, for, such proceedings are limited in nature to the extent of the determination of the rights of legal heirs of the deceased inter-se and scope of such proceedings cannot be enlarged to the settlement of the disputed claim and determination of liabilities of legal heirs of the deceased.

7. In case of Mst. Jameela Akhtar vs. Public-at-Large and others (2002 SCMR 1544), it has been held that such intricate questions of fact could not be decided in summary proceedings and the Hon'ble Supreme Court of Pakistan advised the person claiming his entitlement in the estate of the deceased to get establish the same by filing a civil suit. The payment from the estate of the deceased in accordance with the respective shares of the legal heirs was not stopped; however, it was left open that in case the objector ultimately succeeds in civil suit in establishing his right to certain extent in the estate of the deceased, then suitable adjustment will be permissible from the amount already received by the legal heirs on the strength of the succession certificate.

8. The Courts-below while determining the shares of the legal heirs have come to the conclusion that Mst. Allah Bachai, mother of Rafiq Ahmad deceased would inherit to the

extent of 4/24 shares equal to Rs. 1954036.50/-, whereas, Mst. Shahnaz Bibi, widow of deceased, would be entitled to 3/24 shares equal to Rs. 1465557.375/- and Ahmad Hassan, the son of the deceased, would be entitled to 17/24 shares equal to Rs. 8304655.125/-.

9. Admittedly, Mst. Allah Bachai, mother of deceased Rafiq Ahmad, expired during pendency of the succession proceedings and Respondents No. 4a to 4f as also the petitioner, Ahmad Hassan (son of deceased) and Mst. Shahnaz Bibi (widow of deceased), respectively, being legal heirs of pre-deceased son of Mst. Allah Bachai would be entitled to get their respective shares from 4/24 shares of Mst. Allah Bachai.

10. I have been informed during the course of arguments that the petitioner Shafique Ahmad has also filed a declaratory suit before the Civil Court on 06.03.2012, which is still pending. The share from Mst. Allah Bachai'sentitlement would be the exclusive ownership of the persons, who were entitled to get the same, but in case of ultimate success of the petitioner in civil suit, the amount received by Ahmad Hassan, and Mst. Shahnaz Bibi, son and widow of the deceased Rafiq Ahmad, would be liable to be adjusted accordingly as per the final verdict in the civil suit.

11. With these observations, finding no force in the revision petition, the same is dismissed.

(R.A.) Petition dismissed.

PLJ 2013 Lahore 556
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
M/s. LALA ZAR TEXTILE MILLS, etc.--Petitioners
versus
MUHAMMAD YASAR HAYAT, etc.--Respondents

W.P. No. 15914 of 2012, heard on 27.5.2013.

Civil Procedure Code, 1908 (V of 1908)--

----Ss. 2(2), 47 & O. XXI, R. 10--Suit for recovery was decreed--Execution application before executing Court--Objection petition was challenged by way of constitutional petition--Power of executing Court to determine all the questions arising between parties to suit--Validity--In view of S. 2(2), CPC, order passed u/S. 47, CPC had always considered to be a decree and was appealable--Order passed by executing Court exercising powers u/S. 47, CPC is not open to be impeached in constitutional jurisdiction as envisaged u/Art. 199 of Constitution--Petitioners had not challenged verdict of executing Court arrived at by latter while exercising power u/S. 47, CPC by means of any appeal oral most a revision--Remedies available under law had not been availed and in view of settled position that in presence of any alternate remedy constitutional petition was not maintainable--Petition was dismissed. [Pp. 558 & 559] A & B

Ch. Saghir Ahmad, Advocate for Petitioners.

Mr. Muhammad Iqbal Khan, Advocate for Respondent No. 2.

Date of hearing: 27.5.2013.

Judgment

The suit for recovery, filed by Respondent No. 2, was decreed by a learned Civil Judge, Sahiwal, to the extent of recovery of Rs. 64,48,279/- (rupees sixty four lac, forty eight thousand, two hundred and seventy nine only) alongwith 5% annual mark-up till payment of the suit amount with costs.

2. The petitioners herein being dissatisfied with the said decree challenged the same before this Court by means of RFA No. 24 of 2010, which came up for hearing before a learned Division Bench of this Court on 21.06.2011, when the appeal was dismissed and the decree, as was passed by the learned trial Judge, was upheld.

3. Still feeling disgruntled, the petitioners filed Civil Petition for leave to appeal having No. 1228-L of 2011, which came up for hearing before the Hon'ble Supreme Court of Pakistan on 20.03.2013, when the same was disposed of in the following manner:

"The learned counsel for the respondent has produced before us an interim order passed by the learned executing Court manifesting that the petitioners have already agreed to pay the due amount to the respondent which shows that they are no longer contesting the decree passed against them. The learned counsel for the petitioners has not been able to controvert this factual aspect of the matter as, according to him, he has not been instructed by the petitioners in that regard. From the above mentioned interim order passed by the learned executing Court it appears that a substantial portion of the decretal amount has already been paid by the petitioners to the respondent which shows that the petitioners are no longer interested in challenging the decree passed against them. In these circumstances the present petition has not appeared to us to be posing any live issue and, thus, the same is disposed of on that score. It goes without saying that if the petitioners wish to raise any relevant objection before the learned executing Court in respect of execution of the relevant decree then they may have recourse in that regard before the learned executing Court, if so advised".

4. The decree-holder filed an execution application under the provisions of Order XXI Rule 10 of CPC before the executing Court, where the judgment-debtor has filed an objection petition by maintaining that on the event of deposit of defence savings certificates by the judgment-debtor valuing Rs. 64,00,000/- (rupees sixty four lac only), the decree to the extent of payment of 5% mark-up stood ceased and the judgment-debtor was never specifically directed to make any payment in that regard.

5. The learned executing Court took up such objection petition on 17.03.2012 and after taking into consideration the conduct of the judgment-debtor with regard to the remaining amount, disposed of the objection petition with a direction to the judgment-debtor to pay the remaining decretal amount.

6. The disposal of the objection petition before the learned executing Court has been challenged before this Court by way of this Constitutional petition.

7. The learned counsel for the petitioners has argued that on payment of the amount of Rs. 64,00,000/- (rupees sixty four lac only) in shape of defence savings certificates, when they were not further asked to pay any additional amount of mark-up or costs, the judgment-debtor stood absolved from any further payment towards satisfaction of the decretal amount.

8. Responding to such contentions, the learned counsel for the decree-holder, Respondent No. 2 herein, has argued that front the trial Court up to the Hon'ble Supreme Court of

Pakistan, the decree stood maintained, rather it was never modified and it has to be executed in totality.

9. I have considered the respective arguments of both the sides and perused the record.

10. The objection petition was filed and disposed of within the meaning of Section 47 of CPC, which empowers the executing Court to determine all the questions arising between the parties to the suit in which the decree was passed and also the questions relating to the execution, discharge or satisfaction of the decree and no separate suit in this regard is permissible. Even before the promulgation of the Law Reforms Ordinance, 1972, in view of Section 2(2) of CPC, the order passed under Section 47 of CPC had always considered to be a decree and, thus, was appealable and this view has been confirmed by a Division Bench of Quetta High Court in Messrs SaadullahKhan & Bros. and another vs. The Province of West Pakistan and another (PLD 1971 Quetta 101), and after promulgation of the Law Reforms Ordinance, 1972, any order passed by the executing Court under Section 47 of CPC, would still be considered as an appealable order within the meaning of provisions of Section 104(l)(ff) of CPC. In aforesaid findings, I am fortified by the judgments rendered in Muhammad Ismail vs. Raja Muhammad Younis (2003 CLC 1252) and Muhammad Afzal and 4 others vs. Bashir Ahmed and 4 others (2007 YLR 2821).

11. This Court has proceeded further in case of Muhammad Akhar and others vs. Riaz Hussain and others (1995 MLD 1943) by holding that, where order passed by the executing Court is not appealable, a revision may be competent.

12. At any cost, the order passed by the executing Court exercising powers under Section 47 of CPC is not open to be impeached in the Constitutional Jurisdiction of this Court as envisaged under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The petitioners have not challenged the verdict of the executing Court arrived at by the latter while exercising powers under Section 47 of CPC by means of any appeal or at the most a revision. The remedies available under the law have not been availed and in view of the settled position that in presence of any alternate remedy available under the law, the Constitutional petition is not maintainable.

13. Even on merits, the decree as was granted by the learned trial Court on 10.11.2009 was neither upset nor modified in appeal before this Court and in petition before the Hon'ble Supreme Court. The same has to be executed in its entirely. The unsatisfied portion of the decree has to be satisfied by the judgment-debtor and there must be no escape with the petitioners to avoid their such established liability.

14. In view of the above peroration, I see no force in this writ petition, which otherwise is not a competent remedy under the law and, thus, the same is dismissed.

(R.A.) Petition dismissed.

PLJ 2013 Lahore 561
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
IMRAN AHSAN--Petitioner
versus
S.H.O., POLICE STATION SADDAR, MULTAN & another--Respondents

W.P. No. 3049-Q of 2013, decided on 29.3.2013.

West Pakistan Pure Food Ordinance, 1960 (VII of 1960)--

----Preamble--West Pakistan Pure Food Ordinance 1960 was promulgated in order to consolidate and amend law relating to preparation and sale of food in province--This will be called a special law on subject and provisions of Ordinance, 1960 would be construed strictly and would not be permitted to be intermingled with provision of general law rather would prevail over General Law. [P. 563] A

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), S. 561-A--Pakistan Penal Code, (XLV of 1860), S. 420--West Pakistan Pure Food Ordinance, 1960, Ss. 23-C & 32--Quashing of FIR--Lieutenant Colonel introduced as commandant station headquarter got registered FIR--Responsible for injecting water in carcasses of mutation and beef--An action was proposed to be taken--No lawful authority or competence to get registered a criminal case under provisions of Pure Food Ordinance--Validity--No Court would be competent to take cognizance of the matter is subsequently a report by local police is going to be placed before any Court on basis of FIR--Held: Action on part of complainant is not only an attempt to deviate from prescribed procedure provided under law but also an attempt to take law in his own hands by directing local police to take action under special which never empowered to attain status of complainant--Such un-authorized acts cannot be permitted--No further actions are permissible under law to be taken an strength of FIR--Registration of FIR was an illegal act--FIR was quashed. [Pp. 563 & 564] B & C

Mr. Aurangzeb Ghumman, Advocate for Petitioner.

Mr. Muhammad Aurangzeb Khan, A.A.G. for Respondents.

Date of hearing: 29.3.2013.

Order

Lieutenant Colonel Syed Zia Shabbir who introduced himself as Commandant Station Headquarters, Multan got registered an F.I.R. No. 42 on 18.01.2013 with Police Station Gulgasht, Multan under Section 420, PPC red with Section 23-C of West Pakistan Pure Food Ordinance, 1960 alleging therein that as a result of campaign against the persons responsible for injecting water in carcasses of mutton and beef, it was decided in the meeting of Garrison Commandants to take action against such persons responsible for such malpractice and therefore an action was proposed against firm under the name and style of `Ch. Nabi Ahmad & Company'. The present petitioner Muhammad Imran Ahsan was introduced as a frontman/agent of the firm and by getting registered the above noted criminal case, an action was proposed to be taken by the police.

2. The petitioner challenged the very registration of the F.I.R and sought its quashment.

3. Notice was issued to the respondents. Today, the learned A.A.G appeared as also a police officer from the concerned Police Station along with the record. The main stay of the petitioner is that the complainant of the case had no lawful authority or competence to get registered a criminal case under provision of West Pakistan Pure Food Ordinance, 1960 and the registration of the criminal case at the instance of the complainant and further proceedings in the case are thus nullity in law and are liable to be quashed.

4. On 11.03.1960, West Pakistan Ordinance VII of 1960 was promulgated under the name of West Pakistan Pure Food Ordinance, 1960 in order to consolidate and amend the law relating to preparation and sale of food in the province. This will be called a special law on the subject and thus the provision of said Ordinance would be construed strictly and would not be permitted to be intermingled with the provision of General Law rather would prevail over General Law. A specific procedure has been provided for filing of complaints and also specific person are nominated who can act as complainant in case of any violation of the provision of the said law. Section 32 of the said Act provides that no Court shall take cognizance of any offence punishable under this Ordinance except on the report in writing of the facts constituting such offence made by a Health Officer or a local Authority or an Inspector authorized in this behalf by a general or special order of the Director or Government. Although there is no bar for a person other than the nominated persons in the said section for registration of criminal case but this fact should be kept in mind that when a Court is barred to take cognizance of an offence under this Ordinance, in case the F.I.R was not registered by any nominated person in the said Section then there will be no fun in permitting a person other than nominated person to get a criminal case registered under the provision of a special law. The F.I.R. registered at the instance of such person, would not be processed further to allow the F.I.R to be converted into any report under Section 173 Cr.P.C. and to be placed before a Court of competent jurisdiction for its trial.

5. This is an admitted position that Lieutenant Colonel Syed Zia Shabbir, Commandant of Station Headquarters is not authorized person as provided under Section 32 of the Ordinance ibid to lodge the complaint under the provision of said law, therefore, no Court would be competent to take cognizance of the matter if subsequently a report by the local police is going to be placed before any Court on the basis of the F.I.R under question.

6. The action on the part of complainant is not only an attempt to deviate from the prescribed procedure provided under the law but also an attempt to take law in his own hands by practically directing the local police to take action under the special law which never empowered such like complainant to attain the status of complainant in view of the provision of such special law. Such un-authorized acts can not be permitted. No further actions are permissible under the law to be taken on the strength of F.I.R No. 42/2013, therefore, the very registration of F.I.R is an illegal act, the same is therefore declared as such and resultantly F.I.R. No. 42/2013 dated 18.01.2013 registered under Section 420, PPC red with Section 23-C West Pakistan Pure Food Ordinance, 1960 at Police Station Gulgasht, District Multan is quashed.

(R.A.) FIR quashed.

PLJ 2013 Lahore 570
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
HASNAIN RAZA--Petitioner
versus
MAQBOOL HUSSAIN and 2 others--Respondents

W.P. No. 12975 of 2012, decided on 11.6.2013.

Public Sector University (Amendment) Act, 2012 (LX of 2012)--

----S. 10(3)(b)--University of Education Lahore Ordinance, 2002, S. 41--Constitution of Pakistan, 1973, Art. 199--Writ of quo warranto--Post of principal of university of education--Re-employed on contract basis after retirement--Requirements of Post--Scope of--Object of writ of quo warranto is to enquire from a person the authority of law under which he purports to hold public office and it is primarily requirement that a relator need not be a person aggrieved that while a person is holding a public office without legal warrant and is taxing public exchequer besides causing injury to other who might be entitled to that office, a writ of quo warranto had to be issued and High Court keeping in view the nature of proceedings can undertake inquiry as it deem necessary rather such exercise can be done suo motu even if attention of High Court is not drawn by parties. [P. 575] A

Public Sector University (Amendment) Act, 2012 (LX of 2012)--

----S. 10(3)(b)--University of Education Lahore Ordinance, 2002, S. 41--Post of Principal of University--Re-employment on contract basis--Tantamount to blocking promotion of officers who were waiting for promotion--Requirements of--Re-employer had no qualification and eligibility to hold post of Principal and V.C had no power to grant such appointment for a period exceeding six months and with regard to job, nature of which was other than teaching, research and examinations--Respondents had failed to show the valid authority under which they were holding their public office--If respondents were allowed to continue to retain offices, it would tantamount to perpetuate wrongs and unauthorized and illegal acts which Court of law cannot allowed in any circumstances--Reemployment on contract basis had no legal effect--Petition was allowed. [Pp. 576 & 577] B, C & D

PLD 2011 SC 516 & 2011 PLC (CS) 541, ref.
Sheikh Jamshed Hayat, Advocate for Petitioner.
Ch. Abdul Sattar Goraya, Advocate for Respondents.
Date of hearing: 11.6.2013.

Order

Through this writ of quo warranto, the petitioner has prayed that Maqbool Hussain Gilani (Respondent No. 1) and Basheer Ahmed Ch. (Respondent No. 3) be asked as to under what lawful authority, they are holding the posts of Principal of University of Education Multan Campus, Multan and Acting Registrar, University of Education, College Road Township, Lahore, respectively.

2. Both the respondents, in response to the notice issued, have filed their comments to the writ petition, separately.

3. The learned counsel for the petitioner while giving details of the incompetence of Respondents No. 1 and 3 to hold their respective posts, as referred above, has provided the details qua Respondent No. 1 as under:--

(i) The vacancy position as was in existence in July, 2011 show that the office of Principal falls under BS-20 and was shown as vacant. In the column of remarks, it was noted against the name of Respondent No. 1 shown as Vice-Principal in BS-19 that he has taken over the charge of the post of Associate Professor of Islamiyat against a vacant post of Vice Principal in view of Government of Punjab Higher Education Department Lahore Letter No. SO(CE-I)42-17/2010, dated 30.06.2011 and Notification No. UE/R/2011/2269, dated 07.07.2011, issued by the Registrar University of Education, Lahore and that Respondent No. 1, an Associate Professor was adjusted at University of Education, Multan Campus against a vacant post of Vice Principal (BS-19) in anticipation of the approval of the Syndicate w.e.f. 07.07.2011.

(ii) By means of Notification No. UE/R/2011/2527, dated 05.08.2011, the Vice-Chancellor in exercise of powers stated to have been conferred upon him under Section 14(4)(f) of the University of Education, Lahore Ordinance, 2002, has assigned the duties of Principal, University of Education, Multan Campus to Respondent No. 1, an Associate Professor with immediate effect till further orders and

(iii) the action by virtue of Office Order No. UE/R/2011/2528, dated 05.08.2011, Respondent No. 1 was also delegated powers of Drawing and Disbursing Officer pertaining to University of Education, Multan Campus.

whereas, the details qua Respondent No. 3 are as under:--

(i) Respondent No. 3. after his appointment, by means of Notification No. UE/R/2010/1975, dated 18.05.2010, was appointed as Additional Director Administration on contract for two years on consolidated salary of Rs.50,000/- by the Syndicate of the University on the recommendations of the Selection Board.

(ii) The Vice-Chancellor while exercising powers stated to have been conferred upon him under Section 14(4)(a) of the University of Education, Lahore Ordinance, 2002, granted extension for a period of six months to Respondent No. 3 in his appointment as Additional Director Administration w.e.f. 19.11.2012. It was further clarified in the said notification that Mr. Basheer Ahmed Ch., will continue his assignment as Acting Registrar till the appointment of a regular incumbent. In addition to his consolidated salary of Rs.50,000/-, Respondent No. 3 was also awarded the facility of residential telephone by virtue of Notification No. UE/R/2010/3771, dated 08.09.2010. Another extension of six months was allowed to Respondent No. 3 in his appointment as Additional Director Administration w.e.f. 19.11.2012 and it was further clarified that he will continue his assignment as Acting Registrar till the appointment of a regular incumbent. This was conveyed through Notification No. UE/R/2012/3699, dated 15.10.2012.

(iii) The Director General Audit Punjab had taken notice of the illegalities committed in case of Respondent No. 3 and observations made in this regard were conveyed as under:--

"(a) The officer was appointed as Additional Director Admin by the Vice Chancellor on 01.01.2010 for the period of Six mouth a Rs. 50,000 per month vide office No. UE/R/2010/72 dated 07.10.2010 without following the recruitment procedure i.e. open

advertisement. Whereas per Schedule-2 of Service Statutes, 2005 University of Education. Lahore, the appointing authority of the Additional Director was Syndicate.

(b) Latter on the officer was appointed on contract basis for the period of two years by Syndicate vide Notification No. UE/R/2010/1975 dated 18.05.2010, under Schedule-2 of Service Statutes, 2005 University of Education, Lahore, the required qualification of the post was First class Master Degree in relevant subject. Whereas the officer has 2nd class LLB Degree.

(c) The required age was 35-55 years; the officer was retired from S&GAD on superannuation. The age relaxation was not obtained.

(d) The officer was not appointed against Basic Pay Scale-19".

The Vice-Chancellor of the University of Education, Lahore vide Notification No. UE/R/2010/2553, dated 25.06.2010, allowed Respondent No. 3 to act as Acting Registrar of the University.

4. In response, the learned counsel representing Respondents No. 1 and 3 has mainly tried to attack the conduct of the petitioner and to in-calculate a malice in his personality to non-suit him on such technical grounds by attacking the maintainability of the Constitutional petition. On merits, he considered it suffice to argue that both the respondents are holding their respective offices in accordance with their competence and eligibility as there is no substitute available in whole of the region. In response to a stance taken in para-7 of the memo of petition, the view taken in the comments, which has been reiterated by the learned counsel for the respondents is to the effect that the persons mentioned by the petitioner in the writ petition as more suitable and senior to Respondent No. 1 were either repatriated to their parent department or have been retired from service on attaining the age of superannuation. However, with regard to Associate Professors Javed Farid Awan and Muhammad Arshad Khan, the learned counsel for the respondents has admitted that both are senior to Respondent No. 1, but both in response to the offer to be appointed as Principal, have refused to accept the said job.

When asked to produce such refusal, he simply replied that it was a verbal refusal and no record of such proceedings has been maintained or preserved in the office of the University.

Such plea is not acceptable.

5. The Government of the Punjab in Services & General Administration Department vide Circular No. SI.2-35/2000, dated 10.04.2008, has circulated the decision of the competent authority in the Province for termination of the services of the retired officers/officials holding the posts after their re-employments. Only exemption was provided in this regard apropos officials re-employed in BS-1-11.

6. I have considered the submissions made by the learned counsel for the parties and perused the record, as well as, gone through the case-law on the subject.

7. I will be dealing with the competence of Vice-Chancellor in view of the Provisions of the University of Education, Lahore Ordinance, 2002 (L of 2002), which are detailed in Section 14 thereof and sub-Section 4(a) and (f) reads as under:--

"(a) create and fill temporary posts for a period not exceeding six months;

(f) direct teachers, officers and other employees of the University to take up such assignments in connection with teaching, research, examinations.

It is, however, significant to note that through Section 10(3)(b) of the Public Sector Universities (Amendment) Act, 2012 (LX of 2012), dated 14.11.2012. clause (a) from sub-section (4) in Section 14 stood deleted.

The First Statutes of the University of Education, Lahore provided within the meaning of Section 41 of the Ordinance has assigned the requirement of the post of Director/Principal through Section 2 sub-section (1) whereof reads as under:--

"2. Director/Principal.--There shall be a Director/Principal of each Division/College, who shall be the Chairman and Convener of the Division/College.

(1) The Director/Principal of each Division/College shall be appointed by the Syndicate from amongst the three senior most Professors in the Division/College for a period of three years and shall be eligible for re-employment for another three years.

Provided that if no Professor is available in a Division/College, a Professor from some other Division/College may act as Director/Principal till a Professor of the Division/College itself is appointed".

8. On the recommendations of the Chairman Tobacco Board, Mr. Tahir Raza, Secretary in BS-19 of the Board, was re-employed on contract basis after his retirement and High Court issued a writ of quo warranto and such re-employment was declared illegal. The matter went before the Hon'ble Supreme Court of Pakistan and the final verdict was reported as Pakistan Tobacco Board and another vs. Tahir Raza and others (2007 SCMR 97) holding that merely because the person concerned was described as hard working efficient, did not authorize the Government or employer to bypass the rules available in this regard and the person holding such post on re-employment had to demonstrate that his appointment was in accordance with law and the rules. In the same judgment, it was further held that the object of writ of quo warranto is to enquire from a person, the authority of law under which he purports to hold public office and it is primarily a requirement that a relator need not be a person aggrieved and also that while a person is holding a public office without legal warrant and he is taxing public exchequer besides causing injury to others, who may be entitled to that office, a writ of quo warranto has to be issued and the High Court keeping in view the nature of such proceedings can undertake such inquiry as it may deem necessary in the facts and circumstances of a particular case, rather such exercise can be done suo motu even if the attention of the High Court is not drawn by the parties concerned.

9. The Hon'ble Supreme Court of Pakistan in Suo Motu case No. 24 of 2010 and Human Rights Cases Nos.57701-P, 57719-G, 57754-P, 58152-P, 59036-S, 59060-P, 54187-P, 58118-K of 2010 (2011 PLC (C.S.) 541) while dealing with the subject of employment after retirement has discarded such re-employment and termed it as an act tantamount to blocking the promotion of the Officers, who had also served in the relevant departments and were waiting for their promotion, but were not getting a chance because of the re-employment/contract awarded to the retired officers and it was recommended that such actions must be stopped and discarded for the purposes of achieving good governance in all departments and all the concerned were directed to take necessary steps to ensure that re-employment or employment on contract basis were not made in violation of the relevant law.

10. The Hon'ble Supreme Court of Pakistan in case of Ghulam Shabbir vs. Muhammad Munir Abbasi and others (PLD 2011 Supreme Court 516) is of the view that a writ of quo warranto is not issued as a matter of course. The Court can and will enquire into the conduct and motive of the petitioner. However, no precise rules can be laid down for the exercise of discretion by the Court in granting or refusing the same and each aspect of the case is to be considered. In such cases, it is not necessary that the petitioner must be an aggrieved person and further that if it is established that the petitioner has approached the Court with ulterior motive, mala fide intention etc., relief can be declined. In the reported matter, out of turn promotion of the respondents was challenged without claiming any superior right by the petitioner and it was held that it was a case, where writ of quo warranto can be issued by the High Court.

11. In the present case, although the learned counsel for Respondents No. 1 and 3 has argued that the petition is tainted with malafides, but he has failed to substantiate his such argument with any particular instance to show the malice in the petitioner. The petitioner has not prayed for any personal relief. Only the competence of the respondents has been questioned to hold the particular posts, which they are holding on contract basis, after getting their re-employment, thus, the respondents have failed to non-suit the petitioner on stated grounds of malice or mala fides in order to bring the petitioner before this Court.

By such respondents as in the present case, a relator, who has challenged their authority to hold any public office can only be considered as a person of having no good credentials and in their estimation, he should always be considered as a person having malafide intention, but looking in proper perspective, to bring a petition of quo warranto pointing out such illegality and to save the public exchequer from heavy burden cannot be termed as an act with malice.

12. The resume of the legal provisions attracted in the present case, as has been given herein-above, lead me to hold that Respondents No. 1 and 3 have no qualification and eligibility to hold the posts of the Principal, University of Education, Multan Campus, Multan and Acting Registrar, University of Education, College Road Township, Lahore, and the Vice-Chancellor has no power to grant such appointments, particularly, for a period exceeding six months and with regard to the job, nature of which is other than, teaching, research and examinations.

13. In such view of the matter, the respondents have failed to show the valid authority under which they are holding their respective public offices. If the respondents are allowed to continue to retain their such respective offices, it would tantamount to perpetuate the wrongs and unauthorized and illegal acts, which a Court of law cannot allow in any circumstance.

14. The contention as has been raised by the learned counsel for the respondents to the effect that in complete set up, no substitute of respondents is available, if believed would tantamount to accept the principle of indispensability of a particular person. No one, particularly, in services should have been treated as indispensible. It is alarming that no one is eligible to succeed the respondents, which in other words, mean that our nurseries have turned into barren Institutions. The situation as has been portrayed by the carried counsel for the respondents giving impression that as if the working on the scats presently being occupied by the respondents would become dormant in case they are removed from their said jobs, would a clear indication that we are fallen in a ditch of " " It is also a sign

of no confidence to the second line, which should have been prepared to take responsibilities of future and the aspirants of the said seats must be given opportunities to prove their performance.

15. The net result of the above discussion is that it is declared that Respondents No. 1 and 3 have no authority to hold the posts of the Principal, University of Education, Multan Campus, Multan and Acting Registrar, University of Education, College Road Township, Lahore and their appointments on contract basis, after giving them re-employment to such appointment are acts, which are without lawful authority and of no legal effect. The writ petition is allowed and it is directed that Respondents No. 1 and 3 be relieved from their duties forthwith with a direction to said respondents to relinquish the charge of their respective posts immediately.

(R.A.) Petition allowed.

K.L.R. 2013 Cr.C. 119
[Lahore]
Present: **IBAD-UR-REHMAN LODHI, J.**
Muhammad Khalid
Versus
The State and another

Criminal Miscellaneous No. 12521-B of 2012, decided on 12th September, 2012.

BAIL (INJURIES) --- (Deletion of section)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 365/337-A(iv), 337-F(i), 337-L(2), 148, 149---Bail concession---Ss. 365/148/149, P.P.C. were deleted---Offence under Sections 337-F(i) and 337-L(2), P.P.C. was bailable---No offence under Section 337-F(iv), P.P.C. was made out---Keeping in view of pace of trial, early conclusion thereof was not in sight---Bail after arrest granted. (Para 2)

For the Petitioner: **SaqibAkramGondal, Advocate.**
For the State: **ChaudharyKaramat Ali, Additional Prosecutor-General.**
Muhammad Asghar, Sub-Inspector with record.
Date of hearing:**12th September, 2012.**

ORDER

IBAD-UR-REHMAN LODHI, J. ---The petitioner, namely, Muhammad Khalid, seeks his post-arrest bail in a case registered vide F.I.R. No. 65, dated 24.03.2012, under Sections 365, 337-A(iv), 337-F(i), 337-L(2), 148, 149 of P.P.C., at Police Station, Kakrali, District Gujrat.

2. According to the prosecution, in view of daily diary No. 10, dated 05.04.2012, offences under Sections 365, 148, 149 of P.P.C. were deleted from the F.I.R. and there remains Sections 337-F(iv), 337-F(i) and 337-L(2) of P.P.C. The offences under Sections 337-F(i) and 337-L(2) of P.P.C. are bailable, whereas, it is almost consensus of the parties that from the injury statement, no offence under section 337-F(iv) of P.P.C. is made out. The petitioner is facing the tormentation of incarceration since 28.03.2012. The challan was reportedly submitted in the Court on 12.04.2012, but trial has not commenced. Keeping in view the pace of trial, early conclusion thereof is not in sight.

3. Resultantly, this petition is allowed and the petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (rupees one lac only) with one surety in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

K.L.R. 2013 Cr.C. 307
[Multan]
Present: **IBAD-UR-REHMAN LODHI, J.**
Asghar Ali
Versus
The State

Crl. Appeal No. 118 of 2010, decided on 9th August, 2012.

SUSPENSION OF SENTENCE (MURDER)---(Statutory ground)
Criminal Procedure Code (V of 1898)-------S. 426(1-A)(c)---Pakistan Penal Code, 1860, S. 302(b)---Seeking suspension of impugned sentence of life---Delay in decision of main appeal---Statutory ground---Impugned sentence of life was suspended by High Court.
(Paras 2,3)

[Delay in decision of main appeal. Impugned sentence of life was suspended on statutory ground].

For the Petitioner: **Prince RehanIftikhar Sheikh, Advocate.**
For the Complainant: **Ch. PervaizAkhtarGujjar,Advocate.**
For the State: **Muhammad Abdul Wadood, Deputy Prosecutor General, Punjab.**
Date of hearing: **9th August, 2012.**

ORDER

IBAD-UR-REHMAN LODHI, J. --- The applicant Asghar Ali seeks suspension of sentence and release on bail in case where he was awarded sentence under Section 302(b), PPC for life imprisonment with the direction to pay Rs. 1,00,000/- as compensation to the legal heirs of the deceased and in default thereof further imprisonment of six months' S.I. The benefit of Section 382-B, Cr.P.C. was also extended through judgment passed by the

learned Additional Sessions Judge, Mianchannu on 31.3.2007 in private complaint filed by DildarHussain complainant.

2. The present appeal against such conviction was filed in the year 2010 and since then the same is pending here. For non-fixation or non-hearing of the appeal, the applicant cannot be held responsible. He has earned a statutory right by now to be released on bail after suspension of sentence. It is also pertinent to mention here that the statutory period provided in Section 426, Cr.P.C. has been elapsed keeping in view the date of conviction of the applicant by the learned Trial Court viz. 31.3.2007.

3. Resultantly, without commenting upon the merits of the case, this application is allowed, sentence awarded to the applicant Asghar Ali is suspended and he is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Bench.

Sentence suspended.

K.L.R. 2013 Cr.C. 335
[Lahore]
Present:**IBAD-UR-REHMAN LODHI, J.**
Musa Khan
Versus
Government of Punjab and 4 others
Writ Petition No. 5274 of 2013, decided on 08th May, 2013.

(a) W.P. Maintenance of Public Order Ordinance, 1960---

---S. 3---Provision of---Contemplated---Said provision necessities the "satisfaction" of the order issuing authority on the strength of some events preceded the passage of such order.

(Para 3)

PEREVENTIVE DETENTION---(Absence of material)

(b) Constitution of Pakistan, 1973---

---Art. 199---W.P. Maintenance of Public Order Ordinance, 1960, Ss. 3, 6---Petitioner's father had been ordered to be detained for a period of one month by the DCO---Impugned roder---"Satisfaction"---Rule of alternative remedy---DCO who was the order issuing authority had not forwarded any material justifying connection of detained person with any of defunct organization---Even in impugned order, DCO had not demonstrated as to whether there was any satisfaction on his part before issuance of such detaining order---Since impugned order passed against detention was coram-non judicata and nullity in eye of law, there was no need for detenue to file Representation before the Government---Impugned order of detention was illegal and without lawful authority at same was set aside by High Court---Writ allowed.

(Paras 5,7,9)

Ref. 1997 P.Cr.L.J. 1288, PLD 2010 Lah.371, PLD 2005 Kar. 538.

[No material was jurisdiction justifying detention of detenue that he belonged to defunct organization. High Court while setting impugned order allowed writ petition].

For the Petitioner: **M. YafisNaveedHashmi, Advocate.**
For the Respondents: **Aziz-ur-Rehman Khan, Assistant Advocate-General.**
Date of hearing:**08th May, 2013.**

ORDER

IBAD-UR-REHMAN LODHI, J. --- Through this Constitutional petition, the petitioner challenged the order passed on 30.4.2013, by the District Coordination Officer, Muzaffargarh (respondent No. 2), under the provisions of Section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960, whereunder father of the petitioner has been order to be detained for a period of one month.

2. After hearing the arguments and going through the record, it seems that the order, impugned herein, has been passed on the recommendation of the police authorities, whereby, the person detained has been termed as "one having connection with some defunct organizations. The District Coordination Officer, who is the order issuing authority, has not furnished any material justifying the connection of the detained person with any of the defunct organization. Even today, the learned Assistant Advocate-General was specifically asked to place on record any material, which was made basis to satisfy the independent mind of the order issuing authority for such detention order, but he failed to place on record any such material.

3. Section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 necessitates the "satisfaction" of the order issuing authority on the strength of some events preceded the passage of such order.

4. A Division Bench of Karachi High Court in case of Arbab Akbar Adil Vs. Government of Sindh through Home Secretary, Government of Sindh, Karachi (PLD 2005 Karachi 538) has dealt with a detention matter and through an authoritative views has held as under:--

> "Initial burden lies on the Detaining Authority to show the legality of the preventive detention. Detaining Authority must place the whole material upon which the detention order is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide. Order of detention must be made by he Authority prescribed in the law relating to preventive detention. Each of the requirements of the law relating to preventive detention should be strictly complied with. Satisfaction must in fact exist with regard to the necessity of preventive detention of the detenu. Grounds of detention should have been furnished within the period prescribed by law, and if no such period if prescribed then as soon as may be. Grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the Authority prescribed by law. Grounds of detention should be within the scope of the law relating to preventive detention, i.e., the same should not be irrelevant to the aim and object of the law and

the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice.

Detention order taking away the liberty of a citizen is not sustainable on subjective considerations. Objectivity should exist in the detention order which can be demonstrated by giving necessary details and particulars therein.

Application of mind essential. Word "satisfied" used in S. 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960, indicates that the Authority issuing the detention order should apply his mind to the facts forming basis of the same. Until and unless there is something tangible in the detention order the Authority issuing it cannot be said to have applied his mind objectively and his opinion based on reasons."

Similar view was taken by this Court, in case of Muhammad NadeemVs. Government of Punjab through Home Secretary and another (PLD 2010 Lahore 371).

5. In the case, in hand, the wording of the impugned order shows that even in the ender, the District Coordination Officer has not demonstrated as to whether there is any satisfaction on his part before issuance of such detaining order. Even no grounds of detention were provided to the person detained.

6. The learned Assistant Advocate-General has taken an objection with regard to the maintainability of the present Constitutional petition in presence of a remedy available to the petitioner under Section 6 of the West Pakistan Maintenance of Public Order Ordinance, 1960 by way of representation before the Government.

7. This question has been dealt with by this Court in case of Haq Dad Khan Vs. District Magistrate, Mianwali (1997 P.Cr.L.J. 1288), where similar objection was raised by the learned Assistant Advocate-General, which was answered in the manner that since order passed against the detenu was coram-non-judice and nullity in the eye of law, therefore, there was no need for detenu to file representation before the Government, because such representation could only be made, when order of detaining authority was passed within the four corners of provisions of Section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960. The remedy by way of a representation before the Government has always been considered as an illusion and a Constitutional petition straightaway has always been entertained.

8. The grounds, which were attached with the detention order are vague and unspecific and as held in Arbab Akbar Adil's case (supra), the detention order taking away the liberty of a citizen is not sustainable on subjective considerations. Objectivity should exist in the detention order which can be demonstrated by giving necessary details and particulars therein, which both are conspicuously missing in the present case.

9. The result of the above discussion is that this petition is allowed; the impugned order of detention dated 30.4.2013 is illegal and without lawful authority and the same is set aside. The detenu, namely, Hakeem Khan is ordered to be released forthwith.

Petition allowed.

2014 C L C 154
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD ASLAM----Appellant
Versus
GENERAL MANAGER PIONEER PAKISTAN SEED LIMITED, LAHORE and 4 others----Respondents

First Appeals from Order Nos.89 and 69 of 2009, decided on 5th August, 2013.

(a) Punjab Consumer Protection Act (II of 2005)---
----S. 33---Limitation Act (IX of 1908), S.5---Appeal---Condonation of delay---Deceiving by respondent--- Effect--- Consumer filed appeal against decision of Trial Court beyond period of limitation---Consumer sought condonation of delay on the ground that after decision of Trial Court, respondent-company approached him and promised that he would be compensated by providing 250 bags of seed of maize and thus they deceived consumer and let the limitation period expire---Validity---Explanation extended by consumer in order to seek condonation of delay caused in filing of appeal did not appeal to sense and such plea had never been recognized as justification for condonation of delay in filing of some legal proceedings---High Court declined to condone delay, as consumer failed to justify delayed filing of appeal---Appeal was dismissed in circumstances.

(b) Punjab Consumer Protection Act (II of 2005)---
----Ss.25, 28 (3) (4) & 30---Consumer protection---Claim---Limitation---Consumer purchased seed of maize on 11-12-2007 and used the same in the month of June, 2008, but claim was instituted before Consumer Court on 7-10-2008 and notice was issued on 21-9-2008---Consumer Court partly allowed claim filed by consumer and directed company to provide him 250 bags of maize seed---Validity---Starting point of period of limitation provided for filing of claim before Consumer Court was accrual of cause of action and if in particular background of the matter, cause of action was accrued to consumer in the month of June, 2008, when crop was harvested, institution of claim before Consumer Court was beyond limitation---Consumer purchased 250 bags of maize and out of the same 248 bags were consumed and used by consumer and subsequently challenged quality of whole purchased lot only by producing two bags and that too without any proper seal over the same---Not certain that either the bags contained seed, were in fact originally filled by the company or after de-sealing the same by consumer, those were refilled by some substandard seeds by consumer to create a circumstance to justify the claim---Consumer failed to bring any convincing evidence on record to show that seeds in sealed bags of company were in fact substandard one---Merely by saying of consumer, it could not be presumed that quality of seed was not up to the mark for the reason that consumer was not an expert in the relevant field---Claim was placed by consumer before Consumer Court was beyond limitation as provided in section 28 of Punjab Consumer Protection Act, 2005, and also was not maintainable in absence of mandatory notice, delivery of which was to be proved beyond any shadow of doubt and also on merits---High Court directed Punjab Government to initiate appropriate administrative/legislative measure to make necessary amendments in section 30 of Punjab Consumer Protection Act, 2005, in order to provide power to

Consumer Court to frame issues from divergent pleadings of parties and also to record evidence of parties on such issues and then to give issue-wise findings on such material available before it---High Court set aside the order passed by Consumer Court---Appeal was allowed in circumstances.

Al-Jehad Trust through Habibul Wahab Al-Khairi Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others 1999 SCMR 1379 rel.
Mian Ahmad Mahmood for Appellant.
Barrister Rafey Altaf for Respondents.
Date of hearing: 24th June, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- By means of this judgment I intend to dispose of F.A.O. No.89 of 2009 and F.A.O. No.69 of 2009, as both arises out of one impugned order dated 8-7-2009 passed by the learned Presiding Officer, District Consumer Court, Sahiwal whereby the claim of Muhammad Aslam for recovery of Rs.2,50,00,000/- was accepted to the extent of provisions of 250 bags of seed of maize to said claimant.

2. Both the sides feeling themselves aggrieved of the said findings filed separate appeals. I would first take up F.A.O. No.89 of 2009 for the reasons that the same was filed beyond limitation and along with the memo of appeal Civil Miscellaneous No.1-C of 2009 was also filed, seeking condonation of delay in filing the instant appeal.

In the application under section 5 of Limitation Act, the applicant/appellant has admitted that the appeal was filed beyond limitation provided in this regard. The reason as has been expressed in the Civil Miscellaneous is that the respondent-Pioneer Pakistan Seed Limited, after the decision of the Consumer Court, approached the applicant/appellant for some settlement and promised that the appellant shall be compensated by providing 250 bags of seed of maize and thus deceived the applicant/appellant and let the limitation period expired and for that reason the appeal was filed on behalf of the claimant Muhammad Aslam beyond limitation.

3. I am afraid, the explanation extended by the applicant/appellant in order to seek condonation of delay caused in filing of appeal does not appeal to sense and such plea has never been recognized as a justification for condoning the delay in filing some legal proceedings. The applicant has failed to justify the delayed filing of appeal and the application i.e. Civil Miscellaneous No.1-C of 2009 has no substance, the same is therefore dismissed.

4. Since the delay caused in filing of F.A.O. No.89 of 2009 has not been condoned, resultantly the said appeal is dismissed.

5. Now comes to the other appeal viz. F.A.O. No.69 of 2009 filed by the Pioneer Pakistan Seed Limited, etc. There is an objection with regard to a time-barred claim preferred by

claimant before the Consumer Court and also to the effect that the same was not maintainable in absence of any evidence as to the issuance of notice and the proof of its duly delivery by the claimant to the respondent-serviceprovider required in view of section 28(3) of the Punjab Consumer Protection Act, 2005.

Vide para 4 of the claim, the claimant has, in a vague term, mentioned the issuance of some notices, but neither any date of issuance of the same has been provided in the claim nor any proof of its due delivery has been provided. Along with the claim, a copy of notice although has been placed on the record of the Consumer Court but the same is not worth-consideration for the reason that the same carries .no signature of the person issuing the same nor the claimant has placed any material on record to show the due delivery of the same which is a condition precedent for maintaining a claim before the Consumer Court.

6. In view of section 28(4) of the Punjab Consumer Protection Act, 2005, a claim by a consumer has to be filed within 30-days of arising cause of action. In this case, according to the version of the claimant himself, the seed of maize was purchased on 11-12-2007 and the seed was used in the month of June, 2008 but the claim was instituted before the Consumer Court on 7-10-2008 and the notice shown to have been issued only on 21-9-2008. The starting point of period of limitation provided for filing of claim before the Consumer Court is the accrual of cause of action and if in particular background of this case, the cause of action was accrued to the claimant in the month of June, 2008 when the crop was harvested, the institution of the claim before the Consumer Court was in any case beyond limitation.

7. On merits, it is admitted position that the seed was never purchased directly through the company i.e. Pioneer Pakistan Seed Limited, rather it was purchased from respondent No.2, a Dealer, deals in sale of the seeds in open market. According to law, on the subject without any certificate issued by Federal Seed Certification and Administration Department (under the Federal Government) certifying the quality of seed, no seed can be launched in the market. The claimant has nowhere raised his plea as to whether the seed purchased by the claimant was not certified under such process.

Admittedly, 250 bags of maize seed were purchased by the claimant from respondent No.2 and out of the same, 248 bags were consumed and used by the claimant and subsequently challenged the quality of whole of the purchased lot only by producing two bags and that too without any proper seal over the same, thus it was not certain that either the said bags contained the seed were in fact originally filled by the company or after de-sealing the same by the claimant, those were refilled by some substandard seeds by the claimant to create a circumstance to justify the claim. The claimant has also miserably failed to bring any convincing evidence on record to show that the seed in the sealed bags of the company was in fact substandard one. Merely by saying of the claimant it cannot be presumed that the quality of seed was not up to the mark for the reason that the claimant is not an expert in the relevant field.

8. The appellants in their written statement have highlighted numerous reasons for less production e.g. poor or inadequate fertilizer, no timely plant protection measure, uneven land used for cultivation, retorted plant growth, no proper and timely watering and unfavourable

weather conditions. Once such specific pleas were taken it was incumbent upon the claimant to put his own stance in reaction thereof but these reservations expressed by the appellant-Company were never responded to in some satisfactory manner.

9. There is another angle to be considered in ordinary suits where the plaintiff claims some recovery in shape of the finances, it always make incumbent upon such claimant/plaintiff to provide detailed breakup of the required amount but in the present case although an huge amount of Rs.2,50,00,000/- has been claimed but without any specific breakup of the said required amount. The Consumer Court has in fact not accepted the request of the claimant for recovery of Rs.2,50,00,000/- but has awarded the claim to the extent of the provision of 250 bags of seed of maize. Such claim was not proved on record by the claimant. There is no report on the record as to what was the result of growing of seed of maize consisting of 248 bags and without any convincing evidence having negative impact even for such 248 bags, no adverse inference can be drawn against the appellants. The result is that the claim as has been placed by the claimant before the learned Consumer Court was beyond limitation as provided in section 28 of the Punjab Consumer Protection Act, 2005 and also is not maintainable in absence of a mandatory notice delivery of which is to be proved beyond any shadow of doubt and also on merits, therefore, F.A.O. No.69 of 2009 is allowed and the impugned order passed on 8-7-2009 by the learned Presiding Officer, District Consumer Court, Sahiwal is set aside.

10. Before parting with this judgment, I would like to observe that not only with regard to the claims to be preferred before the Consumer Courts, constituted under the Punjab Consumer Protection Act, 2005 but also keeping in view the increasing tendency in the concerned circles to the effect that even the cases of civil nature for recovery of different amount to be filed in the Courts of plenary jurisdiction and also the claims as to tortuous acts of the adversaries the people have started to rush to the Consumer Courts and as a result of summary procedure, they are getting favourable results. Although section 30 of the Punjab Consumer Protection Act, 2005 which provides procedure to be adopted by the Consumer Court do indicate the production of evidence but neither the concept of framing of issues on the basis of divergent pleadings of the parties nor specific procedure for recording of evidence has been provided with regard to the proceedings to be taken by the Consumer Court. It is high time that the statute viz. Punjab Consumer Protection Act, 2005 Act-II (2005) be suitably amended by inserting the provisions in Section 30 thereof, enabling the Consumer Court to frame issues on the basis of divergent pleadings of the parties and to provide ample opportunity to the parties concerned to produce their evidence on the issues and then to decide the same after giving issuewise findings after consideration of the evidence available on record. This Court can direct the Province of Punjab to initiate appropriate administrative/ legislative measure within a certain period to make necessary amendments in the relevant portion of the statute as indicated hereinabove.

I am fortified in issuing such direction by an authoritative judgment passed by the Hon'ble Supreme Court of Pakistan in the case of Al-Jehad Trust through Habibul Wahab Al-Khairi Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others (1999 SCMR 1379) and Province of Punjab is thus directed to initiate appropriate administrative/legislative measure within a period of next 6-months to make necessary amendments particularly in section 30 of the Punjab Consumer Protection

Act, 2005 in order to provide a power to Consumer Court to frame issues from the divergent pleadings of the parties and also to record evidence of the parties on such issues and then to give issuewise findings on such material available before it.

MH/M-242/L Order accordingly.

2014 C L C 773

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

MUHAMMAD KHALIQ----Petitioner

Versus

JALAL DIN through Legal Heirs and 2 others----Respondents

Writ Petition No.24291 of 2009, decided on 30th January, 2014.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Qanun-e-Shahadat (10 of 1984), Art.76---Constitution of Pakistan, Art.199---Constitutional petition---Suit for pre-emption---Notices of Talb-i-Ishhad---Photocopies---Production of photocopies of Talb-i-Ishhad as secondary evidence---Admissibility---Notices of Talb-i-Ishhad sent by the pre-emptor were not allegedly received by the vendee---Sealed envelopes of said notices were made part of the record of the pre-emption suit---At the time of recording of statement of witnesses, when sealed envelopes of notices of Talb-i-Ishhad were re-opened, they were closed with a stapler instead of glue, and notices were also found to be incomplete---Pre-emptor alleged some overt act/intrigue on part of defendants in league with administrative staff of the Trial Court in changing of the original notices---Pre-emptor moved an application before the Trial Court, seeking to produce photocopies of original notices of Talb-i-Ishhad sent by the him by way of secondary evidence---Said application was allowed by Trial Court---Revisional Court set aside order of Trial Court and resultantly dismissed application for production of secondary evidence---Validity---Trial Court should have referred the matter for inquiry in order to probe the allegation of the pre-emptor, however without such probe, Trial Court accepted the allegation as correct and incomplete notices found inside the envelope, which were opened in court, were considered a result of foul play and resultantly production of secondary evidence was allowed---Secondary evidence could only be allowed, if the party claiming production of secondary evidence, had proved on record either the loss of original documents or possession thereof with the other party---Pre-emptor had failed to prove the loss of original notices of Talb-i-Ishhad, allegedly sent to the vendees, and Trial Court after believing one sided version of the pre-emptor allowed production of secondary evidence---Application for production of secondary evidence was illegally allowed by the Trial Court, therefore judgment of Revisional Court did not call for interference---Constitutional petition was dismissed in circumstances.

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

----Art. 76---Secondary evidence relating to document---Admissibility---Secondary evidence could only be allowed, if the party claiming production of secondary evidence had proved

on record either the loss of original documents or possession thereof with the other party--- Loss of original documents was a sine qua non in order to permit the production of secondary evidence.

Shaigan Ijaz Chadhar for Petitioner.

ORDER

IBAD-UR-REHMAN LODHI, J.--- In a suit for pre-emption. the plaintiff applied to the learned trial Court under the provisions of Article 76 of the Qanun-e-Shahadat Order, 1984, to produce secondary evidence, on the plea that the notices sent to the defendants by meeting the requirement of making 'Talb-i-Ishhad', were not received by the defendants and the sealed envelopes of the said notices were made part of the record of the suit, but at the time of recording of statement of P.W.2, when the said envelopes were ordered to be reopened, it revealed that instead of sticking with gum, it were closed with the help of stapler and on opening of said envelopes, incomplete notices were found inside the envelopes. Some intrigue on the part of the defendants was alleged by the plaintiff in changing of the notices with original ones, and it was requested that photocopies sent by the plaintiff, be allowed to be produced in evidence by way of secondary evidence.

2. The learned trial Court allowed such petition on 28-4-2008, which order was challenged before the learned District Judge in revisional jurisdiction and a learned Additional District Judge, Pakpattan by means of impugned judgment dated 19-11-2009 proceeded to allow the revision petition and resultantly dismissed the application for production of secondary evidence.

3. From the file, it reveals that when the petition seeking production of secondary evidence was moved by alleging some overt act on the part of the defendants, while in league with the administrative staff of the learned trial Court, the matter must be referred to some inquiry in order to probe the allegation, but without such probe, the allegation was accepted as correct, and the incomplete notices, which were found inside the envelopes opened in the Court, were considered as a result of some foulplay on the part of the defendants and resultantly the production of secondary evidence was allowed.

4. The learned revisional court has rightly interpreted the provisions of Article 76 of the Qanun-e-Shahadat Order, 1984, which provides that secondary evidence can only be allowed, if the party claiming production of secondary evidence, has proved on record either the loss of original documents or possession thereof with other party. In any case, loss of original documents is a sine qua non in order to permit the production of secondary evidence.

5. In the present case, the plaintiff has failed to prove the loss of original notices of `Talb-i-Ishhad', allegedly sent to the defendants and without asserting the factual position, the learned trial Court, after believing the one-sided version of the plaintiff, has allowed production of secondary evidence.

6. The learned revisional court has rightly reached to a just conclusion that in view of the provisions of Article 76 of the Qanun-e-Shahadat Order, 1984 the plaintiff has failed to justify the production of additional evidence, and it was illegally allowed by the learned trial Court.

7. The judgment passed by the learned revisional court does not call for any interference, as the same has been passed with lawful authority and no jurisdictional defect has been pointed out in such revisional findings.

8. Finding no force in this petition, the same is dismissed by maintaining the judgment passed by the learned revisional court on 19-11-2009.

MWA/M-64/L Petition dismissed.

2014 C L C 1401
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
AFTAB AHMAD KHAN and another----Petitioners
Versus
WAZIR AHMAD and 4 others----Respondents

Civil Miscellaneous Nos.2-C of 2012, 1, 2, 3 of 2014 and Civil Revision No.1686 of 2012, decided on 12th February, 2014.

Arbitration Act (X of 1940)---
----S. 34---Stay of proceedings in suit---Filing of application under S.34 of Arbitration Act, 1940 by defendant after having availed several adjournments for filing written statement---Application filed by the petitioner/defendant was dismissed---Validity---Petitioner/ defendant on number of occasions had not only appeared before the Court but in order to contest the suit availed opportunities to file written statement---Application under S.34, Arbitration Act, 1940 was moved in order to avoid the filing of written statement for which the trial court had provided last and final opportunity to the petitioner---Act on the part of petitioner/defendant in filing the belated application under S.34 of Arbitration Act, 1940 was not only violative to the requirements of said provision of law but also was contumacious in order to avoid the filing of written statement---Trial court had rightly proceeded to dismiss the application of petitioner---Revision petition was dismissed.

Muhammad Farooq v. Nazir Ahmad and others PLD 2006 SC 196 and Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners PLD 1981 SC 553 rel.
Raja Nadeem Haider for Petitioners.
Syed Shahab Qutab for Respondents Nos.1 to 3.

ORDER

Civil Miscellaneous No.2-C of 2012.

Civil Miscellaneous Nos.1, 2, 3 of 2014. Main Case.

IBAD-UR-REHMAN LODHI, J.--- Anwar Khan (respondent No.4), according to the learned counsel for the respondents, has already been deleted from the original proceedings and in such view of the matter, the learned counsel for the petitioners seeks deletion of said respondents. The request is allowed.

2. Anwar Khan (respondent No.4) is deleted from the array of respondents.

3. The suit for declaration, permanent injunction and cancellation of document was filed by respondents Nos.1 and 2 against the present petitioners and respondents Nos.3, 4 and 5. The petitioners/defendants in the suit appeared on 24-7-2009 and, thereafter, continued appearing till 6-1-2010 by seeking time to file written statement. On 6-1-2010, the proceedings of the suit were adjourned at the request of the contesting respondents by providing them last and final opportunity to file written statement and the matter was adjourned to 12-1-2010. The written statement even on the said adjourned date was not filed and instead, an application under section 34 of the Arbitration Act, 1940 was filed requiring a direction for staying the proceedings of the civil suit. The application was contested and vide impugned order dated 11-5-2010, the said application was dismissed which has been challenged through the present civil revision petition.

4. Section 34 of the Arbitration Act, 1940 (hereinafter to be referred as Act), provides that where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial Authority before which the proceedings are pending to stay the proceedings.

5. The term in "other steps" used in section 34 of the Act has been interpreted by the Hon'ble Supreme Court of Pakistan in the case of 'Muhammad Farooq v. Nazir Ahmad and others' (PLD 2006 Supreme Court 196) to the following effect:---

"From the above proceedings in the Court it would be clear that the appellant even after the receipt of notice of the plaint got three clear dates for filing written statement but the application under section 34 of the Act was moved on the fourth date. Above acts of the appellant on number of dates stated above would show that he intended to participate and defend the suit before the Court."

6. Earlier in case of 'Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners' (PLD 1981 SC 553), it was held:---

"The Legislature has, of course, clearly implied in the language used in the section that the arbitration Clause should be respected, but has also made it abundantly clear that the party seeking to avail of the provision of stay under this section must clarify his position at the earliest possible opportunity, so as to leave no manner of doubt that he wishes to have resort to arbitration proceeding. If he hesitates in this regard, or allows the suit to proceed in any

manner, that conduct would indicate that he has abdicated his claim to have the dispute decided under the arbitration clause, and to have thereby forfeited his right to claim stay of the proceedings in the Court."

"Frequent requests for adjournment for filing written statement would fall within the purview/ambit of the phrase "taking any other steps in the proceedings" within the meaning of section 34 of the Arbitration Act."

7. Hence, it is abundantly clear that the request made on behalf of the petitioners seeking opportunities to file written statement are steps taken in the proceedings which resulted to show the intentions of the petitioners to participate and defend the suit before the court.

8. The requirement of section 34 of the Arbitration Act is in fact the spontaneous reaction of the respondents in the suit for getting the proceedings of the suit stayed, whereas in the case in hand on a number of occasions, the petitioners not only appeared before the court but in order to contest the suit availed the opportunities to file written statement. The application under section 34 of the Arbitration Act, was only moved in order to avoid the filing of written statement for which the learned trial court provided last and final opportunity. The act on the part of the petitioners in filing the belated application under section 34 of the Arbitration Act, was not only violative to the requirements of the said provision of law but also seems to be contumacious in order to avoid the filing of written statement.

9. The learned trial court has rightly proceeded to dismiss the application of the petitioners moved under section 34 of the Arbitration Act and the impugned order suffers from no illegality or irregularity and thus, is not liable to be interfered with.

10. This civil revision petition, having no force, is dismissed.

JJK/A-40/L Petition dismissed.

2014 C L C 1418

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

Sayed ABDUL FAHEED through L.Rs.----Petitioners

Versus

HASSAN MUHAMMAD through L.Rs.----Respondents

Civil Revision No.796 of 2005, heard on 15th May, 2014.

Civil Procedure Code (V of 1908)---

----S. 96 & O.XLI, R.1---Appeal filed before the wrong forum/court---Court admitting such appeal for regular hearing---Contributory negligence of court and appellant---Scope---Filing of an appeal before the wrong forum was to be treated as an appeal filed before the wrong forum and memo of appeal was to be returned to the appellant for its presentation before the proper court---When such an appeal was still admitted to regular hearing by the wrong

forum/court, then it was a case of contributory negligence of both, the appellant and the court---Party to such appeal must not be knocked out on technical grounds, when act of court also contributed to such episode.

Imtiaz Ali v. Atta Muhammad and another PLD 2008 SC 462 ref.
Shaigan Ijaz Chadhar for Petitioners.
Muhammad Jehan Zaib for Respondents.
Date of hearing: 15th May, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI J.--- On the basis of an agreement to sell arrived at on 5-4-1988 for a consideration of Rs.2,06,000, a suit for specific performance was filed on 27-11-1988, which was dismissed by the learned trial Court on 31-10-2001.

2. An appeal was filed before the learned District Judge on 8-12-2001, which for preliminary hearing, was taken up by a learned Additional District Judge on 12-12-2001, when the same was admitted to regular hearing and notices were issued to the respondents.

3. On appearance of the respondents in appeal before the learned District Court, it was pointed out that proper court-fee was not paid on the memo of appeal and, therefore, by means of order dated 12-4-2003, the appellant before the learned District Court was directed to make the good deficiency in court-fee by 28-4-2003.

4. Admittedly, when said direction was duly complied with, another objection as to the maintainability of the appeal before the learned District Judge was raised by the respondents with regard to the pecuniary jurisdiction of the District Judge for hearing the first appeal against decrees passed in civil cases. The learned Additional District Judge by means of order dated 12-4-2003, decided that the District Judge had the jurisdiction to entertain and adjudicate upon appeal filed against the decree dated 31-10-2001.

5. The question of pecuniary jurisdiction was again raised by the respondents in appeal and this time, it prevailed upon the learned Additional District Judge on 6-12-2004, when it was held that pecuniary jurisdiction of the District Judge for hearing the civil appeals was increased from Rs.2,00,000 to Rs.2,50,000 on 26-9-2002, when section 18 of the Civil Courts Ordinance (Amendment) Act, 1986, was further amended. It was further held that at the time of admission of appeal by the learned Additional District Judge, the learned Judge was made to believe that, at the relevant time, the District Judge was having a jurisdiction to entertain the appeals up to the value of Rs.2,50,000. The appeal was also held by the learned Additional District Judge by means of impugned order as being barred by time.

6. Apart from the fact that filing of an appeal before wrong forum was to be treated as an appeal filed before wrong forum and memo of appeal was to be returned to the appellant for its presentation before proper court. This was not done and instead appeal was admitted to regular hearing by the learned District Judge and, thus, even if it was filed before a wrong forum, that was a case of contributory negligence of both, the appellant and the court and a

party to litigation on technical grounds must not be knocked out, when act of the court also contributes in such episode.

7. By subsequent amendments in section 18 of the Civil Courts Ordinance (Amendment) Act, 1986, the pecuniary jurisdiction of the learned District Judge to hear the appeals against the decrees was gradually increased and ultimately it reached to Rs.25,00,000. Had the appeal in hand, had been returned to the appellant and it would have been presented before this Court, even on the increase of pecuniary jurisdiction of the District Judge, again this was to be returned to the latter's court, where it was still pending.

8. The Hon'ble Supreme Court of Pakistan in similar situation, has held in case of Imtiaz Ali v. Atta Muhammad and another (PLD 2008 Supreme Court 462) as under:---

"Filing of appeal within limitation of 30 days from the delivery of judgment is mandatory, while insufficiency of documents filed with an appeal due to some reasons, have got a different concept and effect. Due to the non-availability of required but not mandatory document, one can obtain a period from the office/court, after filing of an appeal within the prescribed period of limitation because from the date of announcement of the judgment, limitation period having commenced, no interruption could stop the limitation running. The period spent for obtaining copy of impugned judgment could be exempted but the appellant cannot be allowed any more period spent for obtaining copy of decree, as it would have overlapping effect and would be grant of period doubly.

The appeal having been filed after one day of period of limitation, has created valuable right in favour of respondents. No sufficient cause for filing of delayed appeal, in the present case, having been found, Supreme Court declined condonation of delay."

9. Keeping in view the above facts, the impugned order dated 6-12-2004, passed by the learned Additional District Judge, Gujranwala, is not sustainable and the same is, therefore, set aside. Civil Appeal No.130 of 2003 titled "Syed Abdul Faheed v. Hassan Muhammad etc." would be deemed pending before the learned appellate court.

10. The parties, present in Court, will appear before the learned District Judge, Gujranwala, on 30-5-2014, who will either hear the appeal himself and decide the same or will entrust the hearing of the same to some other court of competent jurisdiction. However, whichever will be the appellate court will be deciding the appeal on or before 1-7-2014.

11. This revision petition stands allowed.

MWA/A-84/L Revision allowed.

2014 C L D 1420
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
GHULAM SAMDANI---Appellant
Versus
MUHAMMAD ARSHAD MALIK---Respondent

Regular First Appeal No.1169 of 2013, heard on 21st January, 2014.

(a) Negotiable Instruments Act (XXVI of 1881)---
----Ss. 79 & 80---Civil Procedure Code (V of 1908), O.XXXVII, Rr. 2 & 3 & O. VII, R. 10---Institution of summary suit on the basis of affidavit---Negotiable instrument---Scope---Contention of defendant was that suit was not based on any negotiable instrument---Trial Court decreed the suit on account of failure of defendant to pray for leave to appear and defend the suit---Validity---Trial Court had not considered as to whether the plaint presented before it was filed on the basis of any "negotiable instrument"---Suit was decreed on account of failure on the part of defendant to file an application for leave of the court to appear and defend the same---Plaintiff had not produced even copy of any cheques and Trial Court did not require him to produce any evidence in support of plaint and to produce any documentary evidence in order to bring his suit within the ambit of summary suit---Trial Court was not competent to entertain and decide suit in absence of any evidence on record to show that suit was filed upon any negotiable instrument---District Judge was bound to direct his office to examine the suits filed under O.XXXVII, C.P.C. at the time of their filing as to whether same were filed upon any negotiable instrument and a separate report must be available on the file of every suit and only then further proceedings were to be taken in such suits---Impugned judgment and decree passed by the Trial Court were not sustainable in the eye of law and same were set aside---Suit was filed before the wrong forum and plaint was directed to be returned to the plaintiff for presentation of the same before court of competent jurisdiction---Appeal was accepted in circumstances.
(b) Civil Procedure Code (V of 1908)---
----O. XXXVII, R. 2---Institution of summary suit on basis of negotiable instrument---Scope---Suits upon bills of exchange, hundies and promissory notes might be instituted by presenting a plaint before the competent court---Such suit could be decreed if defendant did not appear or fail to defend the suit by taking leave of the court.

Azhar Iqbal for Appellant.
Tariq Mehmood Mughal for Respondent.
Date of hearing: 21st January, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---A suit before the learned District Judge, Sialkot, under the provisions of Order XXXVII, C.P.C. was filed by the present respondent on 14-6-2013, and in response to the summons issued to the defendant/present appellant he made his appearance before the learned Additional District Judge to whom the said suit was entrusted on 24-6-2013, but subsequent thereto, never applied for leave to appear and defend the suit. Resultantly, the

learned Additional District Judge, without asking the plaintiff to produce any evidence, straightaway proceeded to decree the suit only on account of failure on the part of the defendant to pray for the leave to appear and defend the suit.

2. Leaving the merits aside, the present appeal has been filed, on the ground of lack of jurisdiction on the part of the District Judge to adjudicate upon the suit filed before him, on the plea that the same was never based on any negotiable instrument.

3. In support of his plea, the learned counsel for the appellant has drawn my attention to para-3 of the plaint, wherein, the proceedings before a Criminal Court were referred, where on account of some settlement in between the parties, an amount of Rs.1,73,000 was paid to the plaintiff, and with regard to the remaining amount of Rs.15,00,000, an affidavit was sworn by the defendant to the effect that the same shall be paid till 24-12-2012. Earlier issuance of some cheque of the amount of Rs.16,73,000 was although referred, but the affidavit, referred to hereinabove, has been made basis for the filing of the suit under Order XXXVII, C.P.C.

4. The learned counsel for the respondent, conversely, supported the decree dated 25-9-2013 and submitted that the learned District Judge has righty exercised his jurisdiction vested in him under the provisions of Order XXXVII, C.P.C.

5. In view of Order XXXVII, Rule 2, C.P.C., all suits upon bills of exchange, hundies and promissory notes, may be instituted by presenting a plaint before the competent Court. In view of sub-rule (2) thereof, in case the defendant in such suit does not appear or fail to defend the suit by taking leave of the Court in this regard, the suit "can be decreed".

6. This Court by Notification No.338/Rules XI-Y-26, dated 20-10-2001, has added sub-rule (1) in Rule (2) of Order XXXVII, C.P.C. to the following effect:--

"(1) Subject to the provisions of Rule 1, this Order applies to following classes of suits namely:-

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated damage in money payable by the defendant with or without interest arising:

(i) on a contract express; or

(ii) on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of debt other than a penalty; or

(iii) on a guarantee where the claim against the principals in respect of debt or a liquidated damages only; or

(iv) on a trust.

(c) suit for recovery of immovable property with or without claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant."

7. The learned trial court has never bothered to see as to whether the plaint presented before it asking the Court of District Judge to exercise its jurisdiction under the provisions of Order XXXVII, C.P.C. was filed on the basis of any negotiable instrument, in view of the provisions of sections 79 and 80 of the Negotiable Instruments Act, 1881, rather simply on account of failure on the part of the defendant of the suit in not filing an application for the leave of the Court to appear and defend the suit, straightaway decreed the suit. It is not evident from the record as to if the plaintiff produced even any copy of the cheques, mentioned in his plaint, and further it is clear that the learned trial court never required the plaintiff to produce any evidence in support of his plaint and to produce any documentary evidence in order to bring his suit within the ambit of a summary suit under Order XXXVII, C.P.C. It was the inherent duty first of the plaintiff and then the learned trial Court to see as to whether the plaint of the suit, filed under such provisions of C.P.C. can be treated a suit filed upon any bill of exchange, hundies or promissory note within the meaning of negotiable instrument as defined under the provisions of the Negotiable Instruments Act, 1881. Although in case of failure on the part of the defendant in such suit to apply for leave of the Court to appear and defend the suit, the learned trial Court was competent to decree the "suit" but when this term "suit" is provided in sub-rule (2) clause (a), the same is necessarily referable to the term "suit" used in rule 2(1) of Order XXXVII, C.P.C., thus, in absence of any evidence on record to show that the suit was filed upon any negotiable instrument, the learned District Judge was not competent to entertain and decide such suit.

8. It is a foremost and bounden duty of every District Judge to direct their office to examine the suits filed under Order XXXVII, C.P.C. at the time of their filing as to whether the same are filed upon any negotiable instrument viz. bills of exchange, hundies and promissory notes, and a specific separate report must be available on the file of every such suit and only then further proceedings are to be taken in such suits.

9. In view of what has been discussed above, the judgment and decree passed by the learned trial Court on 25-9-2013, is not sustainable in the eye of law, and the same is, therefore, set-aside by accepting this appeal.

10. Since the plaintiff, respondent herein, filed his suit before a wrong forum; therefore, keeping in view the provisions of Order VII, Rule 10, C.P.C., it is directed that the plaint of the Civil Suit No.6 of 2013, filed before the learned District Judge, Sialkot, on 14-6-2013, be returned to the plaintiff/respondent herein, for its presentation to the court of general jurisdiction, where the suit should have been instituted.

AG/G-7/L Order accordingly.

2014 M L D 47

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

QAISAR KHAN and 74 others---Petitioners

Versus

GOVERNMENT OF PUNJAB and 4 others---Respondents

Writ Petition No.184 of 2013, decided on 15th May, 2013.

(a) Punjab Local Government Ordinance (XIII of 2001)---

----S. 195, Sixth Sched. Cls. 49 & 53---Constitution of Pakistan, Art.199---Constitutional petition---New Cattle Market, establishment of---Petitioners being Commission Agents of Old Cattle Market claimed to have right to collect entry fee and commission from sellers and purchasers of cattle and claimed compensation from Municipal Administration for damage caused to their fixtures at Old Cattle Market---Validity---Local Government under law had exclusive power to establish or relocate any public market or public-slaughter house or any part thereof---Private markets could be established within area of Local Government after obtaining licence, but not otherwise---Association of some persons in establishment of a cattle market in public sector by investing amount in purchasing or taking property on lease or by providing allied facilities therein would not legally entitle such persons to claim such fee and commission from sellers or purchasers of cattle using such market---Practice of such association in past would not confer any right on such persons violating relevant law on the subject---Term "commission" for being alien to scheme of law provided for establishment of a cattle market could not be claimed even by a person licensed to establish a private market nor could any one pray for a decree of court in such regard---Petitioners for their claim regarding their investments in establishing new cattle market or providingfacilities therein could approach competent court, which after recording of evidence could decide same---Relief asked for by petitioners being in negation of statutory provisions could not be granted---High Court dismissed constitutional petition in circumstances.

(b) Constitution of Pakistan---

----Art.199---Constitutional jurisdiction of High Court---Scope---Relief asked for, if be in negation of statutory provisions, could not be granted at any cost.

Khalid Ashraf Khan and Mehmood Ashraf Khan for Petitioners.

Ch. Sagheer Ahmad, Abdul Salam Alvi, Haji Malik Muhammad Aslam and Aziz-ur-Rehman Khan, A.A.-G. for Respondents.

Date of hearing: 8th May, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---With the concurrence of the parties, the hearing of this petition is being considered as a Pacca case.

2. Through this judgment, the instant writ petition, as well as, Writ Petition No.324 of 2013 are to be disposed of together as similar questions of law and facts are involved in both the matters.

3. The Hon'ble Supreme Court of Pakistan while converting the Civil Petitions Nos.223 and 268 of 2013 into appeals and by allowing the same remanded back the Writ Petitions Nos.184 and 324 of 2013 to this Court for decision on merits, thus, in such post-remand proceedings, the parties were heard and record has been perused.

4. The background of the controversy pending since long is that from the time immemorial in Multan City, there has been a cattle market adjacent to the Shrine of Shah Shamas Tabraiz near Dolat Gate, Multan and by the passage of time, when such place became a part of almost centre of the city, it felt feasible to shift holding of such cattle market somewhere else in order to avoid the nuisance, traffic hazards, sanitation problem etc., which was started to be confronted to the inhabitants of the areas concerned and, therefore, the cattle market was shifted to an area, which was known as "village Samu Rana" in U.C.No.48, Sher Shah Town, Multan at Southern Bypass in 2006.

5. Prior to such shifting, there have been deliberations by the local administration, wherein some persons, who were known as 'Commission Agents' with regard to such cattle market also participated in the meetings held in order to consider the shifting or relocation of the cattle market and some private persons, including some Commission Agents were also assigned some responsibilities to arrange the purchase of land or to take some rented property on lease for holding such cattle market. After such shifting, there have been some disputes over the point of calculation of commission from sellers and purchasers of the cattle and also entry fee. By then, the Local Government felt its statutory duty to levy and collect such fee, whereas, the persons calling themselves as "Commission Agents" attained a self-styled role of collectors of such fee in their individual capacity and such controversy either had been pending before this Court or before the Government. Everywhere, however, the status of Commission Agents was never accepted as per their own wishes, of having some claim to collect, what they call the commission, fee, tax or ( ).

6. Now what has been prompted to the petitioners to raise their grievance is a public notice issued by the Administrator, TMA Sher Shah Town, Multan, on 5-1-2013, under the provisions of section 195 read with Sixth Schedule and section 49(2) of the Punjab Local Government Ordinance, 2001, intimating that for onwards use, said Town Municipal Administration has established a cattle market at Shuja Abad Road, Multan with all allied facilities and no other place will be permitted to be used as cattle market. The fee of Rs.135 per-cattle as entry fee has been introduced according to the sanctioned schedule in the newly established cattle market. However, in addition to such entry fee, no other charges are being claimed either from sellers or purchasers of cattle.

7. Precisely, grievance raised by the petitioners is that notwithstanding the establishment of new cattle market, where earlier one has been ordered to be relocated, their right to carry out the business of administrating the affairs of cattle market at village Samu Rana would remain intact and the respondent-authority viz. Local Government has no right whatsoever to cause interference into their such, what they have called "lawful business". In an indirect way, a compensation has been claimed, by the petitioners for stated damage caused to some fixtures at previous cattle market at village Samu Rana over which according to petitioners, they have invested on the asking of Local Administration in year 2006. It has further been

prayed that the claim of fee by the TMA Sher Shah Town with regard to such cattle market be also declared as illegal.

8. On 2-8-2001, feeling it expedient to devolve political power and decentralize administrative and financial authority to accountable local governments for good governance, effective delivery of services and transparent decision making through institutionalized participation of the people at grass roots level, the Punjab Local Government Ordinance, 2001 was promulgated. In view of section 195 of the said Ordinance, every Local Government was empowered to perform functions conferred by or under the Ordinance and in performance of such functions was competent to exercise such powers and follow such procedures as are enumerated in the Sixth Schedule, thereof.

9. Section 49 of Sixth Schedule reads as under:-

"49. Public markets and slaughter-houses--(1) A local government may provide and maintain within its town local area public markets and public slaughter-houses, in such number as it thinks fit, together with stalls, shops, sheds, pens and other buildings or conveniences for the use of persons carrying on trade or business in or frequenting such markets or slaughter-houses and may provide and maintain in any such market buildings, places, machines, weights, scales and measures for the weightment or measurement of goods sold therein.

(2) The concerned local government may at any time, by public notice either close or relocate any public market or public slaughter-house or any part thereof "

By virtue of Section 53 of Sixth Schedule, the following provision was made:--

"53. Private markets and slaughter-houses.---(1) No place in a local area other than a public market shall be used as a market, and no place in a local area other than a public slaughter-house shall be used as a slaughterhouse, unless such place has been licensed as a market or slaughter-house, as the case may be, by the concerned local government.

(2) Nothing in sub-paragraph (1) shall be deemed to restrict the slaughter of any animals in any place on the occasion of any festival or ceremony, subject to such conditions as to prior or subsequent notice as the concerned local government with the previous sanction of the local council may, by public or special notice, impose in their behalf."

Section 54 of Sixth Schedule provides conditions for grant of licence for private market or slaughter-house.

10. From the above referred scheme of law, it is, thus, clear that it is the exclusive power of a local government either to establish or relocate any public market or public slaughter-house or any part thereof.

11. The concept of private markets is although provided in the Ordinance, but that has been made conditional with a licencing system to be issued to such interested person desirous of

establishing a private market within the area of that local government and without such licence the functioning of any individual/individuals in the business of any private market is nullity in the eyes of law.

12. The petitioners, in both the petitions, have never surrendered to the jurisdiction of licencing authority i.e. Local Government by seeking permission to establish any private market, rather they only want to recognize their status of "Commission Agents" and to permit them to continue with their such illegal practice in an area, which once was being used as a public market and where according to their own claim, they have invested some amount for provision of some facilities felt necessary at the relevant time for establishment of a cattle market. In fact, what the petitioners want is a completely parallel system to that of a public market being legally run by the respondent-Local Administration and without adopting legal procedure to get licence before establishment of a private market, they intend to continue with their illegal practice under the cover of some judicial order.

13. If at any point of time, some individuals were associated in some arrangements of establishing a cattle market in public sector, either by investing some amount in purchasing/taking some property on lease or by providing some allied facilities in the cattle market once established at village Samu Rana, that would not provide any legal status to such individuals to claim that they have attained the right to collect what they have termed the "commission" from the sellers or purchasers of cattle using cattle market for such purpose. Even if, in past, any individual was associated in such like arrangements, that would not confer any right defeating the statutory provisions of law on the subject. One, who intends to involve in the business of cattle market by establishing the same in private sector, he has to undergo the licencing process as introduced in the Ordinance, without which, he has no right to establish or run a cattle market in private sector.

14. The term "commission" is alien to the scheme of law provided for the establishment of a cattle market, thus, even if one is licenced to establish and run a cattle market in private sector, the receipt of commission would again be an action having no legal sanctity and no one can competently ask for a decree of the Court in this regard.

15. The petitioners or any other individual, if have any claim, as against their stated investments either in establishing the cattle market at village Samu Rana or in providing some facilities there, they/he have/has every right to raise such claim in a Court of law, where after recording of evidence, adjudication can be made.

16. The petitioners have no vested right enforceable through the Constitutional Jurisdiction of this Court. They are asking for a relief in negation of the statutory provisions, which at no cost, can be granted.

17. For whatever has been discussed above, the petitions have no force and the same are dismissed.

SAK/Q-4/L Petitions dismissed.

2014 M L D 431

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

SHAMS-UR-REHMAN---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.1170-B of 2013, decided on 20th August, 2013.

Criminal Procedure Code (V of 1898)---

----S.497---Foreign Exchange Regulation Act (VII of 1947), Ss.4 & 23---Anti-Money Laundering Act (VII of 2010), S.3---Possession of illegal foreign exchange and money laundering---Bail, grant of---Plea raised by accused was that he purchased foreign currency from money exchanger and neither he misused the same nor it was crime proceed---Validity---There was no allegation of any misuse of foreign exchange acquired by accused from authorized money exchanger, therefore, offence under S. 4 of Foreign Exchange Regulation Act, 1947, was not made out---For offence of money laundering, offending money must be proceed of crime---Nothing was alleged against accused that foreign exchange recovered from the possession of accused was in fact a proceed of crime---Bail was allowed in circumstances.

Manzoor Hussain Malik for Petitioner.
Sarkar Abbas, Standing Counsel.
Tariq Mahmood, Inspector F.I.A.

ORDER

IBAD-UR-REHMAN LODHI, J.---Petitioner Shams-ur-Rehman son of Akhtar Muhammad seeks post arrest bail in case F.I.R. No.8 of 2013 dated 21-6-2013 under section 4 of Anti-Money Laundering Act 2010, Section 23 of the Foreign Exchange Regulation Act, 1947 and 109, P.P.C., at Police Station, FIA/CBC, Islamabad, based upon F.I.R. No.86 dated 20-6-2013 registered at Police Station Taman, Tehsil Talagang, District Chakwal.

2. This case was originally registered in Police Station Taman, District Chakwal for commission of alleged offence under Section 4 of Anti-Money Laundering Act, 2010 and section 23 of Foreign Exchange Regulations Act, 1947 read with section 109 P.P.C. and subsequently being a scheduled offence, the investigation has been carried out by F.I.A in C.B.C. Rawalpindi/Islamabad.

3. The allegation against the present petitioner is that on interception when he was alighted from his car, he was found in possession of 25,61,452 Saudi Riyal, 81,000 Pounds, 6,16,050 Norwegians Krone, 3,71,645 Euro, 2,000 Kuwaiti Dinar, 17,000 Omani Riyal, 9,27,000 Japanese Yen, 1,00,000 Qatari Riyal and 45,000 Denish Krone, and according to the allegations contained in the F.I.R at the relevant time, the petitioner was not in a position to produce any valid certificate of having in possession of such huge foreign exchange.

4. Learned counsel for the petitioner first of all referred to a certificate issued by Al Nahdi Exchange showing the purchase of the currency from the said money exchange on 22-4-2013. The Investigating Officer of the case has verified such valid purchase of foreign exchange. Learned counsel while referring section 4(3) of the Foreign Exchange Regulation Act, 1947 has argued that where any foreign exchange is acquired by any person other than an authorized dealer for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose.

There is no allegation of any misuse of the foreign exchange acquired by the petitioner from an authorized money exchanger. Thus, the offence under section 4 of the Foreign Exchange Regulation Act, 1947 does not make out. Further contends in this regard that even otherwise by virtue of section 23 of the said Act, the contravention of section 4(3) of the Act would entail a maximum punishment of two years or with fine or with both and thus keeping in view the maximum sentence provided for such contravention and the fact that the imposition of fine has been provided as an independent sentence, the offence falls outside the scope of prohibitory clause of section 497, Cr.P.C.

5. With regard to the offence under section 4 of the Anti-Money Laundering Act, 2010, it has been argued that the offence of money laundering has been defined in section 3 of the Act and for every such offence of money laundering, the offending money must be a proceed of crime, whereas according to the allegation nothing has been alleged against the petitioner that the foreign exchange recovered from the possession of the petitioner was in fact a proceed of crime. With regard to the offence under Anti-Money Laundering Act, 2010 a punishment in view of section 4 thereof is provided as minimum sentence of one year and at the time of grant of bail, which is to be kept in view is the minimum degree of the sentence provided and on such consideration, the offence falls outside the scope of prohibitory clause of section 497, Cr.P.C.

6. This is a bail after arrest. On all the grounds argued by the learned counsel for the petitioner, the prosecution has no satisfactory contest and thus, the petitioner is entitled to be released on bail. Resultantly, the instant petition is allowed and the petitioner is allowed post arrest bail subject to his furnishing bail bonds in the sum of Rs.10,00,000 (Ten lac only) with one surety in the like amount to the satisfaction of learned trial Court.

MH/S-91/L Bail allowed.

2014 M L D 599

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

IQRA HUSSAIN---Petitioner

Versus

S.H.O. POLICE STATION NAWAB TOWN and another---Respondents

Writ Petition No.25980 of 2013, decided on 4th November, 2013.

(a) Criminal Procedure Code (V of 1898)---
----Ss.561-A, 173, 249-A & 265-K---Constitution of Pakistan, Art.199--Constitutional petition---Maintainability---Application for quashing of F.I.R.---Filing of Challan---Effect---Contention of authorities was that police after preparation of report under S. 173, Cr.P.C. had placed the same before Trial Court and it would be appropriate for accused to have first approached Trial Court in view of S. 265-K, Cr.P.C.---Validity---High Court in exceptional cases could exercise jurisdiction under S.561-A, Cr.P.C. without waiting for Trial Court to pass orders under S.249-A or 265-K, Cr.P.C., if the facts of the case so warranted---Main consideration to be kept in view was futile exercise, wastage of time and abuse of process of Court or not---High Court declined to refer the matter to Trial Court where challan under S. 173, Cr.P.C. had been filed---Constitutional petition was maintainable in circumstances.

Miraj Khan v. Gul Ahmed and 3 others 2000 SCMR 122 rel.

(b) Penal Code (XLV of 1860)---
----Ss.371-A & 371-B---Constitution of Pakistan, Art.199---Constitutional petition---Quashing of F.I.R.---Selling and buying persons for prostitution---Raid was made at guest house in search of some proclaimed offender, instead accused were arrested who were found there in objectionable position busy in some obscene activities---Validity---Prosecution was launched for some ulterior motives just to create harassment for persons involved therein---Prosecution was not equipped with any material in order to involve accused or other persons in offences punishable under Ss. 371-A & 371-B, P.P.C.---When court was convinced that from very inception, prosecution was started with malice, then there was no justification to wait for Trial Court to pass any order under S. 265-K, Cr.P.C.---High Court quashed F.I.R. and proceedings pending on the basis of such F.I.R. before Trial Court---Constitutional petition was allowed in circumstances.

Miraj Khan v. Gul Ahmed and 3 others 2000 SCMR 122; Muhammad Abbas alias Ajmi v. The State 2005 YLR 3193 and Ghulam Qadir Faraz alias Babar v. Station House Officer, Police Station Saddar Kamoke and 2 others 2012 PCr.LJ 638 rel.
Rana Baleegh-ur-Rehman for Petitioner.
Muhammad Nasir Chohah, Assistant Advocate General with Muhammad Hussain, A.S.-I. for Respondent.

ORDER

IBAD-UR-REHMAN LODHI, J.---By means of F.I.R.No.606 of 2013 dated 23-6-2013 registered under sections 371-A and 371-B P.P.C. at Police Station Nawab Town, Lahore, the Incharge of Police Post L-Block got registered the instant criminal case to the effect that he was informed about the presence of a proclaimed offender, namely, Imran Ali, in a guest house. When raided, the said proclaimed offender was not found their but he apprehended some men and women on the allegation that such apprehended persons were found in objectionable position busy in some obscene activities.

2. The petitioner through the present Constitutional Petition seeks quashment of the First Information Report mentioned above.

3. The learned counsel for the petitioner has argued that even if the allegations contained in the F.I.R. are accepted as correct, the offences under sections 371-A and 371-B P.P.C., at no cost, are constituted.

4. The offence under section 371-A P.P.C. would constitute if a person sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment which may extend to twenty five years, and shall also be liable to fine. Similarly, section 371-B, P.P.C. provides a punishment for the purpose of buying a person for the same purpose as were provided in section 371-A, P.P.C. for selling purpose.

5. The learned Assistant Advocate General by intervening in the arguments of the learned counsel for the petitioner has placed information before the Court that the police after preparation of report under section 173, Cr.P.C. has placed the same before the learned trial court and it would be appropriate for the petitioner, first to approach the learned trial court in view of section 265-K, Cr.P.C. to which the learned counsel for the petitioner with the help of a case decided by the Hon'ble Supreme Court of Pakistan titled 'Miraj Khan v. Gul Ahmed and 3 others' (2000 SCMR 122) has submitted that High Court in exceptional cases can exercise jurisdiction under section 561-A, Cr.P.C. without awaiting for Trial Court to pass orders under section 249-A or 265-K, Cr.P.C., if the facts of the case so warrant. Main consideration to be kept in view would be futile exercise, wastage of time and abuse of process of Court or not.

6. Placing reliance on such authority/judgment of the Hon'ble apex Court, I am inclined to decide this petition on merits without referring the petitioner to the learned trial court, where reportedly challan under section 173, Cr.P.C. ought to have been filed.

7. This Court in case of 'Muhammad Abbas alias Ajmi v. The State' (2005 YLR 3193) has held that the police on receipt of spy information raided on a rented room of a Hotel and found the accused busy in committing Zina-bil-Raza with a woman and arrested both of them. Such raid which was conducted without obtaining search warrant from the Magistrate within the requirement of section 103, Cr.P.C, was termed as an illegal act. It was further held in the same judgment that protection of dignity of man and the privacy of home had been guaranteed being inviolable by Article 14 of the Constitution of the Islamic Republic of Pakistan, 1973.

8. Keeping in view the peculiar facts of this present case, I am seeking guidance from an elaborated judgment passed by this Court in the case of `Ghulam Qadir Faraz alias Babar v. Station House Officer, Police Station Saddar Kamoke and 2 others' (2012 PCr.LJ 638) and

for ready reference, some of the selected portion from the said judgment are re-produced here-in-below:--

"According to the contents of the F.I.R. itself on spy information raid was conducted by the police contingent on the dera of Muhammad Idrees son of Ghulam Sabir situated at Mantpura. It has to be seen that the said place of raid was not a public place, rather it was owned and in the possession of a private individual i.e. Muhammad Idrees. In this case neither search warrants were obtained by the police nor even any effort was made by the police in this behalf and further more, no respectable from the locality was associated in the impugned raid proceeding. In such a situation, the alleged police raid cannot be better terms than an "intrusion", which is an act prohibited by the Constitution, the law and the Holy Quran.

On the question of registration of case under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, on the report of a spy informer, this court in its an elaborate judgment "Riaz v. Station House Officer, Police Station Jhang City and 2 others" (PLD 1998 Lahore 35), after discussing the entire background, held that:--

"Law does not permit the registration of a case under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, on the report of a "Mukhbar" because this Ordinance has to be read in conjunction with the Offence of Qazf Enforcement of Hadd) Ordinance, 1979 and "Mukhbar" being entitled to have his name and identity kept secret, this would allow him to even make false imputations of Zina with impunity which would defeat the very spirit and purpose of both Enactments. Such act would not be in conformity with the spirit of Surah Hujrat, Ayat at 6 and guidelines provided by the Holy Quran in this behalf."

The legislators in their wisdom, having regard to the existing norms of the society, were conscious of the fact that if cases under such offences are permitted to be registered on spy information or on the complaints lodged by anonymous persons, this practice could have encouraged false reports to involve innocent men or women for ill designs.

In short, for the purposes of law and implementation of its provisions no room has been made for house search. The Federal Shariat Court has emphatically observed that the charge of Zina should not be casually brought to Court or publicized as it shatters the foundation of the family where female is accused in such a crime. It has been further held that "human weakness should rather be overlooked and ignored, unless committed at public places and becomes a cause of concern from the society's point of view". Reference may be made to the case "Ghulam Sakina v. State" 1991 PCr.LJ 568).

In this case, the police has involved the petitioner and others without any iota of evidence, by violating the statutory provisions of law, also encroached the fundamental right of the petitioner and others guaranteed under Article 14 of the Constitution of Islamic Republic of Pakistan, 1973, providing that the dignity of man and subject to law the privacy of home is inviolable. Such fundamental rights are whenever violated and complained of, the court must step into and investigate under constitutional jurisdiction to pass such order as may be found just, legal and equitable. Human dignity, honour and respect is more important than physical comforts and necessities and no attempt on the part of any person individually,

jointly or collectively to detract, defame or disgrace another person thereby diminishing, decreasing and degrading the dignity, respect, reputation and value of life and more particularly on the part of the police officials, who are otherwise bound to protect the rights of citizens, should be allowed to go with immunity. The provision providing for the dignity of man as a Fundamental Right is uparalleled in the Constitutions and hardly Constitutions of a few countries provide such rights. It is difficult to countenance the clandestine and spurious manner in which law has been put into motion in this case. Both injunctions of Islam and the law of the land are intended to protect and preserve Fundamental Right of the Dignity of man and Privacy of his Home. Both the concepts have to be read conjunctively. Privacy of home after all, also enshrines dignity of man. It may be noted this the word "inviolable" has been used in the Constitution in respect of this right particularly. Violation of the privacy of one's house through arbitrary intrusion by the police, without authority of law is certainly condemnable being repugnant to the concept of the human rights relatable both the dignity of man and privacy of the home.

From perusal of sections 371-A and 371-B, C.P.C., it is very much clear that these provisions only would apply to persons who sell or purchase any person with the intent that such person would be used for the purpose of prostitution or illicit intercourse. In this case no material was available against the accused to substantiate the commission of offence No eye-witness was available before conducting the raid, no search warrant had been obtained before raiding the Dera and police officials committed violation of section 103, Cr.P.C.

Non-observance of all the above legal requirements; not only give a strong impression about the mala fides of the police, but it also is indicative of the fact that this all was done by the concerned police officials in extreme haste, to cover up and shield the wrong, which they had done to the petitioner and other persons, cited as accused in the instant F.I.R."

9. By applying the above settled principal on the case in hand, it is but clear that in the present case, the prosecution was launched for some ulterior motives just to create harassment for the persons involved therein and the prosecution is not equipped with any material in order to involve the petitioner or other persons in the offences punishable under sections 371-A and 371-B, P.P.C. When the Court is convinced that from very inceptions, the prosecution was started with a malice, then there will be no justification to await for the trial court to pass any order under section 265-K, Cr.P.C.

In view of what has been discussed above, the instant petition is allowed and consequently F.I.R. No.606 of 2013, dated 23-6-2013 registered under sections 371-A and 371-B, P.P.C., at Police Station, Nawab Town, Lahore, as well as, the proceedings pending on the basis of such F.I.R before learned trial court are quashed.

MH/I-37/L Petition allowed.

2014 M L D 701

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

MAQSOODAN BIBI---Petitioner

Versus

MANSHA MASIH and 2 others---Respondents

Writ Petition No.1425 of 2012, heard on 19th July, 2012.

Constitution of Pakistan---

----Art.199---Constitutional petition---Recovery of minor/detenu---Minor given into custody of relatives (foster parents) being claimed back by her real parents after lapse of many years---Not justified---Welfare of minor of prime consideration----Personal preference of minor to be given weight---Petitioner (mother of minor) gave custody of minor girl to her sister and respondent (brother in law of petitioner)---Petitioner's sister passed away and respondent contracted second marriage with a woman who already had two sons---Contention of petitioner were that her minor daughter had to live with the two sons of respondent's second wife, who were strangers to the minor and she could not be permitted to live in such company---Validity---Custody of minor could be delivered by the court only in the interest and welfare of minor and not the interests of the parents---Minor had been in the care of respondent since she was two and a half years old and petitioner had never bothered to share any responsibility in her upbringing---Minor was a brilliant girl who was getting education in a well reputed educational institution---Minor stated that two sons of respondent's second wife were living in a different city and not with her; that she lived at her family home with respondent and his second wife; that her real mother (petitioner) was a stranger to her, and that she always treated the respondent as her father and felt comfortable living with him and his second wife---Respondent had stated that he considered the minor as his real daughter and had devoted his remaining life to her welfare; that he had contracted second marriage only for her welfare so as to provide her the company of an experienced lady, and that two sons belonging to his second wife were not living with the minor---Petitioner had never taken any interest in the welfare of the minor---Preference of minor had to be given weight and she had categorically preferred to live with the respondent instead of her real mother (petitioner)---Shifting custody of minor to the petitioner in circumstances would be against her welfare---Petition was dismissed in circumstances.

Mst. Nighat Firdous v. Khadim Hussain 1998 SCMR 1593 and Sh. Abdus Salam and another v. Additional District Judge, Jhang and 2 others 1988 SCMR 608 rel.

Tanveer Iqbal Khan for Petitioner.

Raja Solat Majeed Satti and Rashid Hafeez, Assistant Advocate General Punjab for Respondents.

Date of hearing: 19th July, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Waleeqa was born to the petitioner in 2001 but was given to the custody of her sister Mst. Shahnaz, who was issueless. Mst. Shahnaz was the

wife of Mansha Masih-respondent No.1 and it is that couple, who brought up the minor. Unfortunately, Mst. Shahnaz died almost three years back and after one and a half year of her death, Mansha Masih contracted marriage with one Mst. Sofia. Such turn in the family of Waleeqa prompted the petitioner to ask for the custody of the minor mainly on the ground that when Mansha Masih contracted second marriage, his second wife entered in his house with her two sons, who were strangers at least to Waleeqa and she cannot be permitted to live in such company.

2. The petition under section 491, Cr.P.C. before Sessions Court at Rawalpindi was not acceded to by a learned Additional Sessions Judge, who vide order dated 27-3-2012 dismissed the same leaving it for the petitioner to file a proper petition under the provisions of Guardians and Wards Act, if so advised. The same relief is being sought by filing the Constitutional petition and the same arguments are repeated here in support of the petition.

3. After hearing the arguments of the learned counsel for the petitioner, I have interviewed Waleeqa in my Chamber. She seems to be a brilliant baby and according to her, she is getting education in 7th Class in Army Public School, a well reputed Educational Institution of the Town. She has always been amongst the position holder students. I have inquired from her as to how she is treating Maqsooda and Pitras, to which she has categorically replied that they are strangers to her and she always treated Mansha Masih as her "Papa". She feels comfortable while living with Mansh Masih and Mst. Sofia. With regard to the behavior of Mst. Sofia, she claims that she is being treated like her real daughter and every sort of attention is being extended to her by Mst. Sofia and Mansha Masih. She seems to be composed and comfortable in the company of latter mentioned couple. She has confirmed that the two sons of Mst. Sofia are residing with her paternal grand-parents in Faisalabad and here at Rawalpindi the family who is permanently living consists of Mansha Masih, Mst. Sofia and herself. Mansha Masih has also been interviewed and he in clear terms stated that he always treated Waleeqa as his real daughter and has devoted his remaining life for her welfare. With regard to his second marriage, he disclosed that it was only for the welfare of Waleeqa and to provide her a company of an experienced lady as in the age in which Waleeqa is entering she would be definitely in need of some expertise of an experienced lady. He confirms the position that two sons of Mst. Sofia at the time of his marriage with the said lady were shifted to Faisalabad with their grandparents and here in Rawalpindi Mansha Masih and Mst. Sofia are living with Waleeqa. The baby Waleeqa entered into her conscious life while living with Mansha Masih and Mst. Shahnaz and according to her she has always treated the said couple as her Mama and Papa and during whole of this time, it was Mansha Masih, who was responsible for providing all sort of necessities of life to Waleeqa. Pitras and Maqsooda, who are claimants of the custody of Waleeqa have never taken any interest in the welfare of their child, who was being looked after properly by respondent No.1 and his wife and welfare of minor, which is the prime consideration in such like cases would be with Mansha Masih and Mst. Sofia. To my understanding if at this stage the custody of Waleeqa is shifted it would definitely result in breaking of her personality and in future a brilliant student would be going to loose her psychological balance, which naturally would be against the welfare of minor. She is 12-years of age and is competent to express herself, which she has done before me. The apprehension shown by the petitioner of presence of two sons of Mst. Sofia in the house of Mansha Masih has no basis and if such

persons are not there and Mst. Sofia is looking after her in a proper and appropriate manner, the welfare of the minor Waleeqa, who like to be called as Waleeqa Mansha lies while she would continue to live with respondent No.1 as she is in comfortable position in the present circumstances would be properly safe-guarded. In exercise of parental jurisdiction, I deem it proper that custody of such child at this point of her age would not be disturbed. The welfare of the minor is the paramount consideration in determining her custody. The custody of minor can be delivered by the court only in the interest and welfare of the minor and not the interest of the parents. In this case, the minor had admittedly been under the care of respondent No.1 and his wife since when she was only two and a half years of age and the petitioner has never bothered to share any of his responsibility in up-brining the child. Thus, the welfare lies while the minor would remain in the custody of respondent No.1. The preference of the minor is another consideration, which should be given weight and as earlier noted Waleeqa has in categorical terms preferred to live with respondent No.1 instead of the petitioner. I am fortified while holding this view by the judgment passed case of "Mst. Nighat Firdous v. Khadim Hussain" (1998 SCMR 1593). The apex Court in case reported as "Sh. Abdus Salam and another v. Additional District Judge, Jhang and 2 others" (1988 SCMR 608) has in similar circumstances found that where any parent has permanently handed over his any issue to their some issueless relatives out of love and affection then the real parents were notjustified to claim return of the child after a considerable time the minor spent with their foster parents. In the reported matter, the preference given by the child was also given weight and the custody of minor was ordered to remain with the foster parents, who were providing the minor education, and are socially and economically of a status to bring her up properly and keeping in view the paramount consideration viz. the welfare of the child, the custody from such foster parents was not disturbed.

4. Resultantly this petition fails and is dismissed.

5. The petitioner would further be entitled to see Waleeqa subject to such terms and conditions as would be determined by the learned Guardian Judge upon application, if moved, in this behalf by the petitioner.

MWA/M-293/L Petition dismissed.

2014 M L D 1284

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

MUHAMMAD IKRAM and 2 others---Petitioners

Versus

BAHA-UD-DIN ZAKARIYA UNIVERSITY through Vice-Chancellor and 5 others---Respondents

Writ Petitions Nos.9959, 6964, 7016 and 7132 of 2013, decided on 7th October, 2013.

Constitution of Pakistan---

----Art.199---Constitutional petition---Educational Institution---Admission of students in the University with the connivance of its official---Contention of students was that their

admission was cancelled by the University against the rules---Validity---Students themselves had allowed to be defrauded by an individual act of official working in the University---Petitioners might proceed against such criminal act of the official---Private arrangement between students and official of University would not create any right in their favour to get something which was not according to their entitlement---None of petitioners had obtained marks with the required merits and through some fraudulent means they had shown their admission---Petitioners had no right to continue with their such ill-gotten gains---Such wrong could not be perpetuated---No fundamental right had been infringed by the act of University in cancelling the ill-gotten admission---Constitutional petition was dismissed in circumstances.

Khawaja Qaisar Butt for Petitioners (in Writ Petition No.7016 of 2013).
Shakeel Javaid Chaudhry for Petitioners (in Writ Petition No.6964 of 2013).
Muhammad Aamir Khan Bhutta for Petitioner (in Writ Petition No.7132 of 2013).
Malik Muhammad Tariq Rajwana for Respondents University.

ORDER

IBAD-UR-REHMAN LODHI, J.---By means of this order, I intend to dispose of the instant petition viz. Writ Petition No.9959 of 2013, as well as, Writ Petition No.6964 of 2013, Writ Petition No.7016 of 2013 and Writ Petition No.7132 of 2013, as identical question is involved in all the petitions.

2. Admittedly, when the petitioners applied for admission in different faculties in Baha-ud-Din Zakariya University, Multan, they were having less merit than the required one and according to the learned counsel for the petitioners, they were made to believe by a clerk of Admission Branch of the University that if they would pay an amount of Rs.50,000 per-candidate, they would be granted admission as per their demand. At the relevant time, seemingly, with the connivance of the said official, the petitioners got admission, but when irregularity came to surface, the matter was gone into by an Inquiry Committee constituted to probe in the matter regarding malpractices for admission in the classes of Master's Degree for the session 2011-2013 and Graduation Degree for the session 2011-2015 and admissions of a number of students, including the petitioners, were cancelled.

3. The learned counsel for the petitioners has argued that once the admission was granted, then keeping in view the principle of locus poenitentiae, the same cannot be cancelled. However, the learned counsel has conceded that none of the petitioner qualified for the relevant session by achieving the required merit and it was only on the assurance of some clerk in Admission Branch of the University that after payment of Rs.50,000, the petitioners believed themselves to be the bona fide students of the University in the relevant faculties.

4. When asked as to where is the receipt of such Rs.50,000, the learned counsel responded that since it was not a legal payment; therefore, no receipt available showing such payment to such clerk.

5. The petitioners if they themselves have allowed to be defrauded by an individual act of some official working in Admission Branch of the University, they may proceed against

such criminal act of such individual, but said private arrangement in between a student, who was not qualifying up to the required standard and some dishonest official present in the set up of the University dealing with the students privately, would not create any right in the petitioners to get something, which was not according to their entitlement.

6. Admittedly, none of the petitioner obtained the marks in order to bring their status compatible with the required merits and through some fraudulent means, they have shown their admission and were properly checked have no right to continue with their such ill-gotten gains. The same wrong cannot be perpetrated. No fundamental right has been shown to have been infringed by the act of the University authorities in canceling the ill-gotten admission.

7. The petitions having no force, are dismissed.
AG/M-279/L Petitions dismissed.

2014 P Cr. L J 1344
[Lahore]
Before Muhammad Anwaarul Haq and Ibad ur Rehman Lodhi, JJ
IBRAR HUSSAIN---Appellant
Versus
The STATE and another---Respondents

Criminal Appeal No.194 of 2014, heard on 20th February, 2014.

Control of Narcotic Substances Act (XXV of 1997)---
----Ss. 9(c), 32(2) & 48---Possessing and trafficking narcotics---Confiscation of vehicle---Car in question taken into custody on the allegation that same was being used by appellant/accused in the commission of crime, was confiscated in favour of State and its auction was also ordered---Said car was given to appellant in superdari by Special Court, but ignoring such aspect of the matter; and also violating the process of issuance of notice to the appellant/owner and to enquire into the matter, confiscation of the car was ordered by the Special Court---Impugned judgment to the extent of confiscation of car was nullity in the eye of law, and was not sustainable---To such extent impugned order was set aside, and matter was remanded to the Special Court with the direction, first to issue notice to the owner of car, and then to conduct a discrete inquiry, while maintaining superdari with the appellant; and thereafter pass an order with regard to disposal of car.

Hammad Akbar Wallana for Appellant.
Tariq Saleem Sheikh, Special Prosecutor for ANF.
Date of hearing: 20th February, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---After hearing the learned counsel for appellant, we consider it appropriate to decide the case on merits and as such the case is admitted to

regular hearing. Learned Special Prosecutor for ANF is present and accepts notice on behalf of the State.

2. Since short point is involved, learned counsel for the appellant as well as learned Law Officer requested for hearing of the case today. So be it.

3. In a case, registered through F.I.R. No.11/10 dated 26-4-2010 under section 9(c) of the Control of Narcotic Substances Act, 1997 at Police Station ANF, Faisalabad, a Suzuki Cultus, Registration No.LEA-6165, Chasiss No.370157, Engine No.E 401322 owned by the present appellant was taken into custody by the Investigating Agency on the allegation that the same was being used by the accused person of said registered criminal case. The present appellant being owner of the property, not involved in the criminal case, applied for having the possession of the said vehicle on sapurdari which was allowed in his favour and he is in use of the same since then.

4. The accused Muhammad Tauheed was being tried by the learned Judge, Special Court C.N.S., Faisalabad and a final judgment was passed on 5-7-2013, whereby the accused Muhammad Tauheed was convicted under section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to life imprisonment with fine of Rs.10,00,000 and in default whereof to further undergo 1 year's S.I. The vehicle in question was ordered to be confiscated in favour of State and its auction was also ordered with a further direction to deposit the sale-proceed thereof in the treasury. On having come to know of such order of confiscation of the vehicle, the present appellant filed appeal under the provisions of section 48 of Control of Narcotic Substances Act, 1997.

5. The learned Special Prosecutor appearing for ANF has raised two objections, first as to the maintainability of appeal filed by the present appellant and second with regard to limitation of filing of the appeal.

6. The learned counsel for appellant, responding to such objections, has argued that under section 48, C.N.S.A. a wide scope for filing of appeal has been provided, for, an appeal against the order of a Special Court comprising, a Sessions Judge or an Additional Sessions Judge, shall lie to this Court; that the provisions of such section of appeal places no restriction as to who can file an appeal; that a person, owner of the vehicle, who has been allowed to retain such vehicle on sapurdari, if has never further been associated in any proceedings of trial and has been deprived from such vehicle without any prior notice would certainly be termed as an aggrieved person from the judgment of the learned Judge, Special Court C.N.S., Faisalabad and he would be a competent person to be an appellant against the order of the Special Court.

7. Heard. Record perused.

8. On objection with regard to the limitation for filing an appeal under the provisions of C.N.S.A., although the learned Special Prosecutor has put some labour in order to reach to some conclusion as to what is the limitation to be considered for filing an appeal under C.N.S.A. in absence of any particular provision in such special law, but we are not going to

dilate upon such issue in the present case and leaving the same to be decided in some appropriate proceedings.

9. For the present appeal, suffice it to say that process adopted by the learned Special Court in directing the confiscation of the vehicle in question is in complete negation of the proviso to section 32(2) of C.N.S.A. which reads as under:--

"Provided that no vehicle, vessel or other conveyance shall be liable to confiscation unless it is proved that the owner thereof knew that the offence was being, or was to be committed."

In the present case admittedly the car was given to the appellant on sapurdari by the Special Court but ignoring such aspect of the matter and also violating the process of issuance of notice to the appellant/owner and to enquire into the matter, the confiscation of vehicle was ordered by the Special Court, thus the judgment dated 5-7-2013 to the extent of confiscation of vehicle is nullity in the eye of law and is not sustainable. To such extent, the order dated 5-7-2013 passed by the learned Judge Special Court C.N.S., Faisalabad is therefore set aside and the matter is remanded back to the learned Judge Special Court C.N.S., Faisalabad with a direction, first to issue notice to the owner of the vehicle and then to conduct a discrete inquiry while maintaining sapurdari with the appellant and thereafter pass an order with regard to disposal of Suzuki Cultus Car, Registration No.LEA-6165, Chasiss No.370157, Engine No.E401322.

10. With these observations, this appeal stands allowed.

HBT/I-14/L Appeal allowed.

2014 P L C (C.S.) 459
[Lahore High Court]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD YASIR ANWAR
Versus
VICE-CHANCELLOR, BAHAUDDIN ZAKARIYA UNIVERSITY and 3 others

Writ Petition No.4259 of 2013, decided on 30th May, 2013.

(a) Bahauddin Zakariya University Act (III of 1975)---
----Ss. 16, 24 & 26---Constitution of Pakistan, Art.199---Constitutional petition---Contractual employment--- Regularization--- Semester Implementation Committee---Scope---Change/addition in eligibility criteria for appointments in the University---Petitioner, a contractual employee was denied for regularization due to addition of eligibility criteria for the post held by him---Criteria of eligibility for appointment was changed by Semester Implementation Committee of the University---Validity---Whole scheme of law dealt with the affairs of the University and relevant chapter in the calendar of the University provided a process of selection and allied matters in the University, Semester Implementation Committee figured nowhere---Only Syndicate, Senate and in some emergent situation the Vice-Chancellor were competent to take necessary steps to run the administrative affairs of

the University---Addition in eligibility criteria for appointment of Lecturers recommended by Semester Implementation Committee, was thus, not sustainable.

(b) Bahauddin Zakariya University Act (III of 1975)---
----Ss. 16, 24 & 26---Constitution of Pakistan, Art.199---Constitutional petition---Contractual employment--- Regularization--- Locus poenitentiae, principle of--- Subsequent change/addition in eligibility criteria for appointments---Effect---Petitioner, a contractual employee was denied regularization due to addition of eligibility criteria for the post held by him---Criteria of eligibility for appointment was changed after the appointment of petitioner---Validity---Right had accrued to the petitioner to be regularized on the strength of eligibility criteria provided by Syndicate, which was in existence and holding the field at the relevant date (appointment)---Eligibility of the petitioner was to be adjudged on the touchstone of the criteria prevailing at the relevant date when he satisfactorily completed two years of service on contract---Subsequent change in eligibility criteria and that too by incompetent and irrelevant Committee which was alien to the scheme provided in the relevant rules could not be relied upon, particularly, in order to defeat a right which had already accrued to the petitioner---Principle of Locus poenitentiae would not permit even the competent authority to undo any appointment even if found defective after a long time and the incumbent would not liable to be removed from service---University was directed by the High Court to treat the petitioner as regular employee---Constitutional petition was allowed.

Mian Tariq Javed v. Province of Punjab through Chief Secretary, Government of Punjab, Lahore and 2 others 2008 SCMR 598 rel.

(c) Bahauddin Zakariya University Act (III of 1975)---
----Preamble---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Contractual employment in University---Regularization---University created by Statute---Normally, a right against a University could not be enforced by maintaining a constitutional petition but there was no complete bar on the constitutional jurisdiction of High Court, in entertaining the constitutional petition dealing with the affairs of a University which otherwise was a creation of a statute---Petitioner was eligible to be regularized in service of the University---University was directed by the High Court to treat the petitioner as a regularized employee---Constitutional petition was allowed.

Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another 2012 SCMR 6 and University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali 1992 SCMR 1093 rel.
Khadim Nadeem Malik for Petitioner.
Malik Muhammad Tariq Rajwana, Legal Adviser for Respondent/University.

ORDER

IBAD-UR-REHMAN LODHI, J.--- By means of an advertisement dated 24-7-2008, the respondent-Baha-ud-Din, Zakariya University, Multan invited the applications from Pakistani Nationals for different jobs in the University including four vacancies of Lecturer in Computer Engineering with qualification of Master's Degree/ B.SC.(Engineering) (First Class) in the relevant field with no 3rd Division in the academic career, from HEC

recognized University/ Institution. No experience was required for the said job. The petitioner applied for the said job and by means of office Order No.PF/Cont.C. Engg/Admin-1824, dated 11-2-2010, the Vice-Chancellor on the recommendations of the Director Academcis approved the recommendations of Selection Board arrived at in its 1/2009 meeting held on 10-11 January, 2009 and appointment of the petitioner was ordered as Lecturer in Computer Engineering in University College of Engineering and Technology, on contract basis initially for a period of one year. A condition amongst others was imposed upon the petitioner in case of his acceptance of said job was to withdraw the earlier filed writ petition praying therein for the said job, which petition was withdrawn. The petitioner joined services of the University. By means of office Order No.PF/18/Cont.C.Engg./Admin-1250 dated 1-2-2011, the services of the petitioner were extended for a period of further one year from11-2-2011 to 10-2-2012 in BPS-18. In similar manner, it was further extended vide office Order No.PF/18/Cont.C.Engg. /Admin-1469 dated 10-2-2012 till 10-8-2012 in the same scale.

2. The Registrar of the University, vide Notification No.Univ-597-Admin/8002, dated 12-8-2010 conveyed the decision of the Syndicate arrived at in its 5/2010 meeting held on 17-7-2010 for regularization of the services of contract faculty members who were appointed through Selection Board and completed two years services satisfactorily.

3. The petitioner having been appointed and joined the services in University on 11-2-2010 completed his two years service on 10-2-2012 and even before expiry of said period, he moved the concerned authorities in University for his regularization through application dated 15-11-2011 seeking his regularization w.e.f. 10-2-2012. The office Order No.Admin.UCE&T-22/11809 dated 3-12-2012 indicates that the petitioner even at that point of time was being treated as Lecturer in Computer Engineering in University and in his such capacity assigned the part time duties of Controller of Examination (Personal Computing Examination) for B.Sc. Computer Engineering Session 2011-2012 w.e.f. 1-12-2011 to 31-10-2012 with an additional remuneration for said additional work at the rate of Rs.2000 per month.

4. Having no response for his request to regularize him in the service, the petitioner again on 2-4-2013 sought the same relief which although has not been responded to but the petitioner was made to believe that he was not going to be regularized on the strength of a recommendation by Semester Implementation Committee arrived at in its meeting on 25-9-2012 which added some more qualifications for obtaining CGPA under Semester System and also a lst Division under Annual System.

5. In such background, the petitioner prays for his regularization which prayer is seriously resisted by the University mainly on the plea that firstly the constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is not maintainable with regard to the affairs of the University and secondly that in view of the changed criteria as was recommended by the Semester Implementation Committee the petitioner was not qualified to be considered for regularization.

6. After hearing the learned counsel for the parties and going through the record, I find that in whole scheme of law deal with the affairs of the University and relevant chapter in calendar of

University providing a process of selection and allied matters in the University, "Semester Implementation Committee" figures nowhere. It is only Syndicate, Senate and in some emergent situation the Vice-Chancellor which are competent to take necessary steps to run the administrative affairs of the University. The addition in eligibility criteria for appointment of Lecturer as was recommended by said Committee is, thus, not sustainable and refusal on the part of University by placing reliance on such recommendations stands nowhere.

7. A right was accrued in favour of the petitioner on 10-2-2012 to be regularized on the strength of eligibility criteria provided by the Syndicate on 17-7-2010 and conveyed on 12-8-2010 which was in existence and holding the field on the relevant date, therefore, eligibility of the petitioner was to be adjudged on the touchstone of the criteria prevailing on 10-2-2012, the relevant date in case of the petitioner when he completed two years service on contract, satisfactorily. The subsequent change in eligibility criteria and that too by completely irrelevant Committee which is alien to the scheme provided in the relevant rules cannot be relied upon, particularly, in order to defeat a right which has already been accrued in favour of the petitioner. The Hon'ble Supreme Court of Pakistan in a case reported as Mian Tariq Javed v. Province of Punjab through Chief Secretary, Government of Punjab, Lahore and 2 others (2008 SCMR 598) has authoritatively held that the principle of locus poenitentiae would not permit even the competent authority to undo any appointment even if found defective after a long time and the incumbent would not liable to be removed from service.

8. Learned counsel for the respondent-University has vehemently stressed for dismissal of the petition having not maintainable within the meaning of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

9. Hon'ble Supreme Court of Pakistan in a case reported as "Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another" (2012 SCMR 6) while dealing with a case relatable to Baha-ud-Din Zakariya University which incidentally is the respondent in the present petition also and on the question of maintainability of a constitutional petition with regard to affairs of University following was the dictum laid down:---

"Adverting to the validity of the judgment under challenge, the submissions, of petitioner's learned counsel qua the maintainability of petition before the High Court have been considered by us. However, we find that the impugned judgment even if having some element of jurisdictional defect has been passed in aid of justice and any interference would not be in accord with the canons of equity."

10. Even otherwise, learned counsel for the respondent-University himself has placed reliance on the case reported as "University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali" (1992 SCMR 1093) to contend that "normally" a right against a University would not be enforced by maintaining a constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The use of word "normally" in the said reported judgment do indicate the intention and command of the apex Court that there is no complete bar in entertaining the constitutional petitions dealing with the affairs of a University which otherwise is creation of a statue. The respondent-University is creation of Baha-ud-Din Zakariya University Act (III) of 1975.

11. For what has been discussed above, I am of the view that the petitioner was eligible to be regularized in service of the University as Lecturer in Computer Engineering w.e.f. 10-2-2012 and the University-Authorities have acted in illegality in not accepting his such status.

12. Resultantly, this writ petition is allowed and the respondents are directed to treat the petitioner as a regularized Lecturer in Computer Engineering w.e.f. 10-2-2012 and issue appropriate orders with all consequential benefits within next fifteen days.

13. I have been informed by the learned counsel for the petitioner that notwithstanding the fact that the petitioner is continuously performing his duties in the University, he is not being paid any salary/remuneration since August, 2012.

14. The University Authorities are also directed to immediately arrange the release of withheld remuneration of the petitioner again within a period of next fifteen days and to continue making payment in future without any break according to his entitlement.

JJK/M-174/L

2014 P L C (C.S.) 719

[Lahore High Court]

Before Ibad-ur-Rehman Lodhi and Mahmood Ahmad Bhatti, JJ

PUNJAB TECHNICAL EDUCATION AND VOCATIONAL TRAINING AUTHORITY (TEVTA) through Authorized Signatory

Versus

MUHAMMAD ATIF AMIN and 2 others

Intra-Court Appeal No.359 of 2013 in Writ Petition No.5780 of 2011, decided on 17th December, 2013.

(a) Constitution of Pakistan---

----Arts. 199 & 4---Law Reforms Ordinance (XII of 1972), S.3---Constitutional petition---Civil service--- Intra-court appeal---Advertisement for making appointment to the vacant posts---Non-issuance of appointment letters by the Authority---Scope---Candidate filed constitutional petition for issuance of appointment letter which was accepted by High Court and departmental authorities were directed to issue appointment letters in favour of persons who were on the top of merit list as prepared by them---Validity---Various posts were advertised by the employers-college in the newspaper giving impression that same were needed to be filled---Respondent applied for the posts of Store Keeper and Junior Clerk and when his papers were found in order, he was short-listed for interview---Respondent (candidate) came at the top of the merit list and he opted to join as a Store Keeper---Appointment letter of respondent was ready but process of appointment was disrupted---After completion of formalities and declaring respondent as successful candidate Authority could not cancel appointment process---Authority vested in the Government and its Institutions could not be exercised at its whims and caprices of powers---Authority was

bound to act honestly, fairly, equitably and by not allowing itself to be influenced by any extraneous considerations---Departmental authorities were accountable for their deeds and misdeeds and they could not get away with their arbitrary orders with impunity---Government had stopped the process of recruitment without assigning any reason which was repugnant to the principles of openness, fairness and transparency---All offices and posts were to be filled by those who were the best qualified and richly deserve for them---Intra-court-appeal was dismissed in limine.

Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi PLD 1991 SC 14; 2000 PLC (C.S.) 9 and 2011 PLC (C.S.) 1366 rel.

(b) Constitution of Pakistan---
----Art. 3---Elimination of exploitation---Scope---State should ensure the elimination of all forms of exploitation.

Ijaz Ahmad Awan for Appellant.

ORDER

This ICA brings under challenge the order dated 25-11-2013 passed by a learned Single Judge in Chamber, whereby Writ Petition No.5780 of 2011 was allowed in the terms that "the departmental authorities are directed to issue appointment letters to the persons who are on top of merit list as already prepared by the department, within 15 (fifteen) days".

2. The foremost argument of the learned counsel for the appellant in support of the ICA is that it was clearly stipulated in the advertisement to fill the vacant slots that appointing authority reserves the rights not to fill any post/withhold the appointment against any advertised posts, without assigning any reason.

3. Learned counsel for the appellant argues that Punjab Technical Education and Vocational Authority (TEVTA) is unable to give effect to the order dated 25-11-2013 passed by this Court for the reason that the Chief Minister, Punjab had already approved transfer of Commerce Education Institutions along with the employees, assets and liabilities from TEVTA to the Higher Education Department of the Government of the Punjab vide order dated 28-6-2012. He further submits that the judgments on which the learned Single Judge in Chamber relied in his order dated 25-11-2013 were handed down by the Hon'ble Supreme Court of Azad Jammu and Kashmir, which merely have a persuasive value and were not to be followed as such. At the same time, he questioned the locus standi of the writ petitioner (respondent No.1 herein) on the ground that no vested right accrued to him even after his qualifying for the posts he applied for. With these submissions, the appellant seeks reversal of the order dated 25-11-2013.

4. Arguments Heard. Record perused.

5. As it is, vacancies for various posts were advertised by the Government College of Commerce, Vehari by placing an ad in daily Nawa-e-Waqt in its issue dated 15-5-2010. The advertisement so published gave the unmistakenable impression that the vacant posts are needed to be filled. It is undeniable that Muhammad Atif Amin, the writ petitioner applied for the posts of Store Keeper B.S-6 and Junior Clerk B.S-5. When his papers were found in order, he was short-listed for the interview. Eventually, he came at the top of the list. He was asked to exercise his option as to whether he would like to join as a Store Keeper or Junior Clerk. As is amply borne out by the record, he preferred to serve as a Store Keeper. His appointment letter was ready to be issued, but the whole process was disrupted abruptly. In his comments furnished to this Court in Writ Petition No.5780 of 2011, Principal of the Government College of Commerce, Vehari by and large confirmed the stand of the petitioner, expressing his helplessness and submitting that the District Manager TEVTA, Khanewal-Vehari had made him a call, ordering to stop the recruitment. And he being a subordinate to the District Manager, TEVTA had no option but to leave the things as they were. However, he was shrewd enough to add in his comments that the College was in a dire need of clerical staff because only two clerks were working, while there were classes from D.Com. to M.Com.

6. The argument of the learned counsel for the appellant that even after completion of all formalities and having declared respondent No.1, Muhammad Atif Amin as the successful candidate for the post of Store Keeper and Junior Clerk, the competent authority was at liberty to retrace the steps and to wind up the proceedings as it liked, without assigning any reasons, as specified in the advertisement dated 15-5-2010, is wholly specious, flawed and untenable. After holding out the prospects of employment an then dashing the hopes of a successful candidate cannot be countenanced. Such arbitrariness is redolent of the red-tapisim and colonialism. Such orders also give the impression that the Government is in disarray, and is not willing to discharge the trust reposed in it by the people. It has repeatedly been held by the Superior Courts that all the authority vested in the Government and its institutions is to be treated as a sacred trust, which may not be exercised at the whims and caprices of the powers that be. They are bound to act honestly, fairly, equitably, by not allowing themselves to be influenced by any extraneous considerations. It is reiterated that every person charged with such sacred trust is bound to do right to all manner of people according to law, without fear and favour or affection or ill will. In this behalf, it would be worthwhile to remind all the public authorities of the observations made by the August Supreme Court of Pakistan in the case reported as "Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi (PLD 1991 Supreme Court 14). A relevant portion from the judgment is reproduced below:---

"A public office is a public agency or trust created in the interest and for the benefit of the people, and since an incumbent of a public office is invested with certain powers and charged with certain duties pertinent to sovereignty, the powers so delegated to the officers are held in trust for the people and care to be exercised on behalf of the Government or of all citizens who may need the intervention of the officer. Such trust extends to all matters within the range of the duties pertaining to the office. In other words, public officers are but the servants of the people and not their rulers. A public officer is amenable to the rule which forbids an agent or trustee to place himself in such an attitude towards the principal or cestui que trust as to have

his interest conflict with his duty . Where a statute is silent with respect to the time within which an official act must be performed, the law contemplates that the duty must be performed within a reasonable time. A public official who undertakes to perform an act, even an act which is completely discretionary, must do so reasonably and in complete good faith without such delay as would frustrate its ultimate objective .. One who accepts a public office does so cum onere, or with the burden, and is considered as accepting its burdens and obligations with its benefits. He thereby subjects himself to all constitutional and legislative provisions relating thereto and undertakes to perform all the duties of the office, and while he remains in such office the public has the right to demand that he perform such duties. The acceptance of every public office implies an agreement on the part of the officer that he will execute its duties with diligence and fidelity. The duty of a public officer to fulfill the obligations of his office should take precedence over all other matters .. Every public officer is bound to use reasonable skill ad diligence in the performance of his official duties, particularly where rights of individuals may be jeopardized by his neglect. In other words, he is bound, virtue officii, to bring to the discharge of his duties that prudence, caution, and attention which careful men usually exercise in the management of their own affairs.

Wherever wide-worded powers conferring discretion are found in statute, there remains always the need and the desirability to structure the discretion and the need for this has been pointed out in the Administrative Law test by Kenneth Culp Davis in the following words:----

Structuring discretion means regularizing it, organizing it, producing order in it, so that decisions will achieve a higher quality of justice . The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statement, open rules, open findings, open reasons, open precedents, and fair informal procedure . When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules. The movement from vague standards to definite standards to broad principles to rules may be accomplished by policy statements in any form, by adjudicatory opinions, or by exercise of the rulemaking power . When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules.

In our context, the wide-worded conferment of discretionary powers of reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the powers and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it by Rules, or Policy statements or Precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times."

7. In our view, although the public functionaries do not take oath or oath is not administered to them prescribed in the Constitution of Islamic Republic of Pakistan, 1973 for the President, Prime Minister, Governors, Ministers, Speakers and Judges but this does not mean that while the highest office holders are expected to do justice, other State

functionaries are not required to fulfill the same commitment. Such hypothesis would be anathema to the grain and spirit of the Constitution of the Islamic Republic of Pakistan, 1973 and also opposed to the Principles of Policy set out in Part II of the Constitution of the Islamic Republic of Pakistan, 1973, besides being in conflict with the pious declarations contained in Article 2-A thereof.

8. The people of this country have made a covenant with the State through the Constitution of the Islamic Republic of Pakistan, 1973, which clearly ordains in Article 3 that the State shall ensure the elimination of all forms of exploitation and the gradual fulfilment of the fundamental principle, from each according to his ability to each according to his work.

There is no need to put scholarly interpretation on the above-quoted Article of the Constitution of the Islamic Republic of Pakistan, 1973, which is self-explanatory.

9. The prime argument of the appellant that it has washed its hands of, following the order dated 28-6-2012 passed by the Chief Minister, Punjab, transferring Commerce Education Institutions together with their employees, assets and liabilities from TEVTA to the Higher Education Department of the Government of the Punjab, is unconvincing and unappealable, to say the least. It was admitted by the appellant that earlier, the Government of the Punjab had transferred all the aforesaid assets and liabilities to TEVTA and by the fresh order dated 28-6-2013, the Government of the Punjab has done no more than getting those assets and liabilities retransferred to itself. For all intents and purposes, no fundamental or qualitative change has been brought about. So such an argument as advanced by the learned counsel for the appellant is at best a subterfuge to evade the responsibilities and a clever attempt at circumventing the lawful order dated 25-11-2013 passed by a learned Single Judge in Chamber.

10. The second limb of the argument of the learned counsel for the appellant regarding the judgments relied upon in the order dated 25-11-2013 brought under challenge, is equally spurious. There is no quarrel with the proposition that the judgments handed down by the Hon'ble Supreme Court of Azad Jammu and Kashmir have persuasive value but it does not mean that if they are based on principles of justice, equity, good conscience and they propound principles to secure the rights of citizens, they are to be put aside. We respectfully adopt the view expressed in the judgments reported as 2000 PLC (C.S.) 9 and 2011 PLC (C.S.) 1366, holding that:---

"While going through a long process, a valuable right had accrued to the petitioners for the post of Senior Auditors B-14, who had qualified the written test and were sent back hopelessly without interview twice---Once a right having accrued in favour of the petitioners, it could not be taken back by any subsequent action which culminated in the extension of the earned legal right---Petitioners having such right must be considered for appointment to the advertised post of B-14 in the light of the rules prevalent at the time when the posts in that respect were advertised---Authority was also directed not to re-advertise the posts of Senior Auditors, but to complete the remaining process."

11. At this juncture, we would like to deal with the contention raised by the learned counsel for the appellant to the effect that the very fact that Muhammad Atif Amin, respondent No.1

was placed at the top of the list of the successful candidates would not ipso facto confer any right on him. While making such a submission, he probably had in the uppermost of his mind that particular part of the advertisement which reserved the right to the appointing authority not to fill any post or withheld post, without assigning any reasons. As observed in the foregoing paragraphs, such a right to be reserved by an appointing authority discharging public duties is highly questionable. The question is, on what basis and under what law an appointing authority could arrogate to itself such an overriding power? Does this mean that the public authorities are not answerable to the people of Pakistan and they are above the law? If they think so, it is high time that such misconceptions and misperceptions were dispelled. Under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, they are to account for their deeds and misdeeds. They cannot get away with their arbitrary orders with impunity.

12. We feel that the rider to the advertisements placed in the newspapers, where hope is held out to the prospective candidates for bright future, and the successful among them are declared to be fulfilling the criteria laid down for such posts, and then all of a sudden, the Government or the Institution concerned either stops the whole process of recruitment or denies to offer the post concerned to the best of the candidates, without assigning any reasons, is clearly repugnant to the well-entrenched principles of openness, fairness and transparency. We would not countenance any policy or advertisement, exhibiting such policy where the final process of selection of candidates or even of awarding of contracts or accepting of bids is shrouded in mystery. Certainty and clarity, not muddled thinking and confusion ought to be the hallmarks of good governance and they are to reign supreme in a civilized society. If we are to surge ahead, and stand shoulder-to-shoulder with the advanced nations, all offices and posts are to be filled by those who are the best qualified and richly deserve them.

13. The upshot of the above discussion is that the appeal in hand being devoid of any merits, is hereby dismissed in limine.

AG/P-3/L Intra-Court Appeal dismissed.

2014 P L C (C.S.) 793

[Lahore High Court]

Before Ibad-ur-Rehman Lodhi, J

ALI AHMAD

Versus

EXECUTIVE DISTRICT EDUCATION OFFICER, SIALKOT and another

Writ Petition No.10311 of 2012, decided on 12th November, 2013.

Punjab Civil Servants (Appointments and Conditions of Service) Rules, 1974---

----Rr. 16, 17 & 17-A---Punjab Employees, Efficiency, Discipline and Accountability Act (XII of 2006), S.16---Constitution of Pakistan, Art. 199--- Constitutional petition---Contractual appointments---Termination---Scope---Unemployed children of deceased employee---Term "Post" in Rr.16 & 17 of the Punjab Civil Servants (Appointments and

Conditions of Service) Rules, 1974---Connotation---Petitioner's father was a regular employee who died during service---Petitioner was given appointment on contract basis in place of his deceased father---Petitioner's contractual appointment was terminated on account of absence---Departmental appeal of the petitioner was also dismissed as being contractual employee, he did not have the remedy of departmental appeal---Validity---In case of death of a civil servant, who died during service, one unemployed child of his, was to be appointed against a post---Term "post" provided in the Rr.16 & 17 of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, was referable to the "post", which was being held by the deceased civil servant of the aspiring child for the appointment---Father of the petitioner was a regular employee in education department and his appointment on contract basis was alien to such scheme of law as provided under the R.17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974---In the present case, the petitioner (child of deceased civil servant) was treated as contract employee and was proceeded against in such capacity and his departmental appeal was also dismissed holding that contract employee had no right of appeal---All actions against the petitioner (child of deceased civil servant), while treating him as an employee on contract basis had lost their efficacy---Petitioner (child of deceased civil servant) was a regular employee and he was to be dealt with on any available disciplinary grounds by giving him a status of regular employee---Punitive actions taken against the petitioner were not sustainable, therefore the impugned order was set aside and the petitioner was ordered to be re-instated in service---Constitutional petition was allowed.

Petitioner in person.
Muhammad Nasir Chohan, Asstt. A.-G. Punjab with Muhammad Zahoor-ul-Haq, Headmaster Government High School Kharotta Syedan Sialkot on behalf of Respondent No.1.

ORDER

IBAD-UR-REHMAN LODHI, J.--- The petitioner's father was an employee in Education Department and died during service. In view of Rule 17-A of the Punjab Civil Servants (Appointments and Conditions of Service) Rules, 1974, the petitioner was appointed in place of his deceased father as a Junior Clerk and the appointment letter was issued on 5-12-2008 against a vacant post in Government High School, Kharotta Syedan, District Sialkot; however, such appointment was shown as on contract basis.

2. According to the contentions of the petitioner, he met with a road side accident on 1-2-2010 and was constrained to absent from duty and, therefore, he was proceeded against by the Department and by means of order dated 30-4-2010, passed by the Executive District Officer (Education), Sialkot, his contract was ordered to be terminated.

3. A departmental appeal, filed by the petitioner, remained unsuccessful, when the District Coordination Officer, Sialkot, dismissed the same on 19-9-2011.

4. The petitioner has filed this petition challenging his termination and dismissal of his departmental appeal.

5. The point for consideration in this petition is the import and effect of Rule 17-A of the Punjab Civil Servants (Appointments and Conditions of Service) Rules, 1974, which reads as under:---

"17-A. Notwithstanding anything contained in any rule to the contrary, whenever a Civil Servant dies while in service or is declared invalidated/in-capacitated for further service, anyone of his unemployed children, may be employed by the Appointing Authority against a post to be filled under rules 16 and 17 for which he/she possesses the prescribed qualifications and experience and such child may be given 10 additional marks in the aggregate by the Public Commission or by the appropriate Selection Board or Committee, provided he/she otherwise qualifies in the test/examination and/or interview for posts in BS-6 and above.

Provided further that one child of a Government who dies while in service or is declared invalidated/incapacitated for further service shall be provided a job against posts in BS-1 to 5 in the department in which the deceased Government servant was working, without observance of formalities prescribed under the rules/procedure. Provided such child is otherwise eligible for the post."

6. Keeping in view the above-referred rule, in case of death of a civil servant, who dies during service, his any one unemployed children is to be appointed against a post to be filled under Rules 16 and 17 thereof. Rule 17 deals with the initial appoints of all posts in Grade-1 and above. In both of these rules, when a term "Post" is used, it necessarily referable to the post, which was being held by the deceased father of the aspiring child for the appointment.

7. Admittedly, the father of the petitioner was a regular employee in Education Department.

8. Today, the learned Assistant Advocate-General, who is assisted by a Senior Headmaster from the respondent-Department, has verified that the vacant post against which the petitioner was adjusted, was a regular post.

9. I have also noted that in the appointment letter, although it is mentioned that the appointment was on contract basis, but no period of contract has been prescribed in whole of such document.

10. Even otherwise, when the appointment was made under Rule 17-A of the Punjab Civil Servants (Appointments and Conditions of Service) Rules, 1974, we have to restrict ourselves to the terms and conditions provided in the relevant rules. By going through the whole of the scheme provided in the said rules, the appointment on contract basis is alien to such scheme of law provided under the said rules, particularly, Rules 3 and 7 thereof, which talk about the initial recruitment, the appointment on acting charge basis, or appointment on current charge basis, the appointment by promotion on officiating basis etc., but nowhere, in whole of the said scheme, the Authority has been made competent to appoint any person on contract basis.

11. Initially, the appointment was made on 5-12-2008 and admittedly the petitioner had been performing his duties till February, 2010, thus, even if the initial appointment was considered as temporary appointment, by efflux of time and on account of the fact that initial appointment was made against a regular post and additionally that father of the petitioner had been working against regular post, and the petitioner was adjusted in his place, the appointment made on 5-12-2008 will be considered as a regular appointment.

12. The petitioner was treated as contract employee and was proceeded against in his such capacity and his appeal was also dismissed by the Departmental Appellate Authority holding that a contract employee has no right of appeal under the Punjab Employees Efficiency, Discipline and Accountability Act, 2006, thus, all actions against the petitioner, while treating him as an employee on contract basis have lost their any efficacy.

13. The petitioner was a regular employee as a Junior Clerk in Education Department and he was to be dealt with on any available disciplinary grounds by giving him a status of regular employee and it was not done, as such, the punitive actions taken against the petitioner are not sustainable.

14. The order dated 30-4-2010, passed by the Executive District Officer (Education), Sialkot, terminating the contract of the petitioner and similarly the appellate order, announced on 19-9-2011 by the District Coordination Officer, Sialkot, are set-aside, being illegal and without lawful authority, and the petitioner is ordered to be re-instated into service with effect from 30-4-2010 with a clarification that forthe period commencing from 30-4-2010 and ending 12-11-2013, the petitioner will not claim any financial benefits, but his appointment since 5-12-2008 will be considered as that of a regular employee and except financial benefits, all other allied benefits shall be extended in his favour.

15. The petitioner is directed to give his joining report to the Headmaster of Government High School, Kharotta Syedan, District Sialkot, tomorrow and it will be responsibility of the Department to adjust the petitioner suitably.

16. This writ petition stands allowed in the terms as articulated above.

JJK/A-144/L Petition allowed.

P L D 2014 Lahore 62

Before Syed Muhammad Kazim Raza Shamsi and Ibad-ur-Rehman Lodhi, JJ

JAVED IQBAL---Appellant

Versus

The STATE---Respondent

Criminal Appeals Nos.1940 of 2006, 120 and 962 of 2007 and Murder Reference No.598 of 2007, heard on 21st October, 2013.

(a) Medical jurisprudence---

----Decomposition of human body after death---Stages enumerated.

Following death, the human body progresses through following five basic stages of decomposition:

(i) Fresh:

The fresh stage begins immediately after death when circulatory system (heart beating/pumping blood) stops functioning. It is during this stage that blood settles with gravity creating a condition known as lividity. After several hours muscles also begin to stiffen in a process known as rigor mortis. Body temperature also being to acclimate to environment. Cells begin to break down and release enzymes during a process called autolysis which can cause blisters on skin. Anaerobic organisms in digestive tract beings to multiply, producing acids and gases (the source of bad odours). This process is often referred to as putrefaction.

(ii) Bloat:

As the name implies, the gases being produced during putrefaction begin to build and give the body a distended appearance. Gases and fluid eventually escape through natural orifices as the pressure builds. As gastrointestinal bacteria multiply and can lead to conditions like marbling which is a discolouration pattern seen in skin.

(iii) Active decay:

During this phase body begins to lose much of its fluids and mass (tissues) through purge and insect and / or vertebrae scavenging (coyote, fox, lion, etc.). During this phase one may see very large maggot masses and notice considerable increase in foul odours.

(iv) Advanced decay:

This phase is end of active decay process. Temperatures can either speed up (heat) or slow down (cold) how quickly a body reaches this space. The body has very little body mass and soil staining of surrounding soils is still evident. This soil staining (from body fluids) may actually kill some of the surrounding vegetation temporarily. Maggots migrate away from the body to pupate and flies cease laying eggs.

(v) Dry/skeletal:

This phase is the last measurable stage of decomposition. The timing of this stage varies widely by environment. It may take months. If there is any skin left, it becomes leather like and very tough. Mostly the body is reduced to bones and connective tissue. There is no biomass available for diverse insect colonization. Some beetles and adventitious insects may colonize a body for shelter or feeding on other insects and connective tissue. Over time bones may "bleach" (turn white) with exposure to sunlight and eventually begin to exhibit cracks after several years. These weathering cracks are distinctive and would not be confused with a fresh break (injury).

Parikh's Textbook of Medical Jurisprudence and Taxicology (5th Edn.) ref.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Recovery of skeleton---Murder, proof of---Extra judicial confession---Son of complainant went missing and ten days after one skeleton was found from bamboo crop which was alleged to be that of missing son and accused persons were sent to face trial for committing his murder---Trial Court convicted both the accused and awarded death sentence to one accused while the other was awarded imprisonment for life---Validity---On tenth day of missing of complainant's son, when a skeleton was found, it was believed by prosecution witnesses and complainant to that of missing boy's---In absence of any evidence with regard to attack of animals on dead body of deceased, it was not believable that dead body of human was completely decomposed within a period of ten days and converted into a complete skeleton---To prove offence of murder, death should be homicidal of which onus in criminal trial was on prosecution---In absence of legal proof of death being homicidal, because of serious lacuna of not obtaining report of Anatomy Expert to prove homicidal death, the benefit must go to accused and not to prosecution as the same sealed the fate of prosecution---Prosecution failed to prove with convincing evidence that a skeleton found on tenth day of missing of boy in bamboo crop was that of complainant's son---Even if it was believed that the skeleton was that of complainant's son, even then prosecution failed to establish homicidal death and it was beyond understanding as to how accused persons opened their breast by confessing murder before a person who was not previously known to them---Evidence with regard to extra judicial confession on the part of prosecution was result of padding by prosecution in order to add some colour in faded picture of prosecution---High Court, in exercise of appellate jurisdiction, set aside conviction and sentence awarded to accused persons by Trial Court and acquitted them of the charge---Appeal was allowed in circumstances.

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

----S. 302(b)---Qatl-e-amd---Circumstantial evidence---Reliance---Principles---Where entire prosecution version rests on circumstantial evidence, all circumstances from which conclusion of guilt is to be drawn must be fully established---Prosecution has to travel all the way to establish full chain of evidence which should be consistent only with hypothesis of guilt of accused persons and such circumstance should be of conclusive nature and definite tendency---Circumstances must be satisfactorily established and proved circumstances must bring home offence to accused beyond all reasonable doubts---Each circumstance by itself need not necessarily be conclusive but cumulatively must form unbroken chain of events leading to the proof of guilt---If such circumstances or some of them can be explained by any of reasonable hypothesis, accused must have benefit of such hypothesis---In assessing evidence, imaginary possibilities have no role to play---When there is no direct evidence, chain of events furnished by circumstances should be so far complete as not to leave any reasonable ground for conclusion consistent with innocence of accused.

Aftab Hussain Bhatti and Ch. Zulfiqar Moazzam for Appellant.

Saeed Ahmed Sheikh, Addl. Prosecutor General for the State.
Zafar Iqbal Chohan for the Complainant.
Date of hearing: 21st October, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Javed Iqbal son of Jan Muhammad, Muhammad Naeem son of Abdul Haque and Muhammad Saleem son of Muhammad Amin were tried by learned Additional Sessions Judge, Kasur in case F.I.R. No. 137, dated 16-4-2005 under section 302 read with section 34 of Pakistan Penal Code, 1860 registered at Police Station Khudian, district Kasur, for committing the murder of Muhammad Waqar. Vide judgment dated 22-12-2006 the learned trial Court convicted and sentenced the appellants as under:--

(i) Javed Iqbal under section 302(b) read with section 34, P.P.C. to death with further direction to pay Rs.1,00,000 as compensation to the legal heirs of Muhammad Waqar deceased as envisaged by the relevant provisions of section 544-A Cr.P.C. or in default thereof to further undergo six months' Simple Imprisonment.

(ii) Muhammad Naeem and Muhammad Saleem under section 302(b) read with section 34 P.P.C. to Life Imprisonment each with, further direction to pay Rs.1,00,000 each as compensation to the legal heirs of Muhammad Waqar deceased as envisaged by the relevant provisions of Section 544-A Cr.P.C. or in default thereof to further undergo six months' Simple Imprisonment each.

Benefit of section 382-B Cr.P.C. was, however, extended to them.

2. Javed Iqbal, Muhammad Naeem and Muhammad Saleem appellants have approached this Court by filing Criminal Appeals Nos.1940 of 2006, 120 and 962 of 2007 against their conviction and sentence passed by the learned trial Court. Murder Reference No.598 of 2007 seeking confirmation of death sentence or otherwise awarded to Javed Iqbal-appellant has also been sent to this Court as required by Section 374 Cr.P.C. All these matters are being disposed of together through this single judgment.

3. Muhammad Iqbal-complainant (P.W.9) lodged the matter through F.I.R. (Exh.P-I/1) reporting that on 6-4-2005 his son, namely, Muhammad Waqar, aged 13/14 years, a student of 7th class was sent by the mason working in his house to purchase a "Paan", who went to Bazar but never came back. The matter to the police was reported, for the first time, on 16-4-2005, when on receipt of information about availability of a dead body in the Bamboo crop, the complainant along with other P.Ws. visited the nominated area and found a skeleton of human body without head, who was identified as that of his son Muhammad Waqar with the help of the teeth and a shirt. Even in such delayed F.I.R., no one has been nominated as a suspect. Thereafter, on 19-4-2005 by means of a supplementary statement three persons i.e. Javed Iqbal, Muhammad Naeem and Muhammad Saleem were specifically nominated by the complainant with a further allegation that his son Muhammad Waqar was done to death by said nominated accused

after commission of sodomy with the deceased by the accused persons. It was, thus, that investigating agency proceeded to investigate after associating the nominated accused persons in the investigation and after completion of all formalities furnished a report under section 173 of the Criminal Procedure Code, 1898 before the learned trial Court.

4. The accused persons were charged by the learned trial Court under section 302 read with section 34 of Pakistan Penal Code. During trial, the prosecution produced eighteen witnesses in support of its case in addition to the documentary evidence mainly consists of recovery memos, blood stained earth, blood stained clothes, bicycle, knife and the documents pertaining to the report of identification parade and postmortem report, etc. After getting the statements of the accused persons recorded under section 342 Criminal Procedure Code, 1898, learned trial Court by means of the impugned judgment dated 22-12-2006 convicted and sentenced the appellants as aforementioned.

5. In this case, the entire case of the prosecution rests on circumstantial evidence in addition to last seen evidence and stated extra judicial confession The medical evidence viz. postmortem report conducted by Dr. Adnan Hakim (P.W.16) is again of much significance in this case. We would be dealing separately with the points which have been pressed in service by the prosecution before learned trial Court as well as before us in appeals.

6. Last seen evidence mainly consists on the statement of Javed Ashiq son of Muhammad Ashiq (P.W.14), who is nephew of the complainant, and who informed the complainant that he saw Muhammad Waqar deceased going on a bicycle with some unknown persons on 6-4-2005. Throughout the proceedings of the case, date and time as to when Javed Ashiq (P.W.14) saw Muhammad Waqar going on bicycle has no where been provided, thus, it will remain a mystery as to whether P.W.14 has actually witnessed Muhammad Waqar going with some unknown persons on a bicycle on the fateful day.

7. The other evidence in order to prove that the body found in decomposed position in the Bamboo crop belonging to Muhammad Ameen was of Muhammad Waqar deceased was the statement of Muhammad Javed son of Muhammad Yaqoob (P.W.7), who on 16-4-2005 informed the complainant that he saw a decomposed body in the stated Bamboo crop and thereafter the complainant along with Muhammad Javed (P.W.7), Munir Ahmed (P.W.8) and Bashir Ahmed (P.W.15) went to that place and identified the body as that of Muhammad Waqar deceased with the help of teeth and a shirt. The body, which was examined by Dr. Adnan Hakim (P.W.16), was reported to be a complete skeleton with no flesh on it and therefore, the doctor conducting postmortem examination was not in a position to ascertain the cause of death.

8. On the question as to how much period is required for a human body to be completely decomposed, we have looked into medical jurisprudence and other material available on the point and are of the view that, following death, the human body progresses through five basic stages of decomposition:--

(i) Fresh:

The fresh stage begins immediately after death when the circulatory system (heart beating/pumping blood) steps functioning. It is during this stage that the blood will settle with gravity creating a condition known as lividity. After several hours the muscles will also begin to stiffen in a process known as rigor mortis. The body temperature will also begin to acclimate to the environment. Cells will begin to break down and release enzymes during a process called autolysis which can cause blisters on the skin. The anaerobic organisms in the digestive tract will begin to multiply, producing acids and gases (the source of the bad odors). This process is often referred to as putrefaction.

(ii) Bloat:

As the name implies, the gases being produced during putrefaction begin to build and will give the body a distended appearance. Gases and fluid will eventually escape through the natural orifices o as the pressure builds. As the gastrointestinal bacteria multiply and can lead to conditions like marbling which is a discoloration pattern seen in the skin.

(iii) Active Decay:

During this phase the body begins to lose much of it's fluids and mass (tissue) through purge and insect and/or vertebrate scavenging (coyote fox, lion, etc). During this phase you may see very large maggot masses and notice a considerable increase in foul odours.

(iv) Advanced Decay:

This phase is the end of the active decay process. Temperatures can either speed up (heat) or slow down (cold) how quickly a body reaches this space. The body has very little body mass and soil staining of the surrounding soils is still evident. This soil staining (from body fluids) may actually kill some of the surrounding vegetation temporarily. Maggots will migrate away from the body to pupate and flies will cease laying eggs.

(v) Dry/Skeletal:

This phase is the last measurable stage of decomposition. The timing of this stage varies widely by environment. It might take months. If there is any skin left it will be leather-like and very tough. Mostly the body is reduced to bones and connective tissue. There is no biomass available for diverse insect colonization. Some beetles and adventitious insects may colonize a body for shelter or feeding on other insects and connective tissue. Over time the bones may "bleach" (turn white) with exposure to sunlight and eventually will begin to exhibit cracks after several years. These weathering cracks are distinctive and would not be confused with a fresh break (injury) unless by an inexperienced analyst.

When Parikh's deals on this subject, as provided in Parikh's Textbook of Medical Jurisprudence and Taxicology (Fifth Edition), he draws the following conclusion:-

(a) In 5 to 12 days, colliquative (colliquative-liquifaction) putrefaction begins. The various tissues become soft and loose and are converted into a semi fluid black mass. They ultimately liquefy and breakdown. Only the more resistant viscera which putrefy in 2-3 weeks are distinguishable.

(b) The body is thus skeletonised in 1 to 3 months.

(c) Further provides that thus the importance of autopsy even in states of advanced decomposition is plain, for organs like kidneys, uterus or prostate and blood vessels may still remain and provide vital information. Vascular walls resist decomposition and evidence of coronary insufficiency can often be discovered.

9. After having gone through the above opinion of experts and particularly keeping in view the fact that on 10th day of the missing of Muhammad Waqar deceased when a skeleton was found, it was believed by the P.Ws. and the complainant to that of Muhammad Waqar deceased but in absence of any evidence with regard to the attack of animals on the dead body of deceased, it is not believable that dead body of human being became completely decomposed within a period of ten days and converted into a complete skeletion.

10. A Division Bench of Madhya Pardesh High Court in case of "Shobhau alias Shubhau, Appellant v. State of M.P, Respondent" (1998 Crl.LJ 3934) in a case of similar nature has found that when cause of death could not be known on postmortem for the reason that only skeleton was produced before the doctor for conduct of postmortem, the prosecution ought to have referred the dead body to Anatomy Expert, which was not done in the present case, and that was considered as serious lacuna in the prosecution case and in absence of any ligature mark on the body, it was found difficult to hold that the death was homicidal and not natural.

11, To prove an offence of murder the death should be homicidal of which onus in a criminal trial is upon the prosecution. In absence of legal proof of the death being homicidal, because of serious lacuna of not obtaining the report of Anatomy Expert to prove homicidal death, the benefit must go to the accused and not to the prosecution, as this seals the fate of the prosecution. In our view, the prosecution has failed to prove with convincing evidence that a skeleton found on 16-4-2005 in the Bamboo crop of Muhammad Ameen was that of Muhammad Waqar deceased and even if it is believed that the said skeleton was of the body of Muhammad Waqar deceased, the prosecution would still fail to establish the homicidal death.

12. The other limb of evidence, which is being pressed in service by the prosecution is the last seen evidence mainly rests on the statements of Shaukat Ayyaz (P.W.10) and Muhammad Timer (P.W.11), who subsequently deposed that they both saw all the accused coming out from Bamboo crop on 6-4-2005. It is astonishing as to why till 19-4-2005 when, for the first time, they disclosed this fact of coming out all the accused from Bamboo crop was kept secret notwithstanding the fact that Muhammad Waqar deceased was missing since 6-4-2005. Even these two witnesses never deposed that Muhammad Waqar was seen in the company of said accused persons at the relevant time. Merely that the accused persons were

allegedly seen coming out from Bamboo crop would not prove in certainty that the accused persons were lastly seen in the company of the deceased. While discussing the deposition of Javed Ashiq (P.W.I4), we have already found that the prosecution has failed to read any convincing evidence through the said witness to show as to on which date and at what time the deceased was lastly seen in the company of any of the accused.

13. The other circumstance which is being relied upon by the prosecution is the stated extra judicial confession made by the accused persons anal in this regard Sajid Rasheed (P.W.12) and Khushi Muhammad (P.W.13) were produced. Noteworthy that, 19-4-2005, was the date when the complainant nominated accused persons as responsible of causing death of his son, whereas, the prosecution has developed a story of making extra judicial confession on the very next day i.e. 20-4-2005 before completely irrelevant persons. It is in the prosecution evidence that it was Javed Iqbal, who in presence of other co-accused persons, confessed before Sajid Rasheed (P.W.12) about his guilt and beseeched for his help and it is also an admitted position that said Sajid Rasheed was not previously known to Javed Iqbal accused. It is beyond understanding as to how the accused persons opened their breast by confessing a guilt of murder before a person, who was not previously known to them. Thus, in our view, it seems that evidence with regard to extra judicial confession on the part of the prosecution is result of padding by the prosecution in order to add some colour in the faded picture of the prosecution.

l4. The prosecution has shown the recovery of bicycle (P5) and a knife (P.6) from the place from where the skeleton of human body was found in order to connect Javed Iqbal-appellant with the use of such items. It is again beyond understanding as to how when Muhammad Javed son of Muhammad Yaqoob (P.W.7) had seen the skeleton of body on 16-4-2005 how a bicycle which was not a thing conveniently to be ignored was not seen by at the same place and again that when on 23-5-2005, according to the prosecution, during investigation Javed Iqbal-accused disclosed that he could get recovered bicycle and knife from the scene of occurrence, why only a bicycle was shown to have been recovered him on 23-5-2005 and recovery of knife was kept pending and it was made after two days i.e. 25-5-2005. Notwithstanding the fact that according to the prosecution, presence of both bicycle and knife was disclosed on 23-5-2005 and on the same day the said accused person Javed Iqbal was made to lead the recovery of bicycle from said place. The statement of Munir Ahmed (P.W.8) has caused serious doubts upon the recovery process, when he deposed that knife (P6) was also recovered on 23-5-2005. The complainant and the witnesses viz. Munir Ahmed (P.W.8) and Bashir Ahmed (P.W.15) when after getting information of presence of skeleton in the Bamboo crop visited the said place on 16-4-2005 also remained ignorant with regard to the presence of these two items at the scene of crime. The recoveries are, thus, also not believable.

15. In a case where entire prosecution version rests on the circumstantial evidence, all circumstances from which conclusion of guilt is to be drawn must be fully established. The prosecution has to travel all the way to establish fully the chain of evidence which should be consistent only with the hypothesis of the guilt of the accused persons and this circumstance should be of conclusive nature and definite tendency. The circumstances must be satisfactorily established and the proved circumstances must bring home the

offence to the accused beyond all reasonable doubts. It is not necessary that each circumstance by itself be conclusive, but cumulatively must form unbroken chain of events leading of the proof of the guilt. If such circumstances or some of them can be explained by any of the reasonable hypothesis the accused must have the benefit of such hypothesis. In assessing the evidence, imaginary possibilities have no role to play. When there is no direct evidence to the commission of murder and case rests entirely on circumstantial evidence, the chain of events furnished by the circumstances should be so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused. Therefore, on the basis of what has come on record, in our view, the conviction of the appellants cannot be maintained under section 302(b) Pakistan Penal Code, 1860 and there is no escape but to allow these appeals by setting aside the conviction and sentence awarded by means of impugned judgment and acquittal of the appellants.

16. In view of the above discussion, we accept Criminal Appeals Nos. 1940 of 2006, 120 and 962 of 2007 filed by the appellants, set aside their conviction and sentence passed by learned trial court and acquit them from the charge. Muhammad Naeem and Muhammad Saleem-appellants are on bail and their bail bonds are hereby discharged. Javed Iqbal-appellant is ordered to be released forthwith if not required in any other case.

17. Death sentence awarded to Javed Iqbal-appellant by the learned trial Court is Not confirmed and Murder Reference is answered in the negative.

MH/J-22/L Order accordingly.

P L D 2014 Lahore 324

Before Ibad-ur-Rehman Lodhi, J

Syed FARRUKH WASEEM and another---Petitioners

Versus

PAKISTAN BAR COUNCIL and another---Respondents

Writ Petition No.11940 8of 2013, decided on 4th October, 2013.

(a) Legal Practitioners and Bar Councils Act (XXXV of 1973)---

----Ss. 55 & 13(d)---Pakistan Legal Practitioners and Bar Councils Rules, 1976, R.175-H---Constitution of Pakistan Arts. 25 & 199---Constitutional petition---Code of Conduct for contesting Election of Bar Association---Petitioners impugned amendment to the Pakistan Legal Practitioners and Bar Councils Rules, 1976 whereby R.175-H, was inserted; vide which minimum length of practice was made mandatory for eligibility to contest elections of Bar Associations---Contention of the petitioner was that Pakistan Bar Council was not competent to insert such a Rule in Pakistan Legal Practitioners and Bar Councils Rules, 1976 and that the same was also discriminatory in terms of Art.25 of the Constitution---Validity---Pakistan Bar Council was a body competent to make Rules in view of S.55 read with S.13(d) of the Legal Practitioners and Bar Councils Act 1973 whereby the Pakistan Bar Council was competent to make Rules regulating the functioning of a Bar Association, and it

could not be therefore contended that the Pakistan Bar Council lacked jurisdiction to make Rules or amendments therein---Impugned R.175(H) Pakistan Legal Practitioners and Bar Councils Rules, 1976, inter alia, provided a different minimum length/tenure of practice to be eligible to contest elections for different offices of the Bar Association, and intention behind insertion of the same was to enhance the professional status of the legal fraternity and its elected bodies---Said R.175(H) was not discriminatory in nature for the reason that equal protection of law was available to similarly placed persons, and petitioners had failed to point out as to whether any person or class of persons on basis of discriminatory attitude were being deprived from contesting election of any Bar Association or that a similarly placed person or class of persons at the same time was being permitted to participate in the elections---Fundamental Rights provided in the Constitution were always enforceable subject to reasonable restrictions of law and when a competent body had introduced certain conditions for persons aspiring for different offices of the Bar Association, it could not be said that same were voilative of any fundamental right---High Court observed that the Bar Council had taken a positive and healthy step in order to maintain discipline and dignity in Bar Association, and the same should not be discouraged---Constitutional petition was dismissed, in circumstances.

(b) Constitution of Pakistan--

----Art. 25 & 8---Enforcement of Fundamental Rights---Equality of citizens---Scope---Fundamental Rights provided in the Constitution were always enforceable subject to reasonable restrictions of law and when a competent body had introduced certain conditions for persons aspiring for different offices of the Bar Association, it could not be said that same were voilative of any Fundamental Right.

M. Wasif Mehmood for Petitioners.

ORDER

IBAD-UR-REHMAN LODHI, J.---The petitioners are aggrieved of the insertion of Rule 175-H(c) in the Pakistan Legal Practitioners and Bar Councils Rules, 1976, which for the convenience is re-produced herein-below:--

"175-H Code of conduct for contesting Election of Bar Association:-

(a) No contesting candidate or his supporter shall canvass for votes through advertisements, banners, placards, stickers and posters.

(b) No meal/lunch/dinner by a contesting candidate or his supporter will be given to voters directly or indirectly in connection with election campaign.

(c) It shall be the pre-requisite that contesting candidate for an office of Bar Association is purely a professional practicing Advocate and is member of the Bar Association concerned for not less than three years having active length of practice as under:-

Post Length of Practice

President	(i)	10 years in case of Tehsil/ Taluka Bar Association; and
	(ii)	15 years in case of District and/or High Court Bar Association.
Vice-President	(i)	7 years in case of Tehsil/Taluka Bar Association;
	(ii)	10 years in case of District Bar Association; and
	(iii)	12 years in case of High Court Bar Association.
Secretary	(i)	5 years in case of Tehsil/Taluka Bar Association;
	(ii)	7 years in case of District Bar Association and
	(iii)	10 years in case of High Court Bar Association
Other offices i.e. Finance Secretary Library Secretary/Members, Executive Committee		3 years

Explanation:-

(i) To meet the requirement being of a professional practicing Advocate the candidate shall file certified copies of powers of attorney at least of 15 cases per year relating to preceding 3 years; and

(ii) The length of practice as mentioned above means practice as an Advocate of Subordinate Courts for contesting election against an office of the District/Taluka Bar Association and practice as an Advocate of the High Court for contesting election for an office of the High Court for contesting election for an office of the High Court Bar Association.

2. The learned counsel appearing for the petitioners has argued on two fold basis. Firstly, he is of the view that the Pakistan Bar Council is not competent to insert such rules by making amendments in the already existing rules and secondly he has termed the newly added rule as one hit by the provision of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

3. The Pakistan Bar Council is a body competent to make rules in view of section 55 of Legal Practitioner and Bar Councils Act, 1973 (XXXV of 1973). Section 13 of the said Act provides the functions of Pakistan Bar Council. Clause (ld) of section 13 gives power to Pakistan Bar Council to give directions in accordance with the provisions of the Act to the Provincial Bar Council in respect of the recognition, de-recognition and functioning of the Bar Association. What emerges from the joint reading of section 13(1d) and section 55 of the Act is that Pakistan Bar Council is competent to make rules regulating the functioning of the Bar Association and by no stretch of imagination, it would be argued that said Council lacks any jurisdiction to make rules in this regard.

4. The newly inserted Rule 175(H) provides different length of practice for different offices of Bar Association and intention behind such insertion is obvious as to enhance the professional status of the legal fraternity and its elected bodies. The rule, under challenge, is not discriminatory in nature for the reason that the equal protection of law is available to similarly placed persons and the learned counsel for the petitioners has failed to point out as

to whether any person or any class of persons on the basis of some discriminatory attitude is being deprived to contest election for the office of any Bar Association and a similarly placed person or class of persons at the same time is being permitted to participate in the elections. The fundamental rights provided in Chapter-I of the Constitution are always enforceable subject to reasonable restriction of law and when a competent body has introduced certain conditions for the persons aspiring for different offices of Bar Association, it cannot be said that the same are violative to any fundamental right.

5. The Pakistan Bar Council is the supreme elected body of the lawyers community and it is high time that discipline in elected bodies of lawyers be once again introduced and insertion of Rule 175-H in Pakistan Legal Practitioners and Bar Councils Rules, is a step towards such positive efforts, which must be appreciated instead of criticizing.

6. The fresh entrants in the profession must first focus on use of all their energies to become a good lawyer. Once one becomes a good lawyer, the offices will be offered by the community itself to such a good lawyer and he should not be a claimant himself for such office. The real grace is to become a good lawyer. The fresh entrants in the profession must be desirous to achieve such noble goal. The offices of Bar Association for a reputed lawyer are immaterial. One must have command not only in lawyer community but in public at large with a repute of a good lawyer and this will be the beauty of a lawyer. A member of the Bar should wait for the time that he reached to a destination, when the consensus of the Bar invites him to grace the office of Bar Association instead of asking for such office, in order to add some grace in his person by virtue of such office.

7. The Bar Council has taken a positive and healthy step in order to maintain the discipline and dignity in the Bar Association and that should not be discouraged.

8. I find no force in this writ petition filed by the fresh entrants in the Bar Association and the same is dismissed.

MWA/F-7/L Petition dismissed.

2014 Y L R 465

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

SHAFIQUE AHMAD---Petitioner

Versus

PUBLIC AT LARGE and 4 others---Respondents

Civil Revision No.119 of 2012, decided on 5th June, 2013.

Succession Act (XXXIX of 1925)---

----Ss. 373 & 372----Grant of succession certificate----Succession proceedings, scope of---Real brother of deceased intervened in succession proceedings putting his claim against the property and National Saving Certificates of the deceased---Objections of the intervener

were overruled and succession certificate was granted in favour of legal heirs of deceased---- Validity--- Objector/intervener was not a legal heir of the deceased and provisions of the Succession Act, 1925 would therefore not be helpful to such a person----Objector, in the present case, although was the real brother of the deceased, however he was considered a stranger in the proceedings for grant of succession certificate to the legal heirs of the deceased and would have no locus standi to join the proceedings since succession proceedings were limited in nature to the extent of determination of the rights of legal heirs of the deceased inter se and scope of such proceedings could not be enlarged to include settlement of disputed claims and determination of liabilities of legal heirs of the deceased--- Revision was dismissed.

Dr. Saleem Javed and others v. Mst. Fauzia Nasim and others 2003 SCMR 965 and Mst. Jameela Akhtar v. Public-at-Large and others 2002 SCMR 1544 rel.
Muhammad Ali Siddiqui for Petitioner.
Mian Ahmad Mehmood for Respondents Nos. 2 and 3.
M. Aftab Alam Yasir for Respondents Nos. 4.a to 4.f.
Mumtaz Hassan Awan for Respondent No.5.

ORDER

IBAD-UR-REHMAN LODHI, J.---When on 12-4-2009, Rafiq Ahmad, predecessor-in-interest, of present respondents Nos.2 to 4 breathed his last, his succession was opened. Said deceased was survived through the following legal heirs:--

(i) Mst. Allah Bachai mother

(ii) Mst. Shahnaz Bibi widow

(iii) Ahmad Hassan son

Ahamd Hassan, the minor son, through his real mother Mst. Shahnaz Bibi, applied for getting succession certificate of the legacy of his deceased father before the Civil Judge at Rajanpur.

2. Shafique Ahmad, brother of deceased Rafiq Ahmad, intervened in the proceedings by putting his claim against the property owned by the deceased Rafiq Ahmad in his life time, particularly, with regard to the saving certificates obtained by deceased from National Saving Centres.

3. In order to resolve such controversy, the learned Civil Judge, seized of the matter, proceeded to frame the issues reflecting such controversy and by means of order dated 2-11-2011, over-ruled the objections of Shafique Ahmad and granted succession certificate under the Succession Act, 1925 in favour of Ahmad Hassan, real son of the deceased Rafiq Ahmad, as also in favour of Mst. Shahnaz Bibi, widow of deceased, and the legal heirs of Mst. Allah Bachai, mother of deceased, who expired during pendency of the proceedings before the Civil Judge.

4. The petitioner Shafique Ahmad feeling himself aggrieved of such findings of the learned Civil Judge, preferred an appeal before the learned District Judge, Rajanpur, which was entrusted to an Additional District Judge at Rajanpur, who vide judgment dated 17-1-2012, proceeded to dismiss the same; hence, this revision petition before this Court.

5. Under Section 373 of the Succession Act, 1925 (XXXIX of 1925), the Court, which entertained the application, is supposed to proceed to decide the same in a summary manner as to the right said certificate.

6. The Hon'ble Supreme Court of Pakistan in Dr. Saleem Javed and others v. Fauzia Nasim and others (2003 SCMR 965) has held that the objector/intervener being not a legal heir of deceased and that no Court had given any verdict in favour of such objector's claim as a charge on the property of the deceased, the provisions of the Succession Act, 1925, would not be helpful to such person to establish claim either to become a party in application for grant of succession certificate to the applicants or raise any claim in the estate left by the deceased. Further held that the Court, seized of the matter, relating to the issue of succession certificate could not adjudicate the claim of third person against the deceased for the satisfaction of stated claim from deceased's property. The objector although real brother of deceased, but is considered as a stranger in the proceedings for grant of succession certificate to the legal heirs of the deceased and would have no locus standi to allow him to join the proceedings, for, such proceedings are limited in nature to the extent of the determination of the rights of legal heirs of the deceased inter se and scope of such proceedings cannot be enlarged to the settlement of the disputed claim and determination of liabilities of legal heirs of the deceased.

7. In case of Mst. Jameela Akhtar v. Public-at Large and others (2002 SCMR 1544), it has been held that such intricate questions of fact could not be decided in summary proceedings and the Hon'ble Supreme Court of Pakistan advised the person claiming his entitlement in the estate of the deceased to get establish the same by filing a civil suit. The payment from the estate of the deceased in accordance with the respective shares of the legal heirs was not stopped; however, it was left open that in case the objector ultimately succeeds in civil suit in establishing his right to certain extent in the estate of the deceased, then suitable adjustment will be permissible from the amount already received by the legal heirs on the strength of the succession certificate.

8. The courts-below while determining the shares of the legal heirs have come to the conclusion that Mst. Allah Bachai, mother of Rafiq Ahmad deceased would inherit to the extent of 4/24 shares equal to Rs.1954036.50, whereas, Mst. Shahnaz Bibi, widow of deceased, would be entitled to 3/24 shares equal to Rs.1465557.375 and Ahmad Hassan, the son of the deceased, would be entitled to 17/24 shares equal to Rs.8304655.125.

9. Admittedly, Mst. Allah Bachai, mother of deceased Rafiq Ahmad, expired during pendency of the succession proceedings and respondents No.4a to 4f as also the petitioner, Ahmad Hassan (son of deceased) and Mst. Shahnaz Bibi (widow of deceased), respectively, being legal heirs of pre-deceased son of Mst. Allah Bachai would be entitled to get their respective shares from 4/24 shares of Mst. Allah Bachai.

10. I have been informed during the course of arguments that the petitioner Shafique Ahmad has also filed a declaratory suit before the Civil Court on 6-3-2012, which is still pending. The share from Mst. Allah Bachai's entitled would be the exclusive ownership of the persons, who were entitled to get the same, but in case of ultimate success of the petitioner in civil suit, the amount received by Ahmad Hassan, and Mst. Shahnaz Bibi, son and widow of the deceased Rafiq Ahmad, would be liable to be adjusted accordingly as per the final verdict in the civil suit.

11. With these observations, finding no force in the revision petition, the same is dismissed.

KMZ/S-66/L Revision dismissed.

2014 Y L R 877
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
NOSHER ALI---Petitioner
Versus
The STATE and 2 others---Respondents

Criminal Miscellaneous No.5986-B of 2013, decided on 7th January, 2014.

(a) Criminal Procedure Code (V of 1898)---
----S. 497(2)---Penal Code (XLV of 1860), S.302/34---Qanun-e-Shahadat (10 of 1984), Art. 38---Qatl-e-amd, common intention---Bail, grant of---Further inquiry--- Blind murder---Belated implication---Prosecution report stated that present case was one of blind murder, and the complainant who was a passerby found body of deceased and reported such matter to the police---After almost one month of the registration of F.I.R., an alleged eye-witness of the occurrence came forward and implicated accused for the murder---Strangely alleged eye-witness of the occurrence remained silent and never disclosed fact of seeing accused commit the murder to the police for almost a month---Question as to what prompted the alleged eye-witness to disclose such fact to the police was still a mystery---Alleged confession of accused during police investigation while in custody had no evidentiary value and same could not be used against him---Prosecution had a heavy responsibility to discharge the onus of involvement of accused in the alleged crime---Present case was a classic example of a case of further inquiry---Accused was admitted to bail in circumstances.

(b) Qanun-e-Shahadat (10 of 1984)---
---Art. 38---Confession before police---Admissibility as evidence---Alleged confession of accused during police investigation while in custody had no evidentiary value and same could not be used against him.

Prince Rehan Iftikhar Sheikh for Petitioner.
Malik Saeed Mumtaz, Deputy Prosecutor-General with Naseem S.I. for the State.

ORDER

IBAD-UR-REHMAN LODHI, J.---Through this petition, Nosher Ali (Petitioner) seeks his post-arrest bail in case F.I.R.No.624 of 2012 dated
10-12-2012 under sections 302/34 P.P.C. registered at Police Station Noor Shah, Sahiwal.

2. As per the report of the prosecution, it was a blind murder and the complainant who was a passerby found a body of a lady and reported such occurrence to the police on 10-12-2012. After almost one month of the registration of the criminal case on the application of one Muhammad Zakir, to the effect that he witnessed the occurrence when the deceased was being murdered by the present petitioner Nosher Ali, the petitioner was implicated as an accused.

3. The learned Prosecutor further argued that the present petitioner during police investigation has confessed his guilt.

4. It is very strange as to why Muhammad Zakir who stated to have been a witness of the occurrence of murder remained mum and never disclosed such fact to the police for almost a complete month andwhat promoted him after one month to disclose this fact is still a mystery.

5. The alleged confession by the petitioner during police investigation while in custody has no evidentiary value and the same cannot be used against him. The present case is a classic example of cases of further inquiry. The prosecution is under heavy responsibility to discharge the onus of involvement of the present petitioner in the alleged crime. The petitioner cannot be kept behind the bars for an indefinite period awaiting the conclusion of such trial.

6. Hence, in these circumstances, this petition is allowed and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.200,000 (Two lac only) with one surety in the like amount to the satisfaction of learned trial Court.

MWA/N-6/L Bail granted.

2014 Y L R 1525
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Mrs. ABIDA MEHMOOD and 3 others---Petitioners
Versus
Malik MUHAMMAD BASHIR and 2 others---Respondents

Writ Petition No.2191 of 2012, heard on 5th July, 2013.

Punjab Rented Premises Act (VII of 2009)---
----Ss. 24 & 2(h)---Constitution of Pakistan, Art.199---Constitutional petition--Ejectment of tenant---Default in payment of 'rent due'---Non-compliance of order to deposit tentative rent passed by Rent Tribunal---Ejectment petition was accepted on account of non-compliance of the order of deposit of tentative rent passed by Rent Tribunal---Default in payment of rent as

had been alleged in ejectment petition was not established---Tenant deposited rent of current month in compliance of order of Rent Tribunal---Order of Rent Tribunal was not specific in respect of current or succeeding, the future rent---Appeal filed by tenant was accepted as no default on the part of tenant had been proved---Validity---In absence of any tenancy agreement in-between the parties to the litigation, the rent due was always to be considered a rent to be paid after expiry of one month---Term 'rent due' in no way could be denoted to either an advance rent or deposit of the rent of current month in the same month---Rent Tribunal had passed a vague direction as to by which date of which month, future rent was to be paid by the tenant---Order of Rent Tribunal was in derogation of law on the subject of deposit of 'rent due' and the same was rightly reversed by appellate court---Constitutional petition was dismissed.

Ibrahim Trust v. Shaheed Freigh PLD 2011 SC 311; Asad Brothers v. Ibadat Yar Khan 1991 SCMR 986; Ashraf Hussain v. Asad Bashir 2007 CLC 579; Yaqoob Shah Bukhari v. Shah Muhammad 2001 YLR 2767; Muhammad Baqar Qureshi v. Mst. Razia Begum 1981 SCMR 18; Mehboob Illah v. Saqib Mehmood Riaz and others 1990 SCMR 1688 and Muhammad Naeem Abbas v. Mst. Muhammad Jan 2008 MLD 1659 rel.

Agha Tariq Mehmood Khan for Petitioners.
Sardar Sohail Asmat Ullah Khan for Respondent No.1.
Date of hearing: 5th July, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Pre-admission notice was issued to respondent No.1, however, after hearing the learned counsel for the said respondent, I consider it appropriate to decide the case on merits and, as such, the case is admitted to regular hearing. The learned counsel for respondent No.1 is present and accepts notice on behalf of said respondent.

2. Through this Constitutional petition, the writ petitioners have called-in-question the findings arrived at by the learned Additional District Judge, Rawalpindi, on 28-5-2012, when a rent appeal filed against the ejectment order passed by the learned Special Judge (Rent) dated 17-1-2012 was accepted and resultantly ejectment petition filed by the writ petitioners, was dismissed.

3. The petitioners sought the ejectment of respondent No.1 from the demised premises only on the ground of default in payment of rent and after grant of leave to contest the ejectment petition, the parties were provided opportunity to adduce their respective evidence by means of an order passed on 17-1-2012. The learned Special Judge (Rent), Rawalpindi has ordered the acceptance of ejectment petition and vacation of respondent No.1 from the property, in question, on the findings arrived at on issue No.1. While giving findings on the said issue, the learned Special Judge (Rent) was of the view that the default, as had been alleged in the ejectment petition, was not established, but respondent No.1 was guilty of default in strict compliance of the order passed on 2-12-2010 under the provisions of section 24 of the Rented Premises Laws in Punjab and only on the basis of such non-compliance, the ejectment was ordered.

4. The findings so arrived at by the learned Special Judge (Rent) were challenged by the tenants only. The present petitioners, however, never challenged the findings of the learned Special Judge (Rent), whereby, it was concluded that, the default in payment of rent as was pleaded in ejectment petition was never established to have been committed by respondent No.1. While deciding the appeal, the learned appellate Judge was of the view that even no default has been proved of the order passed on 2-12-2010 by the learned Special Judge (Rent), whereby, the rent was tentatively assessed and order was passed for such deposit.

5. The learned counsel for the petitioners has argued that although the default, as has been alleged in the ejectment petition, could not have been proved, but on account of non-compliance of the order of deposit of tentative rent as was passed by the learned Special Judge (Rent) on 2-12-2010, the tenants exposed themselves to an order of eviction.

6. The learned counsel for respondent No.1 has supported the judgment passed in appeal.

7. I have heard the learned counsel for the parties and have perused the record.

8. Since no other question has been raised, as such, the question of wilful default on the part of respondent No.1 is to be examined.

9. The order dated 2-12-2010 passed by the learned Special Judge (Rent) is of much significance for disposal of the instant petition, relevant part whereof is reproduced hereinbelow:-

"For what has been discussed above, at this stage petitioner is directed to pay the rent of both the shops at Rs.12,000 with effect from April, 2009 untill now and at the same rate for future till the disposal of the petition, in the account of the respondent or with this Rent Tribunal as per procedure. It is made clear that the amount of the rent deposited through his petition as mentioned earlier by the petitioner will he deducted from the above mentioned calculation. The remaining rent will be paid by the petitioner within the period of 30 days from today. In future he will pay at the same rate by tenth of each month."

The perusal of the above order reveal that it is vague to the extent that it has not been made clear as to by 10th of which month either 'current' or 'succeeding', the future rent was ordered to be deposited.

10. The Special Judge (Rent) has been empowered to pass an order for deposit of tentative rent during pendency of ejectment proceedings by means of section 24 of the Rented Premises Laws in Punjab, which is reproduced hereinbelow:--

"(1) If an eviction application is filed, the Rent Tribunal, while granting leave to contest, shall direct the tenant to deposit the rent due from him within a specified time and continue to deposit the same in accordance with the tenancy agreement or as may be directed by the Rent Tribunal in the bank account of the landlord or in the Rent Tribunal till the final order.

(2) If there is a dispute as the amount of rent due or rate of rent, the Rent Tribunal shall tentatively determine the dispute and pass the order fir deposit of the rent in terms of subsection (1).

(3) In case the tenant has not paid a utility bill, the Rent Tribunal shall direct the tenant to pay the utility bill.

(4) If a tenant fails to comply with a direction or order of the Rent Tribunal, the Rent Tribunal shall forthwith pass the final order."

There are two parts of the above referred provision of law. First deals with a direction with regard to the deposit of arrears, if any, and the second one deals with the assessed rent of the premises, in question, for future dates during pendency of the petition. The word 'rent due' used in the first part of the, provision and the word 'same' in the second part of the provision of section 24 are clear indicators to the intention of the legislatures that it is 'rent due,' which can be ordered to be paid by the Rent Tribunal even for the future dates. In absence of any tenancy agreement in between the parties to the litigation, the rent due is always to be considered a rent to be paid after expiry of one month. The said term 'rent due' in no way denotes to either an advance rent or deposit of the rent of current month in the same month.

11. Since the default, as had been alleged in the ejectment petition, could not have been proved by the petitioners and the findings so arrived at by the Special Judge (Rent) were not subsequently challenged by the ejectment petitioners and the default, which has been proved against respondent No.1 according to the Special Judge (Rent) is not a default by any means, the findings arrived at by the learned first appellate court seem to be weighty and in accordance with law. The same are not liable to be interfered with. There is no wilful default on the part of respondent No.1 and in view of the deposit subsequent, to order dated 2-12-2010 in strict compliance of the said order, respondent No.1 cannot be penalized for the imaginary non-compliance of the directions contained in the said order.

12. The phrase 'rent' has although been defined by virtue of section 2(h) of the Punjab Rented Premises Act, 2009, but the phrase 'rent due', which has been used in section 24 of the Act has not separately been defined. Even this was the position in the earlier rent laws viz. the West Pakistan Urban Rent Restriction Ordinance, 1959, as also the Punjab Rented Premises Ordinance, 2007.

13. The phrase 'rent due' has been interpreted by the Courts. In case of Ibrahim Trust v. Shaheed Freigh PLD 2011 Supreme Court 311), the Hon'ble Supreme Court of Pakistan has held as under:--

"In absence of any date fixed between the landlord and tenant by mutual agreement, rent shall be paid not later than 10th of month next following the month for which it is due". .

In the case of Asad Brothers v. Ibadat Yar Khan (1991 SCMR 986), with regard to the rent laws prevailing in Sindh at the relevant time, the findings were as follows:--

"It, therefore, logically follows that an order under section 16(1) of the Ordinance can only be passed, in respect of the arrears of "rent dues" and in respect of future monthly "rent".

This Court in case of Ashraf Hussain v. Asad Bashir (2007 CLC 579) was of the following view:--

"Obviously, the rent of each month becomes "due" on 30th day of that month, thus, tenant is required under the law to deposit the future monthly rent before 15th day of succeeding month. When law unequivocally provides that future monthly rent due is to be deposited before 15th day of succeeding month, how the learned Rent Controller could evolve his own procedure in violation of the provision of law."

Again this court in case of Yaqoob Shah Bukhari v. Shah Muhammad (2001 YLR 2767) by placing reliance on the case of Muhammad Baqar Qureshi v. Mst. Razia Begum (1981 SCMR 18) has held as under:--

"The provision of section 13(2)(i) comprises two parts dealing with two different and distinct situations. In the first part it stipulates a situation where a time is fixed in the agreement of tenancy for payment of rent and in such a case the phrase "rent due by him" means the rent which has become due according to the terms of the tenancy and if it is not paid within 15 days after the expiry of the time fixed in the agreement then the tenant is liable to ejectment."

The Hon'ble Supreme Court of Pakistan in case of Mehboob Illah v. Saqib Mehmood Riaz and others (1990 SCMR 1688) has held in the following manner:--

"Tenant had to deposit the rent for specified month before 15th of the next month. Tenant had sent rent through money orders for the specified month and for the month following on 11th of the specified month and on the 2nd of the next month. Such tender amounted to deposit' in the performance of tenant's obligation under S. 13(6) of the Ordinance and such tenant could not be adjudged as a defaulter and penalized far non-compliance of order under S. 13(6) of Ordinance VI of 1959".

Lastly, this Court in case of Muhammad Naeem Abbas v. Mst. Muhammad Jan (2008 MLD 1659) has held in the following terms:--

"Rent for a month would become due upon its expiry and upon becoming due would become payable before 15th day from such date. Order of Rent Controller directing deposit of rent for same month before 15th of same month would be illegal. Rent for the month of October, 2007 had become due for payment before 15th of next month i.e. 15-11-2007."

14. As noted earlier, the special Judge (Rent), in the present case, has passed a vague "direction making not clear as to by which date of which month, future rent was to be paid by the tenant.

The learned counsel for the petitioners has referred R-35, R-38, R-40 and R-42 showing the deposit of rent for the said month in the same very month, but as the deposit was made after the 10th of each current month, the same was considered as a violation of order passed under section 24 of the Punjab Rented Premises Act, 2009, and the tenants were held defaulters in payment of rent.

15. The findings so arrived at by the Special Judge (Rent) are, thus, in derogation of the law on the subject of deposit of "rent due" and, therefore, the same were rightly reversed by the learned first appellate court.

The learned counsel for the petitioners has failed to point out any jurisdictional defect or illegality in the judgment impugned herein passed by the learned Additional District Judge, Rawalpindi on 28-5-2012. Thus, the same is sustained and the petition having no force is dismissed.

JJK/A-113/L Petition dismissed.

2014 Y L R 2214

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

STATE LIFE INSURANCE CORPORATION---Petitioner

Versus

CO-OPERATIVE INSURANCE SOCIETY OF PAKISTAN---Respondent

Civil Revision No.2401 of 2013, decided on 12th February, 2014.

Civil Procedure Code (V of 1908)---

----O.VI, R.17---Specific Relief Act (I of 1877), S.8---Suit for possession of immovable property---Amendment in pleadings---Principle---Plaintiff company sought amendment in its plaint, after framing of issues, which application was disallowed by Trial Court---Validity---Plaintiff company was required to indicate in clear terms as to at which part of pleadings, it intended to add or delete some version and in case of addition, the proposed addition must be provided in unequivocal terms---Proposed amendment was not to be vague or evasive---Application moved by plaintiff company was lacking completely in such regard---Nowhere in the application any proposed amendment in clear terms had been provided and similarly it was nowhere mentioned as to at which part of already filed plaint, the proposed amendment was to be added or altered---Plaintiff failed to make out a case for amendment in already filed plaint and also failed to point out as to how financial statements of defendant society would be relevant with regard to issues involved in the suit, seeking declaration as to the title of property and recovery of damages---Order passed by Trial Court did not suffer from any illegality or irregularity so as to warrant interference by High Court in its revisional jurisdiction---Revision was dismissed in circumstances.

Matwali Khan v. Shah Zaman and others PLD 1965 AJ&K 26 and Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688 rel.

Syed Naveed Abbas for Petitioner.
Muhammad Hanif Niazi for Respondent.

ORDER

IBAD-UR-REHMAN LODHI, J.---The present petitioner-State Life Insurance Corporation of Pakistan, filed a suit on 27-7-2007 against the present respondent-Messrs Co-operative Insurance Society of Pakistan, seeking a declaration, injunction and recovery of damages. When Life Insurance (Nationalization), Order, 1972, President's Order No.10 of 1972 (hereinafter to be referred as 'the Order') was promulgated, it was provided in Article 15 thereof that all the assets and liabilities pertaining to the life insurance business in Pakistan of all insurers shall, on the appointed date, stand transferred to, and vested in the Corporation to be constituted in view of Article 11 of the said Order. By virtue of clause (2) of Article 15 of the said Order, it was provided that the assets pertaining to the life insurance business of an insurer shall be deemed to include all rights and powers, and all property, whether movable or immovable.

2. The property having No.S-19-R-23, located at 23-Shahrah-e-Quaid-e-Azam, Lahore, was partly purchased by the respondent from the Settlement Department vide PTD dated 24-12-1964, and according to the defendant-respondent, on such purchase, funds of General Insurance Department of the respondent-Society were invested, whereas, remaining part was purchased from an individual owner vide registered sale deed dated 18-3-1964, and the funds required for such sale, were also paid out from the funds of the respondent-defendant of its General Insurance Department. Notwithstanding such purchase, the said building was ordered to be taken over for the petitioner under the order of sub-trustee by means of order dated 27-3-1972 in exercise of the powers under Article 5 of the Order.

3. The respondent, feeling aggrieved of said order of sub-trustee, challenged the same before this Court in Writ Petition No.819 of 1972, which was allowed on 3-11-1992, and after declaring the order of sub-trustee as illegal and without lawful authority; the questions raised in the writ petition were referred for decision by the Insurance Appellate Tribunal, constituted under section 110 of the Insurance Act, 1938. The order passed by this Court was never further challenged and, thus, the order of sub-trustee dated 27-3-1972 was not holding the field any more after 3-11-1992.

4. The Insurance Appellate Tribunal, as a consequence of remand order by this Court, taken up the matter, but refused to adjudicate upon the same by holding that said Tribunal had no jurisdiction to adjudicate upon the matter. This was done vide order dated 7-10-1997. Thereafter, the respondent-defendant sent notices to the occupants of different parts of the building, in question, requiring them to pay rent to the respondent, whereas, some of the occupants were being taken as tenant by the petitioner-Corporation. The respondent also filed a suit seeking possession of the part of the building taken over by the petitioner-Corporation. All such litigation is stated to be pending. The present suit is one of such suits filed in series, after once the order of sub-trustee was set at naught.

5. The plaint, as noted herein-above, was filed in the suit on 27-7-2007 and on behalf of the respondent-defendant-Corporation, a contesting written-statement was filed in February,

2008, and after framing of issues, the evidence of the petitioner-Corporation was being called for.

6. Instead of producing the evidence, on 12-11-2011, an application under the Provisions of Order VI, Rule 17, C.P.C. was moved, seeking some amendment in the plaint, by mentioning the financial statements of the defendant-respondent, covering a period from 1964 to 1972, along with some stated liability evidence.

7. Such plea was contested by the respondent and it was objected to being vague and evasive and an attempt to avoid the closure of the evidence of the plaintiff-petitioner.

8. The learned trial Court by means of impugned order dated 10-9-2013, proceeded to dismiss the application moved under the provisions of Order VI, Rule 17, C.P.C.; hence, this revision petition before this Court.

9. In support of the petition, the learned counsel for the petitioner contended that the Courts are supposed to be liberal in granting the amendments and amendment in the pleadings can be asked, at any stage, and that, right of any party cannot be restricted on technical grounds.

10. The learned counsel appearing for the respondent has defended the impugned order.

11. The provisions of Order VI, Rule 17, C.P.C. empower any party to a suit to alter or amend his pleadings in such manner as may be just.

12. From the above requirement of law, it is, but clear that any party to a litigation, is supposed to be clear and categoric in what he is praying to be inserted in already filed pleadings by way of amendment. For such, an applicant under Order VI, Rule 17, C.P.C. is required to indicate in clear terms as to at which part of the pleadings, he intended to add or delete some version and in case of addition, proposed addition must be provided in unequivocal terms. The proposed amendment must not be vague or evasive.

13. When on such touchstone, the application moved by the present petitioner seeking amendment is adjudged, one found it difficult to ascertain, with some exactitude, as to what is required to be added in the already filed plaint and at which part of the plaint. The wording used in Rule 17 of Order VI, C.P.C., as noted herein-above, clearly suggests that relevant portions of the pleadings must be pointed out by the person, intending to cause any amendment in the pleadings, and the portion, which is to be inserted as a result of alteration or amendment is concerned, be specifically provided.

14. The application moved by the petitioner is lacking completely in this regard. Nowhere in the application, any proposed amendment, in clear terms, has been provided and similarly, it is not mentioned as to at which part of the already filed plaint, the proposed amendment is to be added or altered.

15. The High Court of Azad Jammu and Kashmir in case titled Matwali Khan v. Shah Zaman and others (PLD 1965 AJ&K 26) has held that general prayer for amendment cannot

be made or allowed and that proposed amendment should be in writing and in explicit form and in the same way, order if allowing amendment should also be specific and clear showing nature and extent of amendment allowed.

16. The Hon'ble Supreme Court of Pakistan in Muhammad Akram and another v. Altaf Ahmad (PLD 2003 Supreme Court 688), on the point of amendment, has held that the Court cannot shut its eyes to a glaring fact that the amendment, itself, was sought more than seven years, after the institution of the first written-statement. The delay in making such plea cannot, of course, be barred by any limitation, but the factual aspect thereof cannot be ignored and the factual inferences cannot be avoided.

17. I have seen the impugned order, passed by the learned trial Court on 10-9-2013, which clearly speaks that the proposed amendment would not be of any avail to the petitioner to establish the version taken in the plaint and that yet the petitioner has to produce its evidence and it would be at liberty to produce in evidence any material, it required.

18. I found no illegality or irregularity on the part of the learned trial Court, while dismissing the application, moved by the present petitioner, seeking amendment in the plaint.

19. The petitioner has not made out its case for amendment in the already filed plaint and also failed to point out as to how the financial statements of the respondent would be relevant with regard to the issues involved in the suit, seeking declaration as to the title of the property, recovery of damages, etc.

20. The impugned order does not suffer from any illegality or irregularity, so as to warrant interference by this Court in revisional jurisdiction.

21. The petition, having no force, is dismissed.
MH/S-29/L Revision dismissed.

PLJ 2014 Lahore 189
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
Mst. SHAGUFTA PARVEEN--Appellant
versus
QAISER IJAZ & 2 others--Respondents

F.A.O. No. 172 of 2013, decided on 4.10.2013.

Mental Health Ordinance, 2001 (VII of 2001)--

----Ss. 29 & 30(1)(d)--Power the Court of protection to examine mentally disorder person with regard to mental capacity and condition of such person--Inherited shares--Validity--Examination of alleged mentally disordered person by Court of protection was thus within competence of such Court as provided in Section 30 (1)(b) of Ordinance and no exception

can be taken of such proceedings and findings of Court of protection--Proceedings were crude and cruel effort on part of appellant to even usurp legitimate share inherited by mother from estate of her deceased son--Even at end of the day such share would devalue upon legal heirs of such lady which includes appellant but it seemed that appellant was in hurry to get such share--Appellant had failed to establish respondent as a mental disordered person--Court of protection had reached to just and proper when examination--Appeal was dismissed. [Pp. 192 & 192] A & C

Mental Health Ordinance, 2001 (VIII of 2001)--

----Preamble--Mental Health Ordinance, was promulgated to consolidated and amend law relating to treatment and care of mentally disordered persons, to make better provisions for their care, treatment, management of properties and affairs and to provide for matters connected therewith or incidental thereto and to encourage community care of such to provide for promotion of mental health and prevention of mental disorder. [P. 191] B

Ch. Habib Ullah Nahang, Advocate for Appellant.

Date of hearing: 4.10.2013.

Order

The appellant who is paternal grand daughter of Respondent No. 3 moved the Court of Protection under the provisions of Section 29 of Mental Health Ordinance, 2001 (Ordinance No. VIII of 2001) (hereinafter to be referred as "the Ordinance"), seeking a declaration that Respondent No. 3, her paternal grand mother is a mentally disordered person.

2. The learned Additional District Judge, Multan in his capacity of the Court of Protection as defined in Section 2(d) of the Ordinance, required Respondent No. 3 to attend the Court and after personal examination of said respondent by the Court, the petition moved by the appellant was dismissed on 14.09.2013, hence this appeal before this Court.

3. The learned counsel for the appellant has contended that the first appeal must be admitted as of right and the respondents be summoned.

4. Section 46 of the Ordinance provides a remedy of appeal from the order made by a Court of Protection under Chapter-V of the Ordinance but it is nowhere provided that the appeal so filed would be admitted as of right.

5. The learned counsel for the appellant was asked to address the arguments in support of appeal and thus, he contended that the Court of Protection was not competent itself to examine the person for whom the petition has been filed seeking the declaration to declare such person as a mentally disordered person and the matter must be referred either to a Psychiatric or any other expert in the relevant field.

6. Section 30(1)(d) of the Ordinance provides the regulation for proceedings of the Court of Protection which empowers the Court of Protection to examine the alleged mentally disordered person with regard to the mental capacity and condition of such person.

7. The perusal of impugned order reveals that Respondent No. 3, Mst. Bakhsh Ellahi was examined by the Court of Protection and the finding in this regard are relevant which are reproduced herein below:--

"Although Mst.Bakhsh Elahi is hard of hearing and extremely old lady, appears to be octogenarian but she has given very sound and pertinent and relevant replied to the Questions No. 7, 8 and 9 about her property. When she has been asked about her property, she has clearly stated that she will not give her property to any one as long as she is alive. She will handover her property to person who will love her. She has also asked the petitioner Shagufta Parveen whether she received property of her father Mian Ijaz Ahmad."

The examination of the alleged mentally disordered person by the Court of Protection was thus within the competence of such Court as provided in Section 30(1)(d) of the Ordinance and no exception can be taken of such proceedings and findings of learned Court of Protection.

8. Preamble of the Legislation is always considered a key to such legislation and when we look into the preamble of the Ordinance, it is but clear that the Ordinance was promulgated to consolidate and amend the law relating to the treatment and care of mentally disordered persons, to make better previsions for their care, treatment, management of properties and affairs and to provide for the matters connected therewith or incidental thereto and to encourage community care of such mentally disordered persons and further to provide for the promotion of mental health and prevention of mental disorder.

9. The practical experience proves otherwise. No serious efforts are seen in any sector of life, collective or individual in order to achieve the noble goal provided in preamble of the Ordinance. In comparison whereof, the provisions of Ordinance are being misused in order to achieve our wordly desires. Our social fabrics are being damaged to such extent that the concept of 'Old People Home" has been introduced in our `Islamic Society'. Real children are going to admit their aged and ailing parents in such shelter homes and once the parents are left there real children never return to at least have a look on their said parents. The properties and assets of such parents are thereby usurped by such avaricious children. Even during life time of the parents it has become the custom of our society that the children start claiming their shares from their parents, from the property owned by their parents. The children are crazy enough not to wait for the time they become entitled to have their shares on inheritance after the life of their parents come to an end. This is the height of greed.

Quranic Command as ordained in Surah "Bani Israel" Ayah No. 23 & 24, reproduced herein below is completely being ignored.

Even in the present case, Ijaz Ahmad died leaving behind his mother Mst. Bakhsh Ellahi (Respondent No. 3), two sons Qaisar Ijaz and Athar Ijaz, Respondent No. 1 & 2 and one daughter Mst.Shagufta Perveen, the present appellant, Mother of the deceased naturally got 1/6th share out of the estate of her deceased son Ijaz Ahmad whereas two sons and one daughter have also inherited from the estate of deceased in accordance with their respective shares. It is such 1/6th share inherited by Mst.Bakhsh Ellahi which is bone of contention in this matter. The present proceedings are crude and cruel effort on the part of the appellant to even usurp the legitimate share inherited by the mother from the estate of her deceased son. Even at the end of the day such 1/6th share would devolve upon the legal heirs of such lady which includes the present appellant but it seems that the appellant is in hurry to get such share.

10. The appellant has failed to establish Respondent No. 3 as a mentally disordered person. The Court of Protection has reached to a just and proper conclusion on 14.09.2013 when examined Mst.Bakhsh Ellahi and the petition filed by the appellant was dismissed.

11. I see no illegality in the impugned order which is sustained and the appeal which has no force is dismissed in limine.

(R.A.) Appeal dismissed.

PLJ 2014 Cr.C. (Lahore) 246
Present: Ibad-ur-Rehman Lodhi, J.
ASGHAR ALI--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 12728-B of 2013, decided on 6.11.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 406--Pre-arrest bail--Confirmation--When the prosecution was confronted as to where is the direction of law behind such transaction, which is a basic requirement for bringing an entrustment within the ambit of criminal breach of trust in view of Section 405, PPC, the prosecution has failed to show any direction of law prescribing the mode in which such trust is to be discharged--When such stated direction of law is a sine-qua-non for any entrustment or dominion over property, in absence of the same, no offence punishable u/S. 406, PPC is prima-facie made out--The mala-fides as to the conduct of the complainant in league with the prosecution cannot be ruled out, when a criminal case has been registered in such background by converting a pure civil liability into a criminal one--The petitioner, after getting ad-interim pre-arrest bail, has joined the investigation--This Court is of the view that since the basic requirements for constituting an offence u/S. 405, PPC punishable u/S. 406, PPC are not met with by the prosecution; therefore, there will be no justification to recall already granted ad-interim pre-arrest bail to the petitioners--Bail confirmed. [P. 247] A & B

Mr. A.D. Bhatti, Advocate alongwith Petitioner.

Mr. Nisar Ahmad Virk, Deputy District Public-Prosecutor for State.

Date of hearing: 6.11.2013.

Order

The petitioner is seeking his pre-arrest bail in case FIR No. 111, dated 08.04.2013, offence under Section 406, PPC, registered at Police Station, Sadar Kamalia, District Toba Tek Singh.

2. Admittedly, a private deal was finalized in between two private individuals.

3. When the prosecution was confronted as to where is the direction of law behind such transaction, which is a basic requirement for bringing an entrustment within the ambit of criminal breach of trust in view of Section 405, PPC, the prosecution has failed to show any

direction of law prescribing the mode in which such trust is to be discharged. When such stated direction of law is a sine-qua-non for any entrustment or dominion over property, in absence of the same, no offence punishable under Section 406, PPC is prima-facie made out. The mala-fides as to the conduct of the complainant in league with the prosecution cannot be ruled out, when a criminal case has been registered in such background by converting a pure civil liability into a criminal one. The petitioner, after getting ad-interim pre-arrest bail, has joined the investigation.

4. This Court is of the view that since the basic requirements for constituting an offence under Section 405, PPC punishable under Section 406, PPC are not met with by the prosecution; therefore, there will be no justification to recall already granted ad-interim pre-arrest bail to the petitioners.

5. Resultantly, this Criminal Miscellaneous is allowed and ad-interim pre-arrest bail already granted to the petitioner on 24.9.2013, is confirmed on already furnished bail bonds.

(A.S.) Bail confirmed.

PLJ 2014 Cr.C. (Lahore) 252
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD RAZA--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 8774-B of 2013, decided on 26.7.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 376, 406, 511, 365-B r/w Telegraphic Act, S. 25-D--Bail, grant of--Allegation of abduction--Sister of the complainant, whose marriage was being resisted allegedly by the petitioner, has since been married and settled at Dubai in her new matrimonial life--The maximum allegation was the intimidation and to attempt to commit abduction and also within the meaning of Section 25-D of Telegraphic Act--Petitioner was behind the bars and although the challan has been submitted before the trial Court but the trial was not underway and its early conclusion was not in sight, thus the petitioner cannot be kept behind the bars for indefinite period which would be nothing but a punishment without trial which is against the spirit of law--Bail allowed. [P. 253] A

Mian Shahid Ali Shakir, Advocate for Petitioner.

Complainant in person.

Mr. Aqeel-ur-Rehman Khan, Deputy Prosecutor General Punjab for State.

Date of hearing: 26.7.2013.

Order

Through this petition, the petitioner seeks post arrest bail in case FIR No. 561/2012 dated 22.08.2012 registered under Sections 376, 506, 511, 365-B, PPC read with Section 25-D of Telegraphic Act at Police Station RazabadDistrict Faisalabad

2. The sister of the complainant, whose marriage was being resisted allegedly by the petitioner, has since been married and settled at Dubai in her new matrimonial life. The maximum allegation was the intimidation and to attempt to commit abduction and also within the meaning of Section 25-D of Telegraphic Act. The petitioner is behind the bars since 22.08.2012 and although the challan has been submitted before the trial Court but the trial is not underway and its early conclusion is not in sight, thus the petitioner cannot be kept behind the bars for indefinite period which would be nothing but a punishment without trial which is against the spirit of law.

3. In view of what has been discussed above, this petition is allowed and the petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail allowed.

PLJ 2014 Cr.C. (Lahore) 268
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD SHAFIQUE--Petitioner
versus
STATE and another--Respondents

Crl. A. No. 145 of 2010, Crl. Misc. No. 1 of 2012, decided on 7.1.2014.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Pakistan Penal Code, (XLV of 1860), S. 302(b)--Suspension of sentence--Petitioner was convicted u/S. 302(b), PPC and sentenced him to life imprisonment with further direction to pay Rs--50,000/- as compensation to the legal heirs of deceased as envisaged by the relevant provisions of Section 544-A, Cr.P.C.--Benefit of Section 382-B of, Cr.P.C., was, however, extended to him--Petitioner was convicted and the present appeal was filed and since then the same was pending--There was no possibility for fixation of this appeal in the near future and the petitioner has earned a statutory right by now to be released on bail after suspension of his sentence. [P. 269] A & B

Prince Rehan Iftikhar Sheikh, Advocate for Petitioner.

Malik Saeed Mumtaz, Deputy Prosecutor General Punjab for State.

Malik Abdul Khan, Advocate for Complainant.

Date of hearing: 7.1.2014.

Order

Criminal Miscellaneous No. 1 of 2012

Through the instant petition, Muhammad Shafique-petitioner seeks suspension of his sentence in case FIR No. 347, dated 28.09.2009 registered at Police Station Yousafwala, District Sahiwal. Vide judgment dated 18.12.2009 passed by learned Additional Sessions Judge, Sahiwal, the petitioner was convicted under Section 302(b), PPC and sentenced him

to life imprisonment with further direction to pay Rs. 50,000/- as compensation to the legal heirs of Muhammad Ashraf deceased as envisaged by the relevant provisions of Section 544-A, Cr.P.C. Benefit of Section 382-B of, Cr.P.C., was, however, extended to him.

2. The petitioner was convicted vide judgment dated 18.12.2009 and the present appeal was filed on 13.01.2010 and since then the same is pending. There is no possibility for fixation of this appeal in the near future and the petitioner has earned a statutory right by now to be released on bail after suspension of his sentence.

3. Resultantly, this petition is allowed, sentence awarded to the petitioner is suspended and he is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- (Rupees two lac only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. He is directed to appear before this Court on each and every date of hearing till the final decision of the main appeal.

(A.S.) Petition allowed.

PLJ 2014 Cr.C. (Lahore) 374
[Multan Bench Multan
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD AFZAL--Petitioner
versus
STATE--Respondent

Crl. Appeal No. 507 of 2010, decided on 3.12.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 365-B & 376--Conviction and sentence--Challenge to--Witnesses were not consistent even with regard to the incident of reaching home of alleged victim of the offence, as P.W. victim herself appeared and has deposed that she slipped from the clutches of the accused and reached her home, whereas, her father complamant has deposed that a Punchayat way convened where the accused promised to return her daughter and then after ten days of the said compromise the accused returned her daughter--After the alleged occurrence, the victim of the offence filed a Suit for jactitation of marriage before Judge Family Court, where she appeared as PW and her statement made in such proceedings has been made part of the record of the present trial wherein she has levelled allegation of rape against the brother of appellant--Trial Court has miserably failed to appreciate all such short comings in the prosecution's case and has proceeded wrongly by convicting the appellant under Sections 365-B/376, PPC--Conviction was not maintainable on the consideration noted herein above. [P. 377] A & B

Prince Rehan Iftikhar Sheikh, Advocate for Appellant.

Mr. Muhammad Abdul Wadood, D.P.G. for State.

Mr. Makhdoom Ejaz Hussain Bukhari, Advocate for Complainant.

Date of hearing: 3.12.2013.

Judgment

Muhammad Afzal son of Abdul Ghafoor was tried by learned Additional Sessions Judge, Chichawatni in case FIR No. 246, dated 10.10.2007 under Sections 365-B/376 of Pakistan Penal Code, 1860, registered at Police Station Ghaziabad, District Sahiwal Vide judgment dated 30.01.2010 the learned trial Court convicted and sentenced the appellant as under:--

(i) Under Section 365-B, PPC to Life Imprisonment with fine of Rs.25,000/- or in default thereof to further undergo two months Simple Imprisonment.

(ii) Under Section 376, PPC to Fourteen years R.I, with fine of Rs.25,000/- or in default thereof to further undergo two months Simple Imprisonment.

Benefit of Section 382-B, Cr.P.C. was, however, extended to the appellant. Both the sentences were ordered to run concurrently. Abdul Ghafoor was acquitted by giving benefit of doubt.

2. Muhammad Afzal-appellant has approached this Court by filing the instant appeal through bail against his conviction and sentence passed by the learned trial Court.

3. As a result of investigation carried out by the local police of Police Station Ghaziabad, District Sahiwal in case FIR No. 246 of 2007, the challan was sent to learned Additional Sessions Judge, Chichawatni, who on 19.12.2009 framed charge against the present appellant and his co-accused Abdul Ghafoor in the following manner:--

Firstly:--

That on 2.3.2007 at about 8.00 p.m. in the area of Chak No. 147/9-L falling within the jurisdiction of PS Ghaziabad, Chichawatni you the above said accused abducted Mst. Ishrat Bibi, a daughter of the complainant and thereby committee an offence punishable u/S. 365-B, PPC and within the cognizance of the Court.

Secondly:--

That after the aforesaid abduction, you the above said accused Muhammad Afzal committed with Mst. Ishrat Bibi and thereby committed an offence punishable u/S. 376, PPC and within the cognizance of the Court.

Thereafter, the prosecution evidence was called for. The material witnesses are Mst. Ishrat Bibi, alleged victim of the offence (PW-3) and her father Muhammad Ramzan-complainant (P.W.4). After completing all the formalities of trial, learned trial Court proceeded to convict the appellant as aforementioned, whereas, his co-accused, namely, Abdul Ghafoor was acquitted.

4. Learned counsel for the appellant has argued his case on the formulations that the prosecution his failed to prove guilt in the accused persons with regard to abduction, no exact date of commission of crime has been provided by the prosecution; that the medical evidence does not support the ocular account; and that although, according to the doctor, who examined alleged victim of offence the vaginal swabs were sent to the Chemical Examiner in order to detect semen or otherwise but no report of Chemical Examiner was made part of the record as such according to his contention this is a case of no evidence either of abduction or commission of rape. Finally, learned counsel for the appellant has submitted that on the same evidence, Abdul Ghafoor, co-accused of the appellant, was acquitted even from the charge of abduction.

5. Learned counsel for the complainant as also learned Deputy Prosecutor General Punjab for the State have supported the conviction announced by means of the impugned judgment.

6. According to First Information Report, Exh.PB/1, the occurrence took place on 02.03.2007, which was reported, for the first time, to the police on 10.10.2007 and although statement under Section 161 of the alleged victim of the offence was recorded on 17.10.2010 but she was produced by the police for her medical examination on 20.07.2007 and when she was examined by Lady Doctor Uzma Bukhari, Ex-WMO, District Headquarters Hospital, Sahiwal, following were the observations:--

"She is fully conscious and well oriented with face and space. Cloth has been changed. There are no marks of violence above the body.

Vulva and vagina are healthy. Hymen completely torn and healed. Vagina admits two fingers Easily, Utres is normal in size. No bleeding. No discharge. Two vaginal swabs are taken, sealed and sent to the office of Chemical Examiner, Multan for detection of semen, if any.

Advised. Urine for pregnancy test and ultra sound pelvis".

7. Opinion of the doctor clearly indicates that there was no indication of recent rape with the alleged victim of the offence. In the First Information Report, Amanat Ali and Muhammad Ishaq two persons were introduced as witnesses of abduction of the alleged victim at the hands of the accused persons. During trial, none of them were produced and were given up. In view of Article 129 Illustrations (g) of the Qanun-e-Shahadat Order, 1984, the presumption would be drawn to the effect that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. Further learned trial Court disbelieved the allegation of abduction qua co-accused Abdul Ghafoor on the basis of same evidence, which has been believed against the present appellant in this regard which practice has never been recommended by the Courts in criminal jurisdiction. It is, therefore, held that the prosecution has failed to prove the allegation of abduction against the present appellant also.

8. Keeping in view the opinion of the doctor examined medically the victim and absence of the report of Chemical Examiner, the commission of offence under Section 376, PPC also becomes doubtful.

9. The witnesses viz. Mst. Ishrat Bibi (P.W.3) and Muhammad Ramzan (P.W.4) are not consistent even with regard to the incident of reaching home Mst. Ishrat Bibi, alleged victim of the offence, as P.W.3 Mst. Ishrat Bibivictim herself appeared and has deposed that she slipped from the clutches of the accused and reached her home, whereas, her father Muhammad Ramzan-complamant (P.W.4) has deposed that a Punchayat way convened where the accused promised to return her daughter and then after ten days of the said compromise the accused returned her daughter.

10. After the alleged occurrence, the victim of the offence filed a suit for jactitation of marriage before Judge Family Court, Chichawatni where she appeared us PW.1 and her statement made in such proceedings has been made part of the record of the present trial as Exh.D.A wherein she has levelled allegation of rape against the brother of Muhammad Afzal-appellant. Learned trial Court has miserably failed to appreciate all such short comings in the prosecution's case and has proceeded wrongly by convicting the appellant

under Sections 365-B/376, PPC. The conviction is not maintainable on the consideration noted herein above.

11. Resultantly, this appeal is allowed. The conviction and sentence awarded by the learned trial Court under Sections 365-B/376, PPC is set aside and the appellant is acquitted of the charge. He is directed to be released forthwith if not required in any other case.

(A.S.) Appeal allowed.

PLJ 2014 Cr.C. (Lahore) 405
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
JAHANGIR--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 5206-B of 2013, decided on 19.11.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 376 (ii), 292 & 384--Bail, grant of--Further inquiry--Demanding of money--Inclusion of name of present petitioner as accused, was a story full of doubts as veracity of the complainant and it is a case of further inquiry at least to extent of present petitioner. [P. 405] A

Rana Muhammad Asif Saeed, Advocate for Petitioner.

Mr. Muhammad Abdul Wadood, DPG for State.

Mr. Muhammad Ramzan Tabassum, for Complainant.

Date of hearing: 19.11.2013.

Order

Jahangir petitioner seeks post arrest bail in case FIR No. 265/13 dated 17.7.2013 offences under Sections 376(ii)/292/384, PPC registered at Police Station City Dunyapur District Lodhran.

2. The FIR, which was got registered by the father of the victim, after getting complete instructions from the alleged victim of the offence but nothing except last visit to the house of the father of the victim demanding some money, the present petitioner was never involved in any other offending act.

3. Learned DPG has further informed that there is no allegation of commission of zina against the present petitioner and further that when the accused petitioner proposed the DNA test of the victim she flatly refused to surrender to such medical examination.

4. For what happened in this case till inclusion of the name of the present petitioner as accused, is a story full of doubts as of the veracity of the complainant and it is a case of further inquiry at least to the extent of the present petitioner.

5. Resultantly this petition is allowed the petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail allowed.

PLJ 2014 Cr.C. (Lahore) 418
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
NASIR--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 3610-B of 2013, decided on 26.9.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 91--In private complaint, after summoning accused, trial Court has proceeded with trial and by such act, proceedings in challan case have naturally become dormant--Future proceedings with regard to attendance of accused persons would be regulated under Section 91, Cr.P.C. in complaint case and there is no justification to withhold concession of bail in challan case which, has become dormant--Bail was allowed. [P. 419] A

Rana Muhammad Asif Saeed, Advocate for Petitioner.

Ch. Muhammad Akbar, Deputy Prosecutor General Punjab for State.

Mian Qayyum Nawaz Meo, Advocate for Complainant.

Date of hearing: 26.9.2013.

Order

Nasir-petitioner seeks post-arrest bail in case FIR No. 120, dated 9.05.2011 offences under Section 324/34, PPC registered at Police Station Makdhum Pur, District Khanewal.

2. In the challan case, there was an allegation of indiscriminate firing by the petitioner. On 17.05.2013, a direction was issued to the learned trial Court for expeditious trial and conclusion of the same within a period of one month in Criminal Miscellaneous No. 13-B of 2013. Neither the trial of challan could have been concluded in the said time nor there are any chances of its conclusion on account of filing of private complaint by the complainant of the case showing his dissatisfaction with the findings arrived at in investigation in challan case. In private complaint, after summoning the accused, learned trial Court has proceeded with the trial and by such act, the proceedings in challan case have naturally become dormant. The future proceedings with regard to the attendance of the accused persons would be regulated under Section 91, Cr.P.C. in complaint case and there is no justification to withhold the concession of bail in challan case which, as noted above, has become dormant.

3. Resultantly, this petition is allowed and the petitioner is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rupees one lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail allowed.

PLJ 2014 Cr.C. (Lahore) 445
[Multan Bench Multan]
Present: Ibad-ur-Rehman, Lodhi, J.
KALEEM MASEEH--Appellant
versus
STATE & another--Respondents

Crl. Appeal No. 980 of 2011 and Crl. Misc. No. 1 of 2013, decided on 17.12.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Pakistan Penal Code, (XLV of 1860), Ss. 302(b)--Suspension of sentence--Present appeal against such conviction was filed and since then same was pending here--For non-fixation or non-hearing of appeal, petitioner cannot be held responsible--He has earned a statutory right by now to be released on bail after suspension of sentence--Petition allowed. [P. 446] A

Prince Rehan Iftikhar Sheikh, Advocate for Appellant.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General.

Date of hearing: 17.12.2013.

Order

Crl. Misc. No. 1 of 2013

The petitioner-appellant, namely Kaleem Maseeh, was tried by the learned Sessions Judge, Sahiwal and vide judgment dated 3.11.2011, he was sentenced under Section 302(b), PPC to life imprisonment and to pay Rs. 100,000/- (Rupees one lac) fine and the said amount if recovered half of it was to be payable to the legal heirs of the deceased under Section 544-A, Cr.P.C. and the same was recoverable as arrears of land revenue from the petitioner and in case of default, he was to further undergo six months. Benefit of Section 382(b), Cr.P.C. was also extended to the convict in case F.I.R. No. 32/2011 dated 25.01.2011 under Section 302/34, PPC registered at Police Station Harappa, District Sahiwal.

2. The present appeal against such conviction was filed on 23.11.2011 and since then the same is pending here. For non-fixation or non-hearing of the appeal, the petitioner cannot be held responsible. He has earned a statutory right by now to be released on bail after suspension of sentence.

3. Resultantly, without commenting upon the merits of the case, this petition is allowed, sentence awarded to the petitioner Kaleem Maseeh is suspended and he is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.500,000/-- (Five lac only) with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Bench.

(A.S.) Petition allowed.

PLJ 2014 Cr.C. (Lahore) 446
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD ASHRAF--Appellant
versus
STATE & another--Respondents

Crl. Appeal No. 1125 of 2011 and Crl. Misc. No. 1 of 2012, decided on 17.12.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Pakistan Penal Code, (XLV of 1860), Ss. 302(b)34--Suspension of sentence--Present appeal against such conviction was filed and since then same was pending here--For non-fixation or non-hearing of appeal, was petitioner cannot be held responsible--He has earned a statutory right by now to be released on bail after suspension of sentence--Petition was allowed, sentence awarded to petitioner was suspended. [P. 447] A

Prince Rehan Iftikhar Sheikh, Advocate for Appellant.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for State.

Date of hearing: 17.12.2013.

Order

Crl. Misc.No. 1 of 2012

The petitioner-appellant, namely, Muhammad Ashraf, was tried by the learned Additional Sessions Judge, Mian Channu and vide judgment dated 20.10.2011, he was sentenced under Section 302(b)/34, PPC to life imprisonment as Tazir and to pay Rs. 100,000/- (Rupees one lac) as compensation under Section 544-A, Cr.P.C., to the legal heirs of deceased and in case of default, he was to further undergo six months S.I, Benefit of Section 382(b), Cr.P.C. was also extended to the convict in case F.I.R. No. 56/2010 dated 14.03.2010 under Sections 302/337C/148/ 149, PPC registered at Police Station Chab Kalan, District Mian Channu.

2. The present appeal against such conviction was filed on 15.12.2011 and since then the same is pending here. For non-fixation or non-hearing of the appeal, the petitioner cannot be held responsible. He has earned a statutory right by now to be released on bail after suspension of sentence.

3. Resultantly, without commenting upon the merits of the case, this petition is allowed, sentence awarded to the petitioner Muhammad Ashraf is suspended and he is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 500,000/- (Five lac only) with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Bench.

(A.S.) Petition allowed.

PLJ 2014 Cr.C. (Lahore) 481
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD YOUSAF--Appellant
versus
STATE & another--Respondents

Crl. A. No. 422-J of 2012, decided on 18.12.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----Ss. 426 & 497--Pakistan Penal Code, (XLV of 1860), S. 302(b)--Conviction and sentence recorded by trial Court--Suspension of sentence and releasing on bail--Statutory right--Suspension of sentence and release of the petitioner on bail was claimed as of statutory right, in which there was no impediment, particularly, when the petitioner had already earned his statutory period--Petitioner had earned a right to be released on bail by suspending his sentence. [P. 482] A

Rana M. Asif Saeed, Advocate for Appellant.

Mr. Muhammad Abdul Wadood, D.P.G. for State.

Date of hearing: 18.12.2013.

Order

Criminal Miscellaneous No. 01 of 2013

The petitioner, on conclusion of trial, was convicted by a learned Additional Sessions Judge, Shujabad, on 30.07.2011, and was sentenced to imprisonment for life under Section 302(b), PPC with further direction to pay Rs.1,00,000/- as compensation, and default thereof, to further undergo 2 months S.I., in case FIR No. 338, dated 17.06.2009, under section, 302, PPC, registered at Police Station, City Shujabad, District Multan. Benefit of Section 382-B, Cr.P.C. was also extended to the petitioner. The appeal was filed before this Court on 07.10.2011.

2. The learned Deputy Prosecutor-General has however opposed this Criminal Miscellaneous.

3. The suspension of sentence and release of the petitioner on bail is claimed as of statutory right, in which there is no impediment, particularly, when the petitioner has already earned his statutory period. The petitioner has earned statutory right to be released on bail by suspending his sentence.

4. Resultantly, this Criminal Miscellaneous is allowed; the sentence of the petitioner is suspended and he is directed to be released on bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Bench however, the petitioner shall be appearing in person before this Court on all subsequent dates of hearing.

(R.A.) Application allowed.

PLJ 2014 Cr.C. (Lahore) 490
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
SHABBIR HUSSAIN--Petitioner/Appellant
versus
STATE & another--Respondents

Crl. Misc. No. 1 of 2013 in Crl. Appeal No. 1126 of 2011, decided on 17.12.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Pakistan Penal Code, (XLV of 1860), Ss. 302(b)/34--Suspension of sentence--Present appeal against such conviction was filed and since then same was pending here--For non-fixation or non-hearing of appeal, petitioner cannot be held responsible--He has earned a statutory right by now to be released on bail, after suspension of sentence. [P. 490] A

Prince Rehan Iftikhar Sheikh, Advocate for Appellant-Petitioner.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for State.

Date of hearing: 17.12.2013.

Order

Crl. Misc.No. 01 of 2013

The petitioner-appellant, namely, Shabbir Hussain, was tried by the learned Additional Sessions Judge, Mian Channu and vide judgment dated 20.10.2011, he was sentenced under Section 302(b)/34, PPC to life imprisonment as Tazir and to pay Rs. 100,000/- (Rupees one lac) as compensation under Section 544-A, Cr.P.C. to the legal heirs of deceased and in case of default, he was to further undergo six months S.I. Benefit of Section 382(b), Cr.P.C. was also extended to the convict in case F.I.R. No. 56/2010 dated 14.03.2010 under Sections 302/337C/148/149, PPC registered at Police Station Chab Kalan, District Mian Channu.

2. The present appeal against such conviction was filed on 17.12.2011 and since then the same is pending here. For non-fixation or non-hearing of the appeal, the petitioner cannot be held responsible. He has earned a statutory right by now to be released on bail, after suspension of sentence.

3. Resultantly, without commenting upon the merits of the case, this petition is allowed, sentence awarded to the petitioner Shabbir Hussain is suspended and he is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs. 500,000/- (Five lac only) with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Bench.

(A.S.) Petition allowed.

PLJ 2014 Cr.C. (Lahore) 520
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
MUHAMMAD ISHAQ and another--Appellants
versus
STATE and another--Respondents

Crl. Appeal No. 661 of 2011 and Crl. Misc. No. 1 of 2013, decided on 7.10.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Pakistan Penal Code, (XLV of 1860), Ss. 302(c) & 337-A(i)--Application for suspension of sentence--Challenge to--Petitioner was convicted and present appeal was pending--There was no possibility for fixation of this appeal in near future and petitioner has earned a statutory right by now to be released on bail after suspension of his sentence. [P. 521] A

Prince Rehan Iftikhar Sheikh, Advocate for Petitioner.

Ch. Muhammad Akbar, D.P.G. Punjab for State.

Mr. Akbar Ali Qureshi, Advocate for Complainant.

Date of hearing: 7.10.2013.

Order

Criminal Miscellaneous No. 1 of 2013

Through the instant application, Muhammad Ishaq-petitioner seeks suspension of his sentence in case FIR No. 115, dated 20.02.2010 registered at Police Station Farid Town, District Sahiwal. Vide judgment dated 21.03.2011 passed by learned Additional Sessions Judge, Sahiwal, the petitioner was convicted and sentenced as under:--

(i) Under Section 302(c), PPC to 25-years Rigorous Imprisonment with further direction to pay Rs.3,00,000/- as compensation to the legal heirs of Muhammad Yousaf deceased as envisaged by the relevant provisions of Section 544-A, Cr.P.C. or in default thereof to further undergo six moths Simple Imprisonment.

(ii) Under Section 337-A(i), PPC to two years Rigorous Imprisonment with Daman Rs. 5000/-

Both the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. was also extended to him.

2. The petitioner was convicted vide judgment dated 21.03.2011 and the present appeal was filed on 04.04.2011 and since then the same is pending. There is no possibility for fixation of this appeal in the near future and the petitioner has earned a statutory right by now to be released on bail after suspension of his sentence.

3. Resultantly, this petition is allowed, sentence awarded to the petitioner is suspended and he is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lac only) with one surety in the like amount to the satisfaction of

the Deputy Registrar (Judicial) of this Court. He is directed to appear before this Court on each and every date of hearing till the final decision of the main appeal.

(A.S.) Petitiona allowed.

PLJ 2014 Cr.C. (Lahore) 610 (DB)
Present: Sagheer Ahmad Qadri and Ibad-ur-Rehman Lodhi, JJ.
MUHAMMAD ARIF--Appellant
versus
STATE, etc.--Respondents

Crl. A. No. 446 of 2012, heard on 12.6.2012.

Drugs Act, 1976 (XXXI of 1976)--

----Ss. 27(1)(4) & 31(7)--Conviction and sentence recorded against accused by trial Court--Challenge to--Seizure of stock--Cyclostyled printed form was treated as confessional statement of accused--Being proprietor undertook not to open pharmacy in future in absence of qualified person--Qualified person was not present at time of seizure--Validity--When Drugs Inspector visited pharmacy only proprietor of the Pharmacy was present there and accused had been shown as absent at relevant time--In proceedings conducted by Drug Court no charge was ever framed and Drug Court straightway proceeded to record confessional statement of appellant--Although confessional statement the proprietor of pharmacy was also recorded in similar manner but brought impugned judgment, his statement had never been considered or dealt with in any manner whatsoever and appellant had been singled out for his conviction--Proceeding were carried out an arbitrary, illegal and unauthorized manner by Drugs Inspector and that illegal process continued in proceedings carried out by Drug Court conviction and sentence awarded to accused was not warranted by law and not sustainable--Appeal was allowed. [P. 612] A, B, C & D

Drugs Act, 1976 (XXXI of 1976)--

----Ss. 18(1)(f) & 37(7)--Seizure of stock--Qualified person was not present at time of seizure--Use printed cyclostyled performa as confessional statement--Validity--Drug Court was directed to discontinue practice to use such printed cyclostyled performa as confessional statement of accused person--Drug Inspector who visited pharmacy had adopted an illegal and unauthorized way by inclusion of accused as responsible person notwithstanding fact that he was shown as absent at time of such inspection and in similar manner (DDPP) who conducted case, had also not botered to look into niaties of matter and way when without framing charge confessional statement of appellant was recorded any proper assistance to Court. [P. 612] E & F

M/s. Shazia Malik and Sh. Muhammad Nawaz, Advocates for Appellant.
Mr. Hamayun Aslam, Deputy Prosecutor General Punjab for State.
Syed Tashfeen Iqbal, Provincial Inspector of Drugs for Respondents.

Date of hearing: 12.6.2012.

Judgment

Ibad-ur-Rehman Lodhi, J.--This is an appeal under Section 31(7) of the Drugs Act, 1976 from the judgment passed by the Chairman Drugs Court, Lahore in complaint Judl. No. 274/2011 whereby the appellant herein was convicted under Sections 27(1) and 27(4) of Drugs Act, 1976 and sentenced to undergo 3« year Simple Imprisonment with a fine of Rs. 50,000/- and in default whereof 6-months S.I. Benefit of Section 382-B, Cr.P.C. was also extended if applicable.

2. The prosecution started with the seizure of a stock under Section 18(1)(f) of the Drugs Act, 1976 by an Inspector on 31.12.2009 when the premises of M/s. Imperial Medical Store in GuIshan-e-Ravi, Lahore was visited by the Provincial Inspector of Drugs. Significant to note here that in Form No. 5 (seizure memo.) a proprietor of the said store was shown present at the time of proceedings conducted by the Inspector whereas the present appellant Muhammad Arif, who was shown as a qualified person in the said Medical Store, was shown as absent. A statement at the end of Form No. 5 in vernacular was recorded wherein in addition to different undertakings he being proprietor undertook not to open the pharmacy in future in absence of qualified person which further affirms the position that appellant viz qualified person was not present at the time of seizure.

3. The trial of the complaint was started by the Chairman Drug Court at Lahore and during trial on 29.06.2011 a cyclostyled printed Form was filled and the same was treated as confessional statement of the appellant and by means of judgment dated 07.03.2012 on the basis of such confessional statement, the appellant was convicted and sentenced as detailed herein above. The conviction and sentence so awarded has been challenged by the appellant through the present appeal.

4. Heard. Record perused.

5. There is no denial of the fact that on 31.12.2009 when Provincial Inspector of Drugs visited the pharmacy in question, only proprietor of the said pharmacy was present there and the appellant has been shown as absent at the relevant time.

6. By virtue of Section 31(IV) of the Drugs Act, 1976, a Drug Court shall have all powers conferred by the Criminal Procedure Code, 1898 on the Court of Sessions exercising original jurisdiction. In view of Section 265-E (2) of Criminal Procedure Code, if the accused pleads guilty to the charge framed, the Court shall record the plea and may in its discretion convict the accused thereon. The framing of charge is sine qua non for recording the plea of the accused, if he pleads guilty. In the proceedings conducted by the Drug Court no charge was ever framed and the Drug Court straightway proceeded to record the confessional statement of the appellant. It is requirement of law that the plea of the accused pleading guilty is to be recorded in his own wording but as noted earlier a cyclostyled printed performs by filling its blank has been used and treated as confessional statement which by no means can be given the status of a confessional statement made by the accused with his free will.

7. We have also been informed that although the confessional statement of Hamayun Babar, the proprietor of the pharmacy was also recorded in similar manner but through the impugned judgment, his statement has never been considered or dealt with in any manner whatsoever and the present appellant has been singled out for his conviction.

8. The proceedings from very inception have been carried out in an arbitrary, illegal and unauthorized manner by the Provincial Inspector of Drugs and that illegal process continued in the proceedings carried out by the Drug Court. The conviction and sentence as have been awarded to the appellant is not warranted by law and not sustainable, thus this appeal is allowed, judgment dated 07.03.2012 is set aside and the appellant is acquitted and is ordered to be released forthwith if not required in any other case.

9. The Drug Court is directed to discontinue the practice to use such printed cyclostyled performa as confessional statement of the accused persons.

10. We have noticed that the Provincial Inspector of Drugs, who visited the pharmacy in question, has adopted an illegal and unauthorized way by inclusion of the present appellant as a responsible person notwithstanding the fact that he was shown as absent at the time of-such inspection and in similar manner the prosecutor (DDPP), who conducted the case, has also not bothered to look into the niceties of the matter and the way when without framing the charge "confessional statement" of the appellant was recorded and he has never rendered any proper assistance to the Court as to what procedure under the law was required to be adopted. The learned Administrative Judge of the Drugs Court and Executive District Officer (Health) in City District Government, Lahore are expected to look into the matter and to fix the responsibility of such authorized acts on the part of the above mentioned officials.

(R.A.) Appeal allowed.

PLJ 2014 Cr.C. (Lahore) 634
Present: Ibad-ur-Rehman Lodhi, J.
MUNIR AHMAD--Appellant
versus
STATE--Respondent

Crl. Appeals No. 680 & 692 of 2009, heard on 6.11.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302, 460 & 34--Conviction and sentence recorded by trial Court--Challenge to--Blind murder--Identification by PWs would not had been difficult episode--No previous ill-will--No source of light was explained--Injury was declared subsequently as cause of death--Contradiction about direction of entry and exit wound--Appreciation of evidence--Validity--According to proscution witness there was no blackening around entry point of injury which further negates prosecution's case according to which, injury was caused by putting muzzle of pistol on body of deceased--No electric light on roof, where deceased and witnesses were sleeping--No explanation on part of prosecution as to why only through a supplementary statement, accused persons were nominated after more than one month of registration of criminal case, when according to that witness, she knew at least appellants since long and she disclosed regarding their identity to persons and police visited spot on next morning--By no stretch of imagination and on analysis of prosecution evidence, it can be said that prosecution has established its case beyond any reasonable doubt and keeping in view settled position that benefit of any slightest doubt must be extended to accused persons--

Held: Prosecution has failed to prove its case against appellants beyond shadow of doubt, therefore, by extending benefit of doubt, appeals were accepted. [Pp. 637, 638, 639 & 640] A, B, C, D, E, F & G

Syed Zahid Hussain Bokhari, Advocate for Appellant.

Mr. Nisar Ahmad Virk, D.D.P.P. for State.

M/s Azam Nazeer Tarar and Malik Muhammad Javed Awan, Advocates for Complainant.

Date of hearing: 6.11.2013.

Judgment

This judgment shall dispose of Criminal Appeal No. 680 of 2009, as also Criminal Appeal No. 692 of 2009, filed by Munir Ahmad and Ali Raza, respectively, as both are arisen from the same judgment passed by a learned Additional Sessions Judge, Sheikhupura, on 20.4.2009.

2. The appellants in both the mentioned appeals, namely, Munir Ahmad and Ali Raza, were tried and convicted in one case, which was got registered by the complainant Munir Hussain PW. 11, by means of an FIR No. 589 of 2007 Ex.PA/1, dated 20.6.2007, under sections, 302, 460, 34, PPC, at Police Station, Saddar Sheikhupura, as under by means of impugned judgment as noted herein-above:--

(i) UNDER SECTION 302, PPC READ WITH SECITION 34, PPC

Life imprisonment with fine of R.S. 1,00,000/- each as compensation under Section 544-A, Cr.P.C. to be paid to the legal heirs of the deceased and in default thereof to further undergo 6 months S.I.

(ii) UNDER SECTION 460, PPC READ WITH SECTION 34, PPC.

Imprisonment for life each.

Both the sentences were ordered to run concurrently and benefit of Section 382-B, Cr.P.C. was extended to them.

3. The occurrence, according to the FIR Ex.PA/1, took place in the night between 19/20.06.2007, when the complainant, real brother of Faqir Hussain (deceased), was sleeping on the roof top of his house, adjacent to the house of the deceased and on hearing the voice of firing, he woke up and saw two unknown armed persons standing near the cot of Faqir Hussain, who fired at him (Faqir Hussain). On his hue and cry, the said assailants jumped down in the street. Fire-arm injuries on left shoulder and wrist of right hand of Faqir Hussain were found and when he was being shifted to Civil Hospital, Sheikhupura, in an injured conduction, he succumbed to the injuries.

4. In the supplementary statement Ex.PH, which was not dated by the writer of the same, but it was marked on 23.07.2007 by the authority to whom the same was moved, the present appellants Munir Ahmad and Ali Razaalongwith two other persons, namely, Faiz-ul-Hassan and Muhammad Saleem, were implicated as accused persons.

5. The prosecution mainly rests on the statements of the complainant Munir Hussain PW.11, Mst. Razia Sultana, wife of the deceased PW.7 and brother-in-law of the deceased Abdul Sattar PW.10.

The medical evidence has been brought on record through PW.3 Dr. Muhammad Taha Zubair.

6. After the trial, the learned trial Court proceeded to convict both the appellants in the manner as noted herein-above.

7. The learned counsel for the appellants has mainly argued that it was a blind murder and delayed implication of the present appellants, who were not only the residents of the same locality, but were also known to the prosecution witnesses since their childhood, were subsequently implicated on the basis of some deliberations and had the appellants were the assailants, their identification by the prosecution witnesses would not have been a difficult episode. No previous ill-will has been established on the part of the present appellants. Once the stance, whereupon Section 460, PPC was added in the manner that an amount of Rs. 50,000/- was introduced as was kept by the deceased, the amount of a collection under the name of "Committee" has also not been proved for the reason that neither the said amount was shown to have been recovered from the deceased nor Muhammad Ashraf, stated to be the person responsible for holding such "Committee" was produced in evidence. Also argues that although in FIR Ex.PA/1, no source of light was explained in which allegedly the complainant witnessed the occurrence; however, during trial, the complainant introduced a light from the Mosque, but even such light was not proved to be present there.

8. The learned counsel representing the complainant as also the learned Deputy District Public Prosecutor, for the State supported the impugned conviction and sentences.

9. I have heard the arguments of the learned counsel for the appellants, and the learned counsel for the complainant, as well as, learned Deputy District Public-Prosecutor, and have also gone through the evidence available on the record, with their able assistance.

10. First of all, I am taking up the medical evidence. According to the prosecution evidence, Faqir Hussain (deceased) was in a standing position, when he was fired at by the assailants, who were also standing in front of him. Injury No. 1, which was declared subsequently as cause of death, has been explained as follows by PW.3 Dr. Muhammad Taha Zubair:

"1. A fire-arm injury 1 cm x 1 cm going deep on outer aspect of left shoulder.

On dissection this injury damaged skin, muscles, blond, vessels, fractured fourth rib anteriorly, damaged left pleura, left lung, heart, right lung and diaphragm. Chest cavity was full of blood. Note. A metallic foreign body (bullet) was removed by making an incision on back of right side of abdomen upper part".

It is also the allegation of the prosecution that Injury No. 1 was caused by putting a pistol on the body of the deceased. The travel of the bullet, after entering into the body of the deceased with regard to Injury No. 1, started from the outer aspect of left shoulder going towards the ribs, pleura, left lung, heart, right lung, diaphragm and chest cavity, which demonstrate that the recipient of said injury was in lying condition, and the assailant was standing on the head side of the said injured person, which clearly negated the version of the prosecution, which is to the effect that Faqir Hussain was standing in front of the assailants, when he was hit by a fire-arm on his left shoulder. Had Faqir Hussain in a standing position, the travel of bullet, in any manner, could not have been towards rib and lungs etc. In such situation, injury must have been through and through of the left shoulder.

11. Regarding contradiction about the direction of entry and exit wound and level of the deceased and the assailant the Hon'ble Supreme Court of Pakistan in the case of "Ali Sher and others versus The State" (2008 SCMR 707) at page 711 has held as under:

"At the time of the occurrence Irshad deceased and his companions were walking on the service road running along the above mentioned rajbah. The convicts emerged out of the rajbah and had fired at the deceased from the Patrhi on the bank of the said rajbah. According to the two eye-witnesses the sand bank/Patrhi of the rajbah was 2 or 2-1/2 feet higher than the service road. However, according to the two independent witnesses, namely, Muhammad Ashraf Patwari (PW-7) and Muhammad Sarwar FC (PW-12) it was six feet higher than the service road. It could therefore he safely presumed that the two assailants were standing at a place which was atleast 4/5 feet higher than the place where the deceased was available at the time when the shots had been fired at him. In this view of the matter, the direction of the shots entering and leaving the body of the deceased should have been from upward to downwards but according to the description of the injuries as given by Dr. Rehmat Ali Imran (PW-9) this was not so and infact in his opinion the direction of the some of these injuries was from downwards to upwards. Consequently, we find it difficult to hold that the medical evidence was in line with the ocular testimony or that the eye-witness account was being corroborated by the medical evidence".

12. According to PW.3, there is no blackening around the entry point of Injury No. 1, which further negates the prosecution's case according to which, the injury was caused by putting the muzzle of the pistol on the body of the deceased.

In case of "Muhammad Ishaq versus The State" (2007 SCMR 108), the Hon'ble Supreme Court of Pakistan at page 111 discussed the conflict between the ocular and medical evidence in the following terms:

"Last but not the least, corroboration is sought from the post-mortem report but strange it is to observe that it was totally ignored by the two Courts that post-mortem report has further damaged the already doubtful case of the prosecution. We are surprised to notice that there is burning on all the four inlet wounds of the deceased. Such burning can occur at the most from a distance of 5 to 6 feet front muzzle to the victim. Amazingly the distance from the assailant to the victim is 132 feet.

13. Now comes to the ocular account, which as noted herein-above, mainly rests upon the evidence of Mst. Razia Sultana PW.7, Abdul Sattar PW.10 and the complainant Munir Hussain PW.11.

14. Mst. Razia Sultana, widow of Faqir Hussain (deceased) appeared as PW.7 and she, in categorical terms, deposed that she knew Ali Raza and Munir Ahmad, the appellants, since long and that she appeared before the police at the spot, when for the first time, the police came there and she was in complete knowledge of the identity of the accused persons at that time. This witness admits that there was no electric light on the roof, where the deceased and the witnesses were sleeping. However, according to her, she witnessed the occurrence with the help of an electric light, which was illuminated from a tube light affixed at the Mosque.

15. There is no explanation on the part of the prosecution as to why only through a supplementary statement, the accused persons were nominated after more than one month of the registration of the criminal case, when according to this witness, she knew at least the

appellants since long and she disclosed regarding their identity to the persons and the police visited the spot on next morning.

16. Abdul Sattar PW. 10, brother-in-law of the deceased, who is resident of an area, which is about 20 kilometres from the scene of occurrence and whose presence at the time of occurrence was beyond understanding.However, this witness again has deposed that he told the people of the village visiting the place of occurrence the names of the culprits. This witness goes on to depose that on the following day of the occurrence, he learnt that the police had registered the case against unknown persons and on the same day, Munir Hussain, the complainant of the case, also acquired the same knowledge and both went to the District Police Officer, Sheikhupura on the following day of the occurrence with an application disclosing the names of the culprits, but as noted herein-above, the supplementary statement was taken up, for the first time, on 23.07.2007.

17. Munir Hussain PW.11 is the complainant of the case. This witness, in categorical terms, deposed that the appellants are living in the village Sahoki Maliyan since their birth, and were very much known to him before the occurrence. He further deposed that at 01:30 a.m., he woke up after hearing the fire shots and found that two unknown persons, who were armed with fire-arm weapons, were present on the roof top of Faqir Hussain (deceased) and before the Investigating Officer of the case, he disclosed the names of such persons.

18. It would be beneficial to mention here that, except two fires on the body of Faqir Hussain (deceased), there is no indication from any evidence about any 3rd or 4th fire and when according to the complainant, he woke up after hearing the voice of fire-arms, it certainly mean that after his awakening, no further fire was shot and, therefore, his deposition to the effect that he saw the unknown assailants firing at the deceased by putting muzzle of the pistol upon his body finds no further support from any evidence, rather his own version is negated by his subsequent deposition.

19. Ex.PF is the site-plan and although at Point-G, a door of the Mosque, has been shown, but in the site-plan, no electricity light has been shown as present at that point. Further perusal of the said document disclosed that there is a distance of about 76 feet in between Point-A (the point, where the cot of the deceased was lying) and Point-G (the door of the Mosque).

20. Since presence of electric light is not proved by perusal of Ex.PF, but keeping in view the distances in between Point-A and Point-G, as well as, Point-C and Point-G, there is a remote possibility that on a such long distance, there was sufficient light available at Point-A, with the help of which the assailants could easily have been identified.

21. Earlier divorce of Mst. Razia Sultana PW.7 before her marriage with the deceased has also been brought on record, but that can be taken into consideration, if the prosecution has successfully established the guilt in the accused persons/appellants with the alleged commission of crime. By no stretch of imagination and on analysis of the prosecution evidence, it can be said that the prosecution has established its case beyond any reasonable doubt and keeping in view the settled position that benefit of any slightest doubt must be extended to the accused persons, the appeals are bound to succeed.

22. In the light of above discussion, I hold that the prosecution has failed to prove its case against the appellants beyond the shadow of doubt, therefore, by extending the benefit of doubt, I accept both the appeals, viz. Criminal Appeal No. 680 of 2009, filed by appellant

Munir Ahmad, and Criminal Appeal No. 692 of 2009, filed by appellant Ali Raza, and set-aside their conviction and sentences recorded by the learned trial Court on 29.04.2009. Both the appellants are in Jail. They shall be released forthwith if not required in any other case.

(R.A.) Appeals accepted.

PLJ 2014 Lahore 903
[Multan Bench Multan]
Present: Ibad-ur-Rehman Lodhi, J.
SHOAIB QAMAR--Petitioner
versus
HOME SECRETARY, GOVERNMENT OF PUNJAB, LAHORE and 4 others--Respondents

W.P. No. 3967 of 2013, decided on 4.4.2013.

Constitution of Pakistan, 1973--

----Art. 199--West Pakistan Maintenance of Public Order Ordinance, 1960, S. 3--Constitutional Petition--Detention Order--Where similar objection was raised by Assistant Advocate-General, which was answered in manner that since order passed against detenu was coram-non-judice and nullity in eye of law, therefore, there was no need for detenu; to file representation before Government, because such representation could only be made, when order of detaining authority was passed within four corners of provisions of Section 3 of West Pakistan Maintenance of Public Order Ordinance, 1960--Remedy by way of a representation before Government has always been considered as an illusion and a Constitutional petition straightaway has always been entertained--The grounds, which were attached with detention order are vague and unspecific and as held in Arbab Akbar Adil's case (supra), detention order taking away liberty of a citizen is not sustainable on subjective considerations--Objectivity should exist in detention order which can be demonstrated by giving necessary details and particulars therein, which both are conspicuously missing in present case--Petition allowed. [P. 906] A & B

Mr. Mehmood Khan Ghouri, Advocate for Petitioner.

Mr. Aurangzeb Khan, Asstt.A.G. for Respondents.

Date of hearing: 4.4.2013.

Order

Through this Constitutional petition, the petitioner challenged the order passed on 24.02.2013, by the District Coordination Officer, Multan (Respondent No. 2), under the provisions of Section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960 whereunder brother of the petitioner namely Muhammad Yousaf, has been ordered to be detained for a period of 30 days.

2. After hearing the arguments of the parties, it seems that the order, impugned herein, has been passed on the recommendation of the police authorities, whereby, the person detained has been termed as "one having connection with some defunct organizations. The District

Coordination Officer, who is the order issuing authority, has not furnished any material justifying the connection of the detained person with any of the defunct organization. Even today, the learned Assistant Advocate-General was specifically asked to place on record any material, which was made basis to satisfy the independent mind of the order issuing authority for such detention order, but he failed to place on record any such material.

3. The period originally mentioned in the impugned order for detention of the detenu has already expired, but without providing the detenu the grounds for detention, his detention period has reportedly been extended. On such disclosure, the learned Assistant Advocate-General was asked to get fresh instructions from the concerned quarters, who after getting the same, has informed that the detention period has been extended for a further period of thirty days vide order dated 21.03.2013. For the original detention, there have been no plausible grounds available with the detaining authority and also for extension, no fresh material has been considered, rather this time even the grounds on the basis of which the detention was extended were not provided to the detenu.

4. Section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 necessitates the "satisfaction" of the order issuing authority on the strength of some events preceded the passage of such order.

5. A Division Bench of Karachi High Court in case of Arbab Akbar Adil vs. Government of Sindh through Home Secretary, Government of Sindh, Karachi (PLD 2005 Karachi 538) has dealt with a detention matter and through an authoritative view has held as under:--

"Initial burden lies on the Detaining Authority to show the legality of the preventive detention. Detaining Authority must place the whole material upon which the detention order is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence, of the Court to decide. Order of detention must be made by the Authority prescribed in the law relating to preventive detention. Each of the requirements of the law relating to preventive detention should be strictly complied with. Satisfaction must in fact exist with regard to the necessity of preventive detention of the detenu. Grounds of detention should have been furnished within the period prescribed by law, and if no such period if prescribed then as soon as may be. Grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the Authority prescribed by law. Grounds of detention should be within the scope of the law relating to preventive detention, i.e., the same should not be irrelevant to the aim and object of the law and the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice.

Detention order taking away the liberty of a citizen is not sustainable on subjective considerations. Objectivity should exist in the detention order which can be demonstrated by giving necessary details and particulars therein.

Application of mind essential. Word "satisfied" used in S.3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960, indicates that the Authority issuing the detention order should apply his mind to the facts forming basis of the same. Until and unless there is something tangible in the detention order the Authority issuing it cannot be said to have applied his mind objectively and his opinion based on reasons.

Similar view was taken by this Court in case of Muhammad Nadeem vs. Government of Punjab through Home Secretary and another (PLD 2010 Lahore 371).
6. In the case, in hand, the wording of the impugned order shows that even in the order the District Coordination Officer has not demonstrated as to whether there is any satisfaction on his part before issuance of such detaining order. Even no grounds of detention were provided to the person detained.
7. The learned Assistant Advocate-General has taken an objection with regard to the maintainability of the present Constitutional petition in presence of a remedy available to the petitioner under Section 6 of the West Pakistan Maintenance of Public Order Ordinance, 1960 by way of representation before the Government.
8. This question has been dealt with by this Court in case of Haq Dad Khan vs. District Magistrate, Mianwali (1997 PCr. LJ 1288), where similar objection was raised by the learned Assistant Advocate-General, which was answered in the manner that since order passed against the detenu was coram-non-judice and nullity in the eye of law, therefore, there was no need for detenu to file representation before the Government, because such representation could only be made, when order of detaining authority was passed within the four corners of provisions of Section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960. The remedy by way of a representation before the Government has always been considered as an illusion and a Constitutional petition straightaway has always been entertained.
9. The grounds, which were attached with the detention order are vague and unspecific and as held in Arbab Akbar Adil's case (supra), the detention order taking away the liberty of a citizen is not sustainable on subjective considerations. Objectivity should exist in the detention order which can be demonstrated by giving necessary details and particulars therein, which both are conspicuously missing in the present case.
10. The result of the above discussion is that this petition is allowed; the impugned order of detention dated 24.02.2013 and subsequently order dated 21.03.2013 are illegal and without lawful authority and the same are set-aside. The detenu, namely, Muhammad Yousaf, is ordered to be released, forthwith.

(A.S.) Petition allowed.

PLJ 2014 Lahore 917
Present: Ibad-ur-Rehman Lodhi, J.
Moulana MUHAMMAD ISHAQ SAQI, RIAS-UL-TABLEEGH, BADSHAHI MOSQUE, LAHORE--Petitioner
versus
CHIEF SECRETARY, GOVERNMENT OF PUNJAB CIVIL SECRETARIAT, LAHORE and 2 others--Respondents

W.P. No. 11622 of 2012, decided on 28.5.2014.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional Petition--Issue of seniority--Declaring any change in seniority list was refused--Challenged to before chief secretary by means of appeal--Appeal was dismissed--Assailed--No reasons were assigned for rejection of appeal--Validity--Every Authority dealing with affairs of employees is expected to deal with matters pending before it in a judicious manner--Impugned order was not a speaking order and Chief Secretary had failed to assign any reason of his such findings, same was not sustainable and, therefore, was

set aside--Appeal filed by petitioner before Chief Secretary, was deemed to be pending before appellate authority--Case was remanded. [Pp. 918 & 919] A

Mr. Waqar-ul-Hassan Butt, Advocate for Petitioner.

M/s. Ikram-ud-Din Khan and Syed Aal-e-Ahmad, Advocates for Respondents.

Date of hearing: 12.5.2014.

Order

The petitioner and Respondent No. 3 have been contesting for their seniority to be fixed according to their respective stances. Sometime the petitioner has been shown senior to Respondent No. 3 and on some occasions vice versa. Finally it was the representation of Respondent No. 3, which was decided by the Secretary, Auqaf & Religious Affairs Department, Government of Punjab, Lahore, on 10.10.2012, declaring the petitioner as junior to Respondent No. 3 and any change in the seniority list circulated on 06.10.2003 was refused. The petitioner challenged such findings before the Chief Secretary, Government of Punjab (Appellate Authority) by means of an appeal, which was taken up by the appellate authority on 02.04.2013, when the appeal of the petitioner was dismissed maintaining the order passed by the Secretary, Auqaf & Religious Affairs Department, Government of Punjab, Lahore. The decision of the Chief Secretary consist upon the following three lines Paragraph viz Paragraph No. 7 of the impugned order dated 02.04.2013:--

2. After hearing both the sides and going through the record, this Court has reached to the conclusion that the impugned order reproduced hereinabove does not qualify to be called an "order". No reasons have been assigned for rejection of the appeal of the petitioner, even the opinion which was sought by the Secretary (Regulations) S&GAD, and was available on record as was given by the said secretary on 18.01.2013 to the following effect has not been taken into consideration. The impugned order is silent to demonstrate as to whether the appellate authority had before it the expert opinion of Secretary (Regulations) while deciding the appeal of the petitioner:

> "The Administrative Department has mentioned that both the officials were considered for promotion to the post of District Khateeb but due to non-availability of vacancy of District Khateeb Molana Faqir Habib-ur-RehmanAkhtar was not considered for promotion. As per Auqaf Department Rules 1989, the post of Khateeb is to be filled on merit. Since Molana Mufti Muhammad Ishaq Saqi was promoted as District Khateeb earlier to MolanaFaqir Habib-ur-Rehman Akhtar on the basis of selection on merit, therefore, he will rank senior to Molana Faqir Habib-ur-Rehman Akhtar.

Every Authority dealing with the affairs of the employees is expected to deal with the matters pending before it in a judicious manner. The impugned order as noted hereinabove is not a speaking order and the Chief Secretary has failed to assign any reason of his such findings, same is not sustainable and, therefore, is set aside. The appeal filed by the

petitioner before the Chief Secretary, Government of Punjab, is deemed to be pending before said appellate authority, where the parties will appear on 16.06.2014 and the Chief Secretary then after providing ample opportunity of hearing to both the sides will decide the appeal by means of a speaking and well reasoned order.

3. Since, the issue of seniority of both, petitioner and Respondent No. 3 is hanging since long, it would be appreciated that after first appearance of the parties before the Authority, the matter shall be decided within next three months.

4. With these observations, this petition is allowed.

(R.A.) Petition allowed.

PLJ 2014 Lahore 926
[Rawalpindi Bench Rawalpindi]
Present: Ibad-ur-Rehman Lodhi, J.
AJMAL KHAN--Petitioner
versus
ADDITIONAL DISTRICT JUDGE, TAXILA, DISTRICT RAWALPINDI and 2 others--Respondents

W.P. No. 1471 of 2010, heard on 21.3.2014.

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

----S. 9--Constitution of Pakistan, 1973--Art. 199--Suit for possession--Brother of petitioners were dispossessed from suit property--Suit was decreed--Revision Petition accepted by First Appellate Court was challenged--Proceeded abroad by giving possession of suit property to his brothers to look after same--A person claiming through his brother for purpose of availing remedy--Validity--Petitioner was not in physical possession of land in dispute but, when it was established that petitioner was exclusive owner of property and at time of his proceeding abroad, he handed over possession of the land to his brothers only in order to look the said land, it is petitioner, who would continue to be deemed to be in symbolic possession of same--Plaintiff was not a person, who was actually dispossessed at hands of defendants but his status of a person claiming through his brothers cannot be denied--Filing of a suit under Section 9 of Specific Relief Act, 1877, by claiming possession of his land from, was competent where he through brothers was dispossessed. [Pp. 927 & 928] A & B

Malik Muhammad Kabeer, Advocate for Petitioner.

Respondents Nos. 2 & 3 by already Ex-parte on 16.12.2013.

Date of hearing: 21.3.2014.

Judgment

Respondents No. 2 and 3 have been proceeded against ex-parte after publication of citation in daily `Nawa-e-Waqt' and `News', by means of order dated 16.12.2013 and today, the learned counsel for the petitioner advanced his ex-parte arguments as there is no move on behalf of the said respondents to recall the order of ex-parte proceedings against them.

2. The petitioner herein filed a suit for possession under Section 9 of Specific Relief Act, 1877, against the respondents with the averments that he had purchased a plot measuring 1 Kanal in Village Ghari Sikandar, TehsilTaxila by virtue of sale-deed dated 29.01.2003 and after purchase, constructed foundation up-to the level of D.P.C, thereafter, proceeded abroad by giving the possession of the suit land to his brothers to look after the same. His brothers were dispossessed at the hands of respondents and thus suit was filed.

3. The suit was decreed by the learned trial Court on 03.12.2009. The present respondents feeling aggrieved of the said findings of the learned trial Court preferred a civil revision petition before the learned District Judge, who vide judgment and decree dated 28.01.2010, reversed the findings of learned trial Court, accepted the revision petition and dismissed the suit of the present petitioner.

4. The findings of the learned revisional Court, particularly, in Para No. 16 of the judgment are of much significance, which are re-produced herein below:--

"In view of above facts and circumstances of the case, it reveals that the respondent has no cause of action to file the instant suit as he was neither in Pakistan nor disputed land property was under his physical possession. Actually, the brothers of the respondent might have been dispossessed, so they should have filed this suit at the relevant time claiming the benefit of Section 9 of Specific Relief Act, In my humble view the learned trial Court has not taken into consideration this important ingredient of Section 9 of SRA and has committed an error in this respect. Moreover, this Court cannot give any finding or opinion over the other merits and demerits regarding the registered sale-deed etc. in this appeal. Both the parties should actually go to the learned Civil Court to file their sits for declaration, possession or partition as per their requirement, (if so, advised. It is pertinent to mention over here that the title of the property is immaterial in such like cases and the Court has only to keep in his mind that the person has been illegally dispossessed irrespective of the fact that his possession was legal or illegal. Though, the scope of revision petition is very much limited, yet in cases where the trial Court has committed material illegality then the order can be set aside, as in the instant case, the findings of the learned trial Court on these issues are hereby set aside."

5. Admittedly, the petitioner was not in physical possession of the land in dispute but, when it was established that the petitioner was the exclusive owner of the property in question and at the time of his proceeding abroad, he handed over the possession of said land to his brothers only in order to look after the said land, it is the petitioner, who would continue to be deemed to be in symbolic possession of the same.

6. The learned revisional Court has non-suited the present petitioner only for the reason that the petitioner at the time, when possession was taken over by the respondents was not in actual possession of the laid in question but while holding so, the learned revisional Court has conveniently overlooked the provisions of Section 9 of Specific Relief Act, 1877, which for the convenience are re-produced herein below:

"Suit by person dispossessed by Immovable property.--If any person is disposed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit recover possession thereof, notwithstanding any other title that may be set up in such suit"

The words "he or any person claiming through him" under Section 9 of Specific Relief Act, 1877 are worth to be noted. It is clear that Section 9 supra gives right not only to the person actually dispossessed but also any other person "claiming through him" to initiate legal proceedings within the meaning of Section 9 of the Act. The present petitioner, who is admittedly the owner of the property in question and had been in possession of the same till the time his proceedings abroad, when the possession was delivered to his brothers and when in his absence his brothers were dispossessed, on his return from abroad, he will be a person for initiating legal proceedings under Section 9 of Specific Relief Act, 1877, as a person claiming through his brothers for the purpose of availing a remedy under Section 9 of Specific Relief Act, 1877.

7. The findings of the learned revisional Court in non-suiting the petitioner only on the plea that he was not practically dispossessed and thus has no status to be a plaintiff in a suit under Section 9 of Specific Relief Act, 1877, are misconceived. No doubt, the plaintiff was not a person, who was actually dispossessed at the hands of the defendants but his status of a person claiming through his brothers cannot be denied. As such, he was competent to file a suit under Section 9 of Specific Relief Act, 1877, by claiming possession of his land from, where he through brothers was dispossessed.

8. The findings of the learned revisional Court on Issues No. 1 & 2 are, therefore, reversed by maintaining the findings on such issues as were passed by the learned trial Court. Resultantly, the judgment and decree passed by the learned revisional Court on 28.01.2010, is set aside by maintaining the judgment and decree passed by the learned trial Court on 03.12.2009.

9. Writ Petition is allowed.

(R.A.) Petition allowed.

2015 C L C 519

[Lahore]

Before Muhammad Khalid Mehmood Khan and Ibad-ur-Rehman Lodhi, JJ

Ch. ABDULLAH YOUSAF----Petitioner

Versus

ELECTION TRIBUNAL, PUNJAB and 6 others----Respondents

Writ Petition No.8455 of 2012, decided on 24th October, 2012.

(a) Representation of the People Act (LXXXV of 1976)---

----Ss. 56, 62, 65 & 67---Notification No.F.1(7)/85-Cord, dated 16-3-1985---Constitution of Pakistan, Art.199---Constitutional petition---Election dispute--- Witnesses, categories of---Dispute was with regard to summoning of witnesses by election petitioners---Plea raised by returned candidate was that evidence of only that witness could be recorded whose affidavit was annexed with election---Validity---In the present case, there were only two categories of witnesses, one private and the other were official witnesses---Private witnesses were those who at the time of filing of election petition were in control and access of election petitioner and who intended to depose on factual aspect of disputes raised in election petition---

Official witnesses included persons, who at the time of election petition, were not in direct control and access of election petitioner but at the time of recording of evidence, their appearance as witness deemed to be necessary, in order to prove some record maintained in their respective organizations, and were to be summoned through process of law, to appear as witness---Requirement of providing affidavits of witnesses was mandatory with regard to private witnesses, whereas with regard to official witnesses, only requirement to be fulfilled by election petitioner was to file a list of such official witnesses with election petition justifying their production and also mention document, if any, which were required to be proved through such witnesses---Election Tribunal was equipped with powers to summon any witness even if in the list of witnesses, his name was not included, if such witness was required by Election Tribunal and his evidence was considered to be material for the purposes of arriving at just decision---Election Tribunal was justified in holding that Chief Editor of a newspaper was a competent witness, whose statement was to be recorded as an official witness and also that petition filed against interim decision given by Election Tribunal was not entertainable and maintainable in Constitutional jurisdiction of High Court---Constitutional petition was dismissed in circumstances.

Muhammad Asim Kurd alias Gailoo v. Nawabzada Mir Laskhari Khan Raisani and 11 others 1998 SCMR 1597; Sh. Rashid Ahmad v. The Election Tribunal comprising Mr. Justice Mian Nazir Akhtar of Lahore High Court, Lahore and another PLD 1993 SC 791 and Dr. Sheela B. Charles v. Election Tribunal and another 1995 CLC 344 ref.

(b) Representation of the People Act (LXXXV of 1976)---
----S. 67(1A)---Election petition---Duration of trial---Expeditious decision of election petitions is the intention of law and for that purpose, Election Tribunal has been empowered to avoid technicalities.

Dr. Khalid Ranjha for Petitioner.
S.M. Masud and Moiz Tariq for Respondent No.3.
Date of hearing: 16th October, 2012.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- We propose to dispose of all these three petitions viz. Writ Petitions Nos.8455, 8456 and 8457 of 2012, as the same are filed against impugned order dated 2-3-2012, and bearing the same features.

2. The petitioner was notified as returned candidate as Member of the Provincial Assembly Punjab in the elections held on 18-2-2008 from the Constituency of PP-109 Gujrat-II. His such notification was challenged by the runner up of the election-respondent No.3, by way of an election petition, which after provided scrutiny by the Election Commission, was marked to a Election Tribunal. Along with the election petition, a list of 55 witnesses, which was further divided into two categories providing official and private witnesses, separately was also annexed. After receiving the written-statement by the contesting respondent, the learned Tribunal proceeded to frame the issues and evidence of the parties was called for. In the list of official witnesses, at serial No.13, a representative of Daily Dak Gujrat was

mentioned along with the record of newspapers of different dates. On 17-2-2012, one Arshad Ali, a representative of Daily Dak Gujrat appeared and writ petitioners objected to accept that person as a witness and to record his evidence, who after hearing the objection was refused to get his statement recorded and Chief Editor of Daily Dak Gujrat was summoned for 2-3-2012 for proving the newspaper cuttings, placed on record. On the adjourned date i.e. 2-3-2008, when Chief Editor of Daily Dak Gujrat, on summoning the Tribunal appeared, again the writ petitioners raised an objection as to his competence to appear as a witness and the learned Tribunal allowed such witness to be examined as a representative of the said Publication and also ordered that if he will be in a position to verify the record, his examination would be continued as a record keeper also.

3. The order passed by the Election Tribunal has been challenged by the writ petitioners in these writ petitions.

4. While arguing the petitions, the learned counsel for the writ petitioners with reference to section 62 of the Representation of the People Act, 1976 (hereinafter to be referred as the 'Act'), as also the procedure laid down by the Election Commission under section 62(1) of the said Act stressed that unless an affidavit of the witness is annexed with the election petition, he cannot be permitted to appear as a witness at a subsequent stage. He is also of the view that the term "Representative" of Daily Dak was a vague term, and the Chief Editor of the said Publication cannot be allowed to be summoned as a witness giving him a status of representative. Further submits that a person representing any newspaper can, by no stretch of imagination, be held as an "official witness".

5. Conversely, the learned counsel representing the contesting respondent mainly by placing reliance on the cases of Muhammad Asim Kurd alias Gailoo v. Nawabzada Mir Laskhari Khan Raisani and 11 others (1998 SCMR 1597), Sh. Rashid Ahmad v. The Election Tribunal comprising Mr. Justice Mian Nazir Akhtar of Lahore High Court, Lahore and another (PLD 1993 Supreme Court 791) and Dr. Sheela B. Charles v. Election Tribunal and another (1995 CLC 344) has raised objection as to the availability of Constitutional petition against the decision of an Election Tribunal. On merits, the learned counsel argued by making a particular reference to Black's Law Dictionary 5th Edition that the term "official" includes a person invested with the authority of an Office and, as such, the Chief Editor has validly been called to appear as an "official witness". It is the stance of the respondent that for an official witness, it is not obligatory to place on record his affidavit prior to his summoning as a witness.

6. We have heard the learned counsel for the parties and perused the record carefully.

7. The issue of election disputes has, in detail, been provided in Chapter VII of the Representation of the People Act, 1976 and by virtue of section 56 of the Act, when an election petition is filed before the Election Commission, it would first be scrutinized in the Commission and if the Commissioner finds that any provision of sections 52, 53 or 54 of the Act has not been complied with, the petition shall be dismissed forthwith and if the election petition is not dismissed under subsection (1) of section 56 of the Act, then in view of

subsection (2), the Commissioner shall refer it for trial to a Tribunal, which Tribunal is to be appointed by the Commissioner for trial of the election petitions under the Act.

8. By means of section 62 of the Act, it is provided that subject to the provisions of this Act and the rules, every election petition shall be tried in accordance with the procedure laid down by the Election Commission. Section 65(1) of the Act provides that notwithstanding anything to the contrary contained in any other law for the time being in force, no document shall be inadmissible in evidence at the trial of an election petition only on the ground that it is not duly stamped or registered.

An appeal against any "decision" of the Tribunal is provided by virtue of section 67(3) of the Act to the Hon'ble Supreme Court of Pakistan.

9. No rules, as are required to be framed in view of section 62(1) of the Act, have been framed; however, in absence of the rules required to be framed, giving minute details for the trial of the election petition, the Commission through Notification No.F.1(7)/85-Cord., dated 16-3-1985, has laid down a procedure for the trial of the election petitions. Clauses (1), (3), (5) and (9) of the said procedure would be relevant for the present purposes, which are re-produced herein-below for ready reference:---

1. Every election petition shall be filed with the Secretary, Election Commission of Pakistan, Islamabad, in triplicate and shall be accompanied by all such documents and affidavits of the witnesses as are desired to be produced by the petitioner along with the receipt indicating that the copies of the petition and the attached documents and the affidavits annexed to the petition have been supplied to the respondent.

3. The respondent shall upon the receipt of notice of the petition from the petitioner within seven days file his written statement together with all documents relied upon by him and the affidavits of the witnesses as are desired to be produced in defence.

5. Where any party desires to summon any official witness he shall file with the petition a list of such witnesses justifying his production and also mention the documents, if any, which are required to be proved through such witness.

9. The tribunal may refuse to examine a witness if it considers that his evidence is not material or that he has been called on a frivolous or vexatious ground for the purpose of delaying the proceedings or defeating the ends of justice.

The joint reading of the above referred sections and Clauses makes one thing clear that there are two categories of the witnesses; one private and the second one is official witnesses. The private witnesses are those, who at the time of filing of election petition are in control and access of the election petitioner and who intends to depose on the factual aspect of the disputes raised in the election petition, whereas, the official witnesses includes the persons, who at the time of election petition, were not in the direct control and access of the election petitioner, but at the time of recording of evidence, their appearance as witness deems to be necessary, in order to prove some record maintained in their respective Organizations, who

are to summon through process of law to appear as a witness. The requirement of providing affidavits of witnesses is mandatory with regard to the private witnesses, whereas, with regard to the official witnesses, only requirement to be fulfilled by the election petitioner is to file a list of such official witnesses with the election petition justifying their production and also mention the documents, if any, which are required to be proved through such witnesses. Notwithstanding this position, the Election Tribunal is further equipped with the powers to summon any witness even if in the list of witnesses, his name is not included, if, it is required by the Tribunal and his evidence is considered to be material for the purposes of arriving at just decision.

10. In the present case, when the election petition was filed before the Election Commission, its scrutiny was held and when it was held qualified to be a valid election petition, only then it was referred to the Election Tribunal. The steps taken in the Election Commission were never challenged by any person feeling himself aggrieved of declaration by the Election Commission to the effect that the petition was filed competently. The name of representative of Daily Dak Gujrat was included in the portion of the list of official witnesses since its inception and after evaluating the status of the Chief Editor of Daily Dak in his Organization, he was given the status of official witness by the learned Tribunal and was allowed to get his statement recorded. In view of the procedure notified by the Election Commission for the purposes of trial of the election petitions before the Tribunal, no affidavit is required to be attached with the election petition of a person, who is intended to be summoned as an official witness, therefore, the objection raised by the writ petitioner before the Election Tribunal as to the competence of the Chief Editor, Daily Dak Gujrat to be an official witness was without any worth and it was rightly declined to be taken into consideration.

11. The learned counsel for the contesting respondent has attacked the maintainability of Constitutional petition filed against what he has called as "interim order" of the Tribunal, which according to him, can only be called in-question in appeal provided under section 67(3) of the Act.

It is provided in the relevant statute i.e. section 67(1A) of the Act that the Election Tribunal shall proceed with the trial of the election petition on day to day basis and the decision thereof shall be taken within four months from its receipt, provided that where the delay in the proceedings is occasioned by any act or omission of a returned candidate or any other person acting on his behalf, the Tribunal shall refer to the Commissioner that such candidate may be declared by the Commission to have ceased to perform the functions of his office either till the conclusion of the proceedings or for such period as the Commission may direct.

The perusal of above referred provisions of law do reveal that expeditious decision of the election petitions is the intention of law and for that purpose, the Election Tribunal has been empowered to avoid technicalities, but in the matter, under consideration, the proceedings of the petition before the Tribunal have been made suffered from technicalities and a petition, which was filed in the year 2008, is still pending. The petition, which was required to be decided within a period of four months, has not yet been finally decided after expiry of four years. This is complete negation of the mandatory provisions of law. Neither the proceedings have been concluded in the stipulated time nor any punitive action has been

recommended against the persons responsible for such delay as is provided in the relevant provisions of law.

12. The Hon'ble Supreme Court of Pakistan in Muhammad Asim Kurd alias Gailoo's case, while interpreting section 67(3) of the Representation of the People Act, 1976, has held that impugned order being interim in nature and final order was yet to be passed by the Tribunal, thus, appeal against final order of the Tribunal would be before the Supreme Court of Pakistan.

13. A Division Bench of this Court in Sh. Rashid Ahmad's case (supra) has held that any "decision" of the Election Tribunal is appealable to Supreme Court of Pakistan. The word "decision" as used in section 67 of the Act would not always refer to the final order, but would include an interim order also. The petitioner, if aggrieved, could have filed an appeal before the Supreme Court of Pakistan and at any rate in case ultimate final order is passed against him, he would be entitled to challenge the interim order in that appeal in view of the established legal position to the effect that while challenging final order, interim order was also challengeable. On such principles, the Constitutional Petition against interim order passed by the Election Tribunal was held not entertainable.

Same was the view of another learned Division Bench of this Court in Dr. Sheela B. Charles' case.

14. What has emerged of the above discussion is that the Election Tribunal on 2-3-2012 was justified in holding that the Chief Editor of Daily Dak Gujrat was a competent witness, whose statement was to be recorded as an official witness and also that the petition filed against the interim decision given by the Election Tribunal is not entertainable and maintainable in Constitutional Jurisdiction of this Court, therefore, all these writ petitions are dismissed, with no orders as to costs.

15. Before parting with this judgment, we deem it proper to point out that the rules, which are required to be framed in view of the provisions of section 62(1) of the Representation of the People Act, 1976, have not yet been framed and only by notifying the procedure by the Election Commission, the minute details with regard to the proceedings in election petitions, and the procedure has been provided. In comparison whereof, with regard to the Local Government Elections, the Local Government Election Petition Rules have separately been framed, therefore, it would be in the fitness of things that the rules, which ought to have been framed for effective adjudication of the election petitions, be framed by the relevant competent authority meeting the requirement of section 62(1) of the Act.

16. In view of the provisions of section 62(1) of the Representation of the People Act, 1976, the chain is only complete if the provisions of the Act, rules framed thereunder and the procedure laid down by the Election Commission in this regard are in existence. In absence of rules, an important link in the chain is missing.

MH/A-17/L Petition dismissed.

2015 C L C 1204

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

ASLAM ALI SHAH----Appellant

versus

MUHAMMAD AZAM----Respondent

S.A.O. No.112 of 2010, decided on 25th July, 2013.

(a) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Ejectment of tenant---Landlord filed eviction petition on the grounds of violation of the terms of rent deed, subletting and personal need for his "brother"---Petition was accepted concurrently---Validity---Brother could not be included in the list of children---No issue on the point of subletting was framed---Personal need for the brother of the landlord was not recognized as a valid ground for eviction of tenant---Proof with regard to settlement or agreement in-between the tenant and sub-tenant as to the period of sub-tenancy and the rate of rent for such period was required to establish subletting---Landlord had failed to justify the allegation of subletting by placing any cogent evidence on record---Violation of the terms and conditions of the rent agreement had nowhere been provided in the West Pakistan Urban Rent Restriction Ordinance, 1959 as a ground seeking eviction by the landlord---Both the courts below had erred in law by holding that in violation of the terms and conditions of the rent agreement, the tenant was guilty of subletting of rented premises---Eviction order was not sustainable---Impugned order and judgment passed by the courts below were set aside and ejectment petition was dismissed---Appeal was allowed in circumstances.

(b) Words and phrases---

----"Sub-lease"---Meaning.

Black's Law Dictionary Eighth Edition ref.

(c) Words and phrases---

----"Sub-lessee"---Meaning.

Black's Law Dictionary Eighth Edition ref.

(d) Words and phrases---

----"Let"---Meaning.

Black's Law Dictionary Eighth Edition ref.

Ahmed Awais Khurram for Appellant.

Raja Zulqarnain for Respondent.

Date of hearing: 23rd July, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- On the strength of a rent deed entered into in between the parties to the litigation on 1-9-2001, the present appellant was inducted as a tenant in the demised shop. The term of tenancy in such rent deed was agreed as four years ending on 1-9-2005.

2. On 13-10-2005, the respondent, herein, filed an ejectment petition against the appellant on the grounds of violation of the terms of rent deed, subletting and personal need for his younger brother.

3. The petition was contested and in reply, the appellant came forward with a plea that although the tenancy was not extended by means of a written rent deed after expiry of the first one, but verbally, it was agreed in between the parties that the rent, which was being paid at the relevant time at the rate of Rs.3500 per month, will be enhanced to that of Rs.4400 per-month, keeping in view the provisions of section 5-A of the Urban Rent Restriction Ordinance, 1959 (hereinafter to be referred as 'the Ordinance'), providing twenty five percent increase in the rent after every three years in case of non-residential building and, thus, in view of such increase, the appellant started depositing the rent at the rate of Rs.4400. With regard to the allegation of subletting, it was categorically denied with a version that in the business being carried out in the said shop, the appellant associated his real brother Ashraf Ali Shah as a partner and in fact there is no subletting.

4. The learned Rent Controller proceeded to frame the following issues in presence of the learned counsel for the parties on 14-3-2008:---

"(1) Whether the respondent has violated the terms and conditions of the rent-agreement? OPP.

(2) Whether the premises in question is required by the petitioner in good faith for his personal use and occupation? OPP.

(3) Relief."

After recording evidence of the parties, the learned Rent Controller proceeded to allow the petition on the findings that the ejectment petitioner succeeded to prove Issue No.1 and subletting has been established; however, Issue No.2 was decided as not proved relating to the personal need of the ejectment petitioner.

5. Appeal filed by the present appellant was dismissed by the learned first appellate court on 11-5-2010, and the conclusion arrived at by the learned Additional District Judge is indicative to the effect that the personal need of landlord for his brother was also accepted by the appellate court.

6. Such findings were challenged by way of present S.A.O., which was earlier allowed by this Court on 12-10-2012.

7. The respondent feeling aggrieved of such findings preferred C.P.L.A. No.2348-L of 2012 before the Hon'ble Supreme Court of Pakistan and vide order dated 4-3-2013, the same was converted into appeal and by allowing the same, the matter was remanded to this Court for decision afresh on merits, after sending for the record of the case. The reasons prevailed upon the apex Court seem to be that no findings by this Court on the issue of subletting, were given.

8. In post-remand proceedings, the records of the lower courts were requisitioned and parties were heard.

9. The learned counsel for the appellant has argued that, in fact, no issue as to the allegation of subletting was ever framed by the Rent Controller. The issues were framed in presence of the learned counsel for the parties and neither any other issue was pressed nor at any subsequent stage, the ejectment petitioner moved the forum of the Rent Controller to frame some additional issues reflecting the element of subletting. Further submits that section 13 of the Ordinance nowhere provides a ground for eviction of a tenant in case of stated violation of the terms and conditions of the rent agreement and although there are some statements of witnesses touching the issue of subletting, but no findings could have been expected from the courts-below on the point of subletting in absence of any particular issue framed in that regard. The learned counsel for the appellant continued to argue that the personal need of the landlord, which was specifically pleaded for his brother's requirement again is alien to the provisions of the Urban Rent Restriction Ordinance, 1959, and referred section 13(3)(ii)(a)(b) of the Ordinance, which enables a landlord to apply to the Controller for an order directing the tenant to put the landlord in possession in case of a non-residential building, if he requires it in good faith for his own use or for the use of his children. The learned counsel has rightly pointed out that "brother" can in no manner be included in the list of "children".

10. The learned counsel for the respondent, on the other hand, has conceded that although no issue was framed on the point of subletting; however, he insisted to treat Issue No.1 as reflecting the portion of the pleadings relatable to the point of subletting. He, however, frankly conceded that on Issue No.2, there is no case on merits, as personal need of the brother of the landlord is nowhere recognized as a valid ground for eviction of a tenant in view of the provisions of the Ordinance.

11. With the assistance of the learned counsel for the parties and in compliance of the directions contained in order dated 4-3-2013, passed by the Hon'ble Supreme Court of Pakistan, I have scanned the evidence of the parties to examine as to whether the ejectment petitioner has succeeded to establish subletting on the part of the tenant-appellant. Muhammad Azam, the landlord, appeared as AW.1 and with regard to the point of subletting, he has stated while in witness-box that he was not in possession of any document showing the creation of a subletting in between the tenant and his real brother. He was also ignorant of any rate of rent settled with regard to such sub-tenancy. The said witness has expressed his lack of knowledge as to the suggestion of joint business of two brothers in the rented premises. Real brother of the landlord Muhammad Waqas appeared as AW.2 and he

was also unaware of the joint business of two brothers in the rented premises. Production of this witness was mainly aimed to prove the personal need of the said brother of the landlord. Muhammad Wasim appeared as AW.3 and even this witness failed to justify the allegation of subletting by placing any cogent evidence on record in proof of such allegation.

12. In comparison of such evidence of the ejectment petitioner, the respondent-tenant Aslam Ali Shah appeared as RW.1 and in his examination-in-chief, he has categorically denied of any subletting with regard to the rented premises, rather he stated with regard to his joint business with his real brother Ashraf Ali Shah. During cross-examination over this witness, the landlord introduced another person, namely, Nagra, as the alleged sublettee. This suggestion was in clear departure of the pleadings and, thus, cannot be taken into consideration. Ashraf Ali Shah, the alleged sublettee, appeared as RW.2 and except as to the presence of the mentioned person Nagra as a sublettee in the rented premises, the witness was never confronted with a specific allegation that he is occupying the rented premises as sublettee.

13. Although the term "tenant" has been defined in section 2(i) of the Ordinance, but the terms "sublettee", "sublessee" or "sub-tenant" have nowhere been defined in the Ordinance and I have to borrow the definition of such terms from Black's Law Dictionary Eighth Edition, wherein "sublease" has been defined in the following manner:---

"A lease by a lessee to a third party, conveying some or all of the leased property for a shorter term than that of the lessee."

The term "sublessee" has also been defined as under:---

"A third party who receives by lease some or all of the leased property from a lessee."

"Let" is another term, which is to be taken into consideration and the Dictionary has provided the following meaning to such term:---

"To offer (property) for lease, to rent out"

Keeping in view the above definitions of "sublease", "sublessee" and "let", it is, but clear that in order to establish the allegation of subletting, some proof in the kind of some settlement or agreement in between the tenant and sub-tenant as to the period of sub-tenancy, and the rate of rent for such period to be paid by the sub-tenant are at least the assignments to be suitably performed by the person alleging subletting.

14. The evidence, which has been discussed in the above lines, clearly indicates that the landlord has failed to bring on record any such required evidence, in absence of which, the presence of Ashraf Ali Shah in the rented premises cannot be termed as in capacity of sub-tenant.

15. The learned counsel for the appellant has rightly argued that the violation of the terms and conditions of the rent agreement has nowhere been provided in the Ordinance as a

ground seeking eviction by a landlord; however, since with a specific direction to give findings on the issue of subletting, the matter was remanded to this Court by the apex Court, ignoring even such weighty arguments of the learned counsel for the parties, the evidence has been examined and analyzed and the pleadings are also considered with a view to see as to whether the landlord has succeeded to establish his such plea, but nothing on record is suggestive to hold that the allegation of subletting has been proved by the landlord.

16. Viewing from another angle, sticking to the terms and conditions of the agreement, which admittedly came to an end on 1-9-2005, would be a ridiculous situation as on one hand, the landlord has come forward with a plea that after expiry of the rent agreement on 1-9-2005, same was never renewed and, on the other hand, he was still alleging the violation of the said rent agreement.

17. The result of the above discussion is that both the courts-below have erred in law by holding that in violation of the terms and conditions of the rent agreement (expired on 1-9-2005), the appellant was guilty of subletting of the rented premises and, thus, eviction order passed on such findings is not sustainable. The impugned order dated 11-11-2009 and the judgment dated 11-5-2010, respectively passed by the two forums-below are, thus, set aside. This appeal is allowed and consequently the ejectment petition, filed by the respondent, is dismissed with no order as to costs.

18. The records of the lower courts be remitted back immediately.

AG/A-111/L Appeal allowed.

2015 C L C 1546

[Lahore]

Before Ibad ur Rehman Lodhi, J

Dr. MUHAMMAD AFZAL HUSSAIN----Petitioner

versus

ADDITIONAL DISTRICT JUDGE, LAHORE and 5 others----Respondents

Writ Petition No.6861 of 2015, heard on 2nd June, 2015.

(a) Punjab Undesirable Cooperative Societies (Dissolution) Act (I of 1993)---

----S. 16---Abatement of suits and proceedings pending before any Court or authority---According to S.16 of Punjab Undesirable Co-operative Societies (Dissolution) Act, 1993, all issues relating to property, assets and liabilities of undesirable cooperative society which even were pending before any court or authority stood abated on appointment of Liquidator---All fresh proceedings against such society were only to be instituted before Co-operative Judge within 60 days of such abatement---All decrees etc. passed by any court, except Supreme Court of Pakistan against properties and assets of any undesirable cooperative society or after first day of July, 1990, were to become unexecutable and of no legal effect unless such judgment and decree was confirmed by Co-operative Judge after hearing concerned parties---

Any person who relied on such decrees, judgments etc. was competent to approach Co-operative Judge for its confirmation within 60 days of appointment of Liquidator.

(b) Punjab Rented Premises Act (VII of 2009)---
----Ss. 15 & 5---Eviction of tenant---Agreement between landlord and tenant---Proof of relationship---Unless a person established his title qua the suit property beyond any doubt, he would not be competent to ask for eviction of person occupying premises in his own independent right.

Rehmatullah v. Ali Muhammad and another 1983 SCMR 1064 rel.

(c) Punjab Rented Premises Act (VII of 2009)---
----Ss. 15 & 5---Eviction of tenant---Tenancy agreement---Scope---Person claiming himself to be owner or landlord of premises seeking eviction of tenant in ejectment petition must be equipped with a tenancy deed registered with Rent Registrar---According to S.5(5) of Punjab Rented Premises Act, 2009, tenancy deed was the exclusive proof to establish a relationship of landlord and tenant in between the parties.

Tariq Masood for Petitioner (in Writ Petition No.6861 of 2015).
Shahzada Muhammad Zeeshan Mirza and Muhammad Sajjad Chaudhry for Petitioner (in Writ Petitions Nos.6024, 6027, 6040, 6041, 6042, 6249, 6252, 6281, 6338, 6341, 6342 and 6344 of 2015).
Waqar Hassan Mir for Respondents Nos.3 to 6.
Date of hearing: 2nd June, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- Through this common judgment, I intend to dispose of this writ petition as also Writ Petitions Nos.6024, 6027, 6040, 6041, 6042, 6049, 6252, 6281, 6338, 6341, 6342 and 6344 of 2015, as all the ejectment petitions from which these petitions arose, were filed with regard to the same property, and common questions of law, and facts are involved therein, and the order and judgment dated 23-5-2014 and 17-12-2014, passed by the learned Special Judge (Rent) and the learned Additional District Judge, respectively, have been called-in-question.

2. The ejectment petitioners preferred their ejectment petitions against the present petitioners seeking their ejectment from respective portions in possession of the petitioners in Property No.1000/C, Jinnah Market, Chowk Surjan Singh, Paniwala Talab, Rang Mahal, Lahore, which building consists of a number of shops and flats over a total area of 2-1/2 kanals.

3. The background, which is relevant for the disposal of present Constitutional petitions is that, it is an admitted position that the property was originally owned by Roop Lal Mehta, who continued to be in the ownership of the same till his death i.e. the year 1986. The LRs of deceased Roop Lal Mehta alienated the said property in favour of National Industrial Cooperative Finance Corporation Limited (hereinafter to be referred as "NICFCL"). On promulgation of Punjab Undesirable Cooperative Societies (Dissolution) Ordinance, 1992,

on 16-5-1992, the Corporation, noted herein-above, stood dissolved and the matters relating to such Undesirable Cooperative Societies were further to be dealt with by the Punjab Cooperative Board for Liquidation.

4. On 12-12-1992, one Ch. Manzoor Elahi, filed a civil suit titled (Ch. Manzoor Elahi v. Punjab Cooperative Board of Liquidation), seeking a decree against the Liquidation Board, claiming him as a lawful owner of the suit property on the plea that, the LRs of late Roop Lal Mehta through their general attorney, alienated the entire property to the plaintiff for a consideration of Rs.7,00,000 (rupees seven lac only), who (plaintiff) got executed the registered sale deed directly in favour of NICFCL, only as a benami transaction.

5. According to the plaint, the arrangement was settled as a security against a loan of Rs.7,00,000 (rupees seven lac only), extended in favour of Ch. Manzoor Elahi, and after making the payment of loan amount with an interest at the rate of 20% to the Finance Corporation, the plaintiff of the suit required the Corporation to handover the titled documents to the plaintiff, but when the Corporation refused to hand over the original sale deed and other requisite documents to the plaintiff, it forced Ch. Manzoor Elahi to file a civil suit against the Punjab Cooperative Board for Liquidation.

6. On the basis of a conceding statement, shown to have been made on behalf of the Board of Liquidation, the suit stood decreed on 8th day of its filing i.e. 20-12-1992, and on the strength of such decree, the plaintiff/decree-holder started claiming himself to be the exclusive owner of the property, in question and treating the occupants of the property as 'his tenants'.

7. After the death of Ch. Manzoor Elahi, the above-mentioned decree-holder, his LRs. were stated to have transferred whole property through general attorney Bilal Ahmad Mir, in favour of the eviction petitioners/real sons of the said attorney.

8. The ejectment petitioners thereafter without giving particular description of the property filed the ejectment petitions.

9. On the other side, the decree, as was granted on 20-12-1992, was challenged by the writ petitioner in Writ Petition No.6861 of 2015. Dr. Muhammad Afzal Hussain and the Liquidation Board also called in question the decree dated 20-12-1992, by means of separate applications under section 12(2), C.P.C., who in the civil suit, were shown to have conceded the plaint, and the learned trial court on entertaining such applications under section 12(2), C.P.C., passed an order to maintain status-quo on 16-6-2011.

10. By means of another separate civil suit, the deed of general power-of-attorney shown to have been executed by Ch. Manzoor Elahi (deceased)-plaintiff of the civil suit, which stood decreed on 20-12-1992 in favour of the plaintiff and sale deeds got executed by the stated attorney in favour of the ejectment petitioners were challenged by Dr. Muhammad Afzal Hussain, noted herein-above, which is still pending.

11. The learned Rent Tribunal, on 23-5-2014, proceeded to refuse to grant leave to contest to the present petitioners and held them as defaulters in payment of rent and ordered their eviction.

12. In appeals, findings of the learned Rent Tribunal were maintained vide judgment dated 17-12-2014.

13. After hearing the learned counsel for the parties and going through the record, what emerges is that presently, the ejectment petitioners enjoy no perfect title in their favour qua the property, in question.

14. Nobody is denying the fact that, at the time of promulgation of Punjab Undesirable Co-operative Societies (Dissolution) Act, 1992 the property vested in NICFCL. Section 16 of the Ordinance, which subsequently converted into Act of 1993, reads as under:---

"16. Abatement of all suits, proceedings, etc.--- (1) All suits or proceedings pending before any Court or authority against an Undesirable Co-operative Society in respect of its assets and liabilities shall stand abated on the appointment of the Liquidator:

Provided that fresh proceedings against such a society may be initiated before the Co-operatives Judge within 60 days of such abatement.

(2) All decrees, judgments and orders passed by any Court, except the Supreme Court, against an Undesirable Co-operative Society or against properties and assets thereof on or after the first day of July, 1990 shall be unexceptionable and of no legal effect, unless such judgment, decree or order is confirmed by the Co-operatives Judge after hearing the concerned parties.

(3) Any person who relies on such decrees judgments or orders, may within 60 days of the appointment of the Liquidator, apply to the Co-operatives Judge for its confirmation."

In the light of above promulgation, the civil suit instituted on 12-12-1992 before the Civil Court was, thus, a nullity in the eye of law, as all the issues relating to the property, assets and liabilities of Undesirable Cooperative Society, which even were pending before any court or authority stood abated on the appointment of the Liquidator and further that all fresh proceedings against such Society were only to be instituted before the Co-operative Judge within 60 days of such abatement. Further that all the decrees etc. passed by any court, except the Hon'ble Supreme Court of Pakistan against the properties and assets of any Undesirable Cooperative Society or after the first day of July, 1990, were to become unexcutable and of no legal effect, unless such judgment and decree etc. is confirmed by the Cooperatives Judge, after hearing the concerned parties and any person, who relies on such decrees, judgments etc., was competent to approach the Cooperative Judge for its confirmation within 60 days of the appointment of the Liquidator.

15. For the reason that, still applications under section 12(2), C.P.C. calling in question the decree dated 20-12-1992, are pending adjudication before the learned trial court, no further

comments as to the validity of the decree dated 20-12-1992 are being made, lest it may prejudice the case of anybody before the learned trial court hearing such applications under section 12(2), C.P.C. However, for the time being, suffice it to say that, on the strength of a decree, effect of which has already been suspended by the same court, which earlier granted the same, while hearing application under section 12(2), C.P.C., has at least no force to be executed or to be asked to be taken into consideration as a decree in full force. The view expressed by the Hon'ble Supreme Court of Pakistan in case of Rehmatullah v. Ali Muhammad and another (1983 SCMR 1064), relevant portion thereof is reproduced as under:---

"Landlord failing to establish relationship of "landlord and tenant" beyond reasonable doubt cannot be allowed benefit of affirmative finding on issue. Rent Controller need not go into disputed "question of title". Leading of evidence by parties before Rent Controller on issue of "title" not desired. Proper course for Rent Controller, in circumstances, would be to decide issue against landlord and advise landlord to get his "title" established from a Court of general jurisdiction before seeking ejectment. Such findings to be specifically recorded by Rent Controller in his order. Decision by Rent Controller and Appellate Court, High Court or Supreme Court not to operate as bar to suit to be filed by landlord in order to establish his title. Landlord can re-agitate matter before Rent Controller again and decision of Rent Controller taken earlier would not constitute res judicata or preclude him from re-agitating matter before him once again."

is fully applicable in full force on the facts and circumstances of the present cases, and unless the ejectment petitioners establish their title qua the suit property beyond any doubt, they would not be competent to ask for eviction of the persons occupying the premises in their own independent right.

16. The courts below have conveniently closed their eyes from such aspect of the matter and have refused to grant leave to the present petitioners on erroneous considerations. Even to invoke the jurisdiction of a Rent Tribunal under The Punjab Rented Premises Act, 2009, a person claims himself to be the owner or landlord of the premises seeking eviction of the respondent in the ejectment petition, must be equipped with a tenancy deed registered with the Rent Registrar, and in view of the provisions of section 5(5) of the Act, it is the exclusive proof to establish the relationship of landlord and tenant in between the parties to such ejectment petition.

17. Admittedly, the ejectment petitioners are not equipped with any such rent deed and this fact has candidly been conceded by the learned counsel appearing for respondents Nos.3 to 6. The ejectment petitions, filed by the respondents before the Rent Tribunal were not competent and, thus, were not entertainable. The Rent Tribunal was having no jurisdiction to entertain such incompetent petitions. The proceedings conducted before the Rent Tribunal and also the appellate court were having no legal sanction.

18. For what has been discussed above, present petitions are allowed by declaring that the ejectment petitions filed before the Rent Tribunal by the respondents were not competent in the eye of law and as a consequence thereof, order and judgment dated 23-5-2014 and 17-12-2014, passed by the courts below are set-aside.

RR/M-198/L Petition allowed.

2015 C L D 173
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Messrs J.S. DEVELOPERS through Chief Executive and another---Petitioners
Versus
STATE BANK OF PAKISTAN through Governor SBP and another---Respondents

Writ Petition No.1353 of 2014, decided on 25th April, 2014.

Banking Companies Ordinance (LVII of 1962)---
----Ss. 25-A, 41(2) & (3)---State Bank of Pakistan Act (XXXII of 1956), S.3---Constitution of Pakistan, Art. 199---Constitutional petition---Alternate remedy---Written off loans---Credit Information Bureau (CIB) list---Petitioners availed financial facilities from bank and during litigation the same were settled between the parties without payment of markup---Petitioners were aggrieved of inclusion of their names in CIB list maintained by State Bank of Pakistan---Validity---Petitioners on one hand were not going to make payment of markup, which had been written off by the bank, at the same time they wanted that their names should not be included in list indicating such defaulters to be maintained by CIB in State Bank of Pakistan---Petitioners had no right to ask for such illegal withholding of information from financial institutions just in order to put at guard the banks/financial institutions for any future transaction to be carried out with them---High Court noted it with serious concern that bona fide account holders were not being extended any due benefit of such banking system, rather privileged classes were being extended undue benefits resultantly economy had become termitarium and main causes for such disaster were those undue benefits which were being extended to so called aristocracy, which class was behind our economy---High Court observed that it was high time to eradicate such menace---State Bank of Pakistan must deal with such elements and also banks/financial institutions, who were proved to be hands in gloves with such defaulters, with strong hands to put all such stakeholders in a discipline---Remedy of representation provided under S.41(3) of Banking Companies Ordinance, 1962, whereunder, State Bank could, on representation make to it or on its own motion, modify or cancel any direction issued under S.41(1) of Banking Companies Ordinance, 1962---Petitioners had alternate remedy to represent against inclusion of their names in list maintained by CIB and without availing such remedy constitutional jurisdiction of High Court was not competent---Petition was dismissed in circumstances.

Messrs Abdul Aziz Nawab Khan and Company v. Federation of Pakistan, Ministry of Finance and others 2006 CLD 55 and Messrs Yousaf Sugar Mills v. Trust Leasing Corporation and others 2006 CLD 1191 ref.

Muhammad Umer Riaz for Petitioners.
Rehan Nawaz for Respondent No.1.
Amir Waheed Butt for Respondent No.2.

ORDER
IBAD-UR-REHMAN LODHI, J.---Both the petitioners, in their respective capacities, availed different financial facilities from the Bank of Punjab and in case of non-observance

of the repayment according to the settled schedule, the parties had to enter into litigation. During such litigation, they settled their disputes by entering into Settlement Agreement dated 30-5-2012, and by implementing the settled terms in that agreement, not only both the sides withdrew their respective proceedings from the concerned courts, but also the Bank issued clearance certificates in favour of both the petitioners. The amount of mark-up, however, was not paid by the petitioners rather it was written off as indicated in the Statement showing written off loans or any other financial relief of five hundred thousand rupees or above provided during the year ended on December 31, 2012.

2. When such information of written off mark-up was conveyed under the law to the State Bank of Pakistan, the names of the petitioners were included in the list maintained by the Credit Information Bureau (hereinafter to be referred as "CIB").

3. The petitioners are aggrieved of inclusion of their names in such list of CIB and through the present Constitutional Petition, prayed for issuance of writ declaring such placement as illegal, unlawful and without any justification.

4. The admitted position is that the petitioners benefited themselves by availing financial facilities from the Bank of Punjab, a Scheduled Bank, and notwithstanding the settlement of disputes in between the petitioners and the Bank of Punjab, it remained a fact that the amount of mark-up was never paid by the petitioners and on receipt of such waiver by the Bank of Punjab in favour of the petitioners, the State Bank of Pakistan, under the law, has included the names of the petitioners in the list maintained by CIB in the State Bank of Pakistan showing such defaulters.

5. The State Bank of Pakistan was established in view of section 3 of the State Bank of Pakistan Act, 1956 (XXXII of 1956) in order to regulate the monetary and credit system of Pakistan and to foster its growth in the best national interests with a view to securing monetary stability and fuller utilization of the country's productive resources.

6. In order to consolidate and amend the laws relating to banking companies, the Banking Companies Ordinance, (LVII of 1962) was promulgated. Section 41 whereof provides the powers to the State Bank, including a power to give direction to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interest of the banking company, or to secure the proper management of any banking company generally. The State Bank may, from time to time, issue directions as it deems fit, and the banking companies or any particular banking company, as the case may be, shall be bound to comply with such directions. The State Bank was made competent by means of section 41(2) of the Ordinance to issue, from time to time, directions, guidelines and instructions with respect to activities and operations of banks and the Financial Institutions for carrying out purposes of the Ordinance and matters ancillary thereto. Section 25-A of the Ordinance gives powers to the State Bank to collect and furnish the credit information and every banking company was made bound to furnish to the State Bank credit information in such manner as the State Bank may specify, and the State Bank may, either of its own motion or at the request of any banking company, make such information available to any banking company on payment of such fee as the State Bank

may fix from time to time. Provided that, while making such information available to the banking company, the State Bank shall not disclose the names of the banking companies which supplied such information to the State Bank. Provided further that, a banking company which proposes to enter into any financial arrangement which is in excess of the limit laid down in this behalf by the State Bank from time to time shall, before entering into such financial arrangement, obtain credit information of the borrower from the State Bank.

7. The State Bank of Pakistan by means of Circular Letter No.29 of 2013, dated 21-11-2013, directed all Banks/DFIs to convey the information to the Credit Information Bureau with regard to write off loans and it was made clear that write off loans includes any form of relief allowed to the customer in terms of dues outstanding towards the bank/DFI, including principal, markup/profit and other charges. All concerned were directed to up-date the information to CIB by meticulous compliance of the directions contained in said Circular.

8. In case of Messrs Abdul Aziz Nawab Khan and Company v. Federation of Pakistan, Ministry of Finance and others (2006 CLD 55), it was held that the State Bank of Pakistan has developed a mechanism for collecting information through banks/financial institutions pertaining to their customers and their financial status available with them. Purpose seems to be that from one source i.e. CIB in State Bank of Pakistan any bank or any financial institution may in its turn collect information about the financial status of a customer with other banks enabling them to decide business transaction with the proposed borrower. The mechanism has been adopted to save the financial institutions falling prey to the defaulters and such exercise is only aimed at to conduct transparent business and to provide the financial institutions, who were holding depositor's funds 'to look before they leap' with regard to financial commitment.

9. Credit Information Bureau is a project of State Bank of Pakistan for collecting data, primary purpose of which is to equip all banks and financial institutions notwithstanding such placement of name of any business concern in the list maintained by CIB. The lending institution, however, is at liberty to extend financial assistance to a borrower despite placement of name of a customer on Credit Information Bureau list.

10. The learned counsel for the petitioners has placed reliance on Messrs Yousaf Sugar Mills v. Trust Leasing Corporation and others (2006 CLD 1191) and contended that the placement of a person on the list of CIB indicating the defaulters placed a restriction on a business to enter freely into a contract with bank etc., therefore, before such placement every individual is entitled to a notice.

I am afraid the findings arrived at by this Court in Yousaf Sugar Mills's case are not of any help for the petitioners, for, it was a case of Leasing Company, which extended facility of some financial assistance to the petitioner in the reported case and it was held that in view of section 25 of the Banking Companies Ordinance, 1962, the State Bank of Pakistan can collect credit information from the Banking Company only, whereas, Leasing Company does not fall within the definition of Banking Company. It was further elaborated that Banking Company is under the control of State Bank of Pakistan while Leasing Company,

as against a Banking Company is under the control of Securities and Exchange Commission of Pakistan.

In the present case, respondent No.2 is a bank and not a Leasing Company, thus, the petitioners cannot get any benefit of any findings arrived in a case relating to Leasing Company.

11. In the present case, the Bank of Punjab has not only entered into an agreement with the defaulters and after receipt of the principal amount only of the loan facility, issued clearance certificates, but when this petition was filed, the learned counsel representing the Bank of Punjab appeared with no contest to the prayer made by the petitioners. This seems to be an attempt on the part of a scheduled bank to be out of the administrative control of State Bank of Pakistan and to regulate its own financial discipline ignoring what the Central Bank wants from the banks/financial institutions.

12. The Credit Information Bureau in State Bank of Pakistan on a number of times since 2007 to 2012, repeatedly asked the petitioners that the CIB proposed to reflect the information extended by the Bank of Punjab on the CIB database and after providing the detail of other due amounts of the loans/mark-up, required the petitioners that if the statement is not in agreement with their record, they should settle the disputes with the banks/financial institutions and in such case, their names will no longer be included in the CIB database, and if the statement provided by the State Bank of Pakistan to the petitioners was not in agreement with their record, the petitioners were required to provide CIB the details and take up the matter with the concerned institutions. In case a satisfactory settlement of other due amount would not take place, within one month from the issuance of notices, it was made clear that the information will be included in the CIB database.

13. It is unfortunate that the tendency of writing off the loans or markup is being increased in our financial circles. The business concerns get loan facilities amounting to millions and billions of rupees and subsequently as of right claim writing off the same, and at the same time, do not want that even their such status of having written off their loan facility be made public. Our banks and financial institutions, in certain cases, seem to be a tool in the hands of such defaulters.

14. None of the said notices was responded to by the petitioners and, therefore, rightly the State Bank of Pakistan included the names of the petitioners in the CIB database.

15. The petitioners, on one hand, are not going to make payment of mark-up, which admittedly have been written off by the Bank of Punjab and at the same time, wants that their names should not be included in the list indicating such defaulters, to be maintained by the CIB in State Bank of Pakistan. The petitioners have no right to ask for such illegal withholding of information from the financial institutions just in order to put at guard the banks/financial institutions for any future transaction to be carried out with the petitioners. In our banking system, we experience on every second day that the bona fide account holders are not being extended any due benefit of such banking system, rather the privileged classes are being extended undue benefits and, thus, resultantly our economy has become

termitarium and the main causes for such disaster are those undue benefits, which are being extended to so-called aristocracy , which class is behind our economy. A common man of lower middle class, who obtains a loan from House Building Finance Corporation for construction of his house or receives a petty amount from any bank, is not only prosecuted but also persecuted and a privileged class is allowed to enjoy the facility of taking loan facilities and then subsequently writing them off and even then they ask the courts to put a restraint over the financial institutions of this country to even disclose such anti economy activities to public at large. This is high time to eradicate such menace. The State Bank of Pakistan must deal with such elements and also the banks/financial institutions, who are proved to be hands in gloves with such defaulters, with strong hands to put all such stakeholders in a discipline.

16. The petitioners have filed this Constitutional Petition by stating that they have no other adequate and efficacious remedy, but ignored the remedy of representation provided under section 41(3) of the Banking Companies Ordinance, 1962, where under, the State Bank may, on representation made to it or on its own motion, modify or cancel any direction issued under subsection (1) of section 41 of the Ordinance. The petitioners were having a remedy to represent against the inclusion of their names in the list maintained by CIB and without availing such remedy this petition directly filed in constitutional jurisdiction of this Court is not competent.

17. For what has been discussed above, this petition having no force is dismissed.

MH/J-14/L Petition dismissed.

2015 C L D 595

[Lahore]

Before Muhammad Khalid Mehmood Khan and Ibad-ur-Rehman Lodhi, JJ

Mst. INAYAT BEGUM---Appellant

Versus

STATE LIFE INSURANCE CORPORATION through Chairman and another---Respondents

Regular First Appeal No.187 of 2008, decided on 17th December, 2014.

(a) Insurance Ordinance (XXXIX of 2000)---

----Ss. 118, 121 & 124---Limitation Act (IX of 1908), Art. 86(2)---Life insurance claim---Computation of period of limitation for filing of claim/application before the Insurance Tribunal under S.118 of the Insurance Ordinance, 2000---Scope---Deceased died on 9-7-2003 and claimant filed application under S. 118 of the Insurance Ordinance, 2000 on 31-7-2006; and such claim was held to be barred by time in view of Art. 86(2) of the Limitation Act, 1908---Validity---Period of three years notwithstanding the entries made in column No. 3 of Art.86(a) of the Limitation Act, 1908 would start from the point of time, when the proof of death of the insured had been given to or received by the insurer; and when merits of the case were adjudged on such provision of law---When on 17-6-2004, fact of death of insured

was placed before the Insurance Corporation; it was the point of time from where period of limitation was to be started for filing of an application under S.118 of the Insurance Ordinance, 2000 before the Insurance Tribunal---Application of claimant was therefore within time and claimant was wrongly made victim of limitation---High Court set aside impugned order of Insurance Tribunal and allowed application of the claimant---Appeal was allowed, accordingly.

(b) Insurance Ordinance (XXXIX of 2000)---
----Preamble & S. 118--- Insurance laws--- Deficiencies--- No period of time prescribed in which a claim had to be decided by the Insurance Corporation or an Insurance Company--- Unbridled power available with Insurance Corporations to keep claims pending for an indefinite period of time--- High Court observed that there was need for necessary legislation and amendment in the Insurance Ordinance, 2000---Comparative legislation and principles examined---Recommendations and proposals for legislative reforms outlined.

Liaqat Ali Butt for Appellant.

Ali Akbar Qureshi and Ibrar Ahmad with Safdar Ali Qureshi, Law Officer for Respondents.

Date of hearing: 11th September, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This is an appeal under section 124(2) of the Insurance Ordinance, 2000, arising out of the judgment, passed by the learned Insurance Tribunal Punjab, Lahore, on 31-3-2008, whereby, the application of present appellant Mst. Inayat Begum, for recovery of death claim along with liquidated damages, was dismissed being barred by time.

2. Nasir Hussain, son of the appellant, purchased two insurance policies during his life time on 1-7-2001 and 1-12-2002, respectively. He reportedly died on 9-7-2003. After his death, the claim by the appellant was filed on 17-6-2004 with respect to both the above noted policies, which was not accepted by the Insurance Corporation and it was held to have been repudiated.

3. The Insurance Tribunal was established on 20-6-2006. At the relevant time, there was no specific remedy available to the aggrieved legal heir of deceased insured and, therefore, a complaint was filed by the appellant before the Federal Ombudsman, which was declined on 1-12-2005. Writ Petition No. 6735 of 2005, calling in question, such findings was dismissed by this Court on 27-4-2005. From the refusal on the part of the Federal Ombudsman, a representation was also filed before the President of Pakistan, which was also dismissed on 25-2-2006. In the meanwhile, as noted hereinabove, the Insurance Tribunals were established under the Insurance Ordinance, 2000, w.e.f. 20-6-2006 and, therefore, an application under section 118 of the Insurance Ordinance, 2000, was filed by the appellant on 31-7-2006.

4. In addition to other issues, the learned Tribunal also proceeded to frame Issue No.1 touching the limitation for filing any application seeking death claim along with liquidated damages in view of Article 86(a) of the Limitation Act, 1908.

5. Although the Insurance Corporation has contested the plea of the appellant on merits also, but for the reason that before the Tribunal, no evidence, except one R.W.1 was produced, who even was not an Inquiry Officer on behalf of the Insurance Corporation on the basis of which, the policies of the deceased insured were refused to be encashed in favour of the appellant. Even though the witnesses, stated to have been appeared before the Inquiry Officer, did not appear before the Tribunal in witness box. No evidence showing the ailment of the deceased insured at the time of obtaining the policies was made part of the record; only on the basis of general observations that the Insurance Corporation had sufficient material with it justifying the bad health of the deceased insured at the time of purchase of policies, the claim of the appellant was refused.

6. Even the appellant was hit on the point of limitation on the basis of wrong interpretation of Article 86(a) of the Limitation Act, 1908. For ready reference, Article 86(a) of the Limitation Act, 1908, is reproduced hereinbelow:--

Description of suit	Period of limitation	Time from which period begins to run
86(a). On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	[Three years]	[(a). The date of the death of the deceased.

The careful reading of the above provision of law reveals that the period of three years notwithstanding the entries made in Column No.3 of such Article would start from the point of time, when the proof of the death of the insured has been given to or received by the insurer, and when the merits of present case are adjudged on the touchstone of such provision of law, it would abundantly clear that, when on 17-6-2004, through claim, when the fact of death of the insured was, for the first time, placed before the Insurance Corporation, it was the point of time from-where the period of limitation was to be started for the appellant for filing an application under section 118 of the Insurance Ordinance, 2000 before the Tribunal. The application filed on 31-7-2006 was, thus, within time from 12-6-2004, and the appellant was illegally made victim of the law of limitation on the basis of wrong interpretation of the relevant provision.

7. We have noted, with concern, that in the Insurance Ordinance, 2000, although a power to scrutinize the claim of the claimants/LRs of deceased-insured, has been provided to the Insurance Company, but no period of time has been prescribed as to in which such claim has to be decided either way by the Insurance Company.

Section 4(1) of the Service Tribunals Act, 1973 provides that any civil servant aggrieved by any order, whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him, prefer an appeal to the Tribunal, whereas, in view of section 4(1)(a) of the said Act, it has been provided that, where an appeal, review or representation to a departmental authority is provided under the Civil Servants Ordinance, 1973, or any rule against any such order, no appeal shall lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was so preferred.

This clearly indicates that whenever in any scheme of law, the departmental authority has been given a power to review its own decision, a stipulated time has been provided to such departmental authority and in case within such stipulated time, the matter pending before such authority is not decided, the aggrieved person would be entitled to prefer his appeal before the available legal forum constituted specifically in that regard.

No such parallel provisions have been provided in Insurance Laws and once a claim is filed before the Insurance Company by the LRs of deceased-insured, the Insurance Company has not been bound down with reference to a time limit within which the matter or claim placed before it, is to be decided or after expiry of the same, interested person would be competent to approach the Insurance Tribunal.

In the circumstances, when the authorities or the departments are given the power to review their own decisions, in fact, the role of a Judge has been assigned to their own cause, and such power must not to be unfettered of unbridled and at least should be checked through the restraints of time limit.

Similarly, in labour laws, a workman aggrieved of any adverse order passed against him can competently issue a grievance notice to the employer and certain period of limitation has been provided for the employer to decide either way such grievance notice and like service matters, if within such certain period of limitation as provided under section 33 of the Industrial Relations Act, 2012, the employer has failed to decide the grievance notice, it would be deemed that the same has been answered in negative and, thus, the workman would be competent to seek his remedy by filing a grievance petition before the concerned Labour Court within certain period of limitation, after such deeming refusal on the part of the employer.

8. Here in the insurance laws, we find nothing of the kind of such parallel provisions and in our view, the Insurance Companies/ Corporation have been given unbridled power to keep the claims pending with them for an indefinite period and, if the authorities sitting in the Corporations, want to use the same, as a tool to deprive the claimants from their legitimate right, the limitation period of three years may also be exhausted resulting into frustration of the claim of the concerned interested persons to be filed before the Insurance Tribunal within a period of three years as provided under Article 86(a) of the Limitation Act, 1908; therefore, we suggest necessary legislation to be introduced by the Ministry of

Law resulting into suitable amendment in section 118 of the Insurance Ordinance, 2000, providing certain limitation for Insurance Companies/Corporations, regarding decision on claim of the legal heirs of deceased insured within certain period and if within such period, such claim is not decided, it would be deemed that the same has been refused and, thus, the aggrieved persons would have a right to approach the Insurance Tribunal by moving an application under section 118 of the Insurance Ordinance, 2000.

The Insurance laws, as are available in the prevailing condition, are m the nature that the same provided unlimited time to the Insurance Company to withhold the claims of the aggrieved persons under the name of scrutiny or examination and it is left open to the Insurance Company to exhaust the period of limitation as has been provided for any aggrieved person to approach the Tribunal in order to redress his remedy. In certain cases, it has been noticed that with motivated intention the claim has been withheld by the Insurance Company till the expiry of period of limitation provided under Article 86(a) of the Limitation Act, 1908, and thus, on being satisfied that the time limit provided in the relevant law had expired, the aggrieved person or persons are intimated about redundancy of their insurance claims, thus, practically making the aggrieved persons out of time for approaching the concerned Insurance Tribunal. This cannot be termed as a good law and need attention of the Legislature to convert the same into a beneficial and good law.

9. Copy of this judgment is, therefore, ordered to be delivered to the Secretary Law, Ministry of Law, Justice and Parliamentary Affairs (Justice Division), Islamabad, for taking appropriate legislative measures in the lines, as noted hereinabove.

10. For reason that we are not in agreement with the findings of the Insurance Tribunal both on merits, as well as, on the point of limitation, the present appeal is allowed and the application moved by the appellant before the Insurance Tribunal stands allowed.

KMZ/I-1/L Appeal allowed.

2015 C L D 618
[Lahore]
Before Muhammad Khalid Mehmood Khan and Ibad-ur-Rehman Lodhi, JJ
STATE LIFE INSURANCE CORPORATION OF PAKISTAN through Attorney and another---Appellants
versus
Mst. MANZOOR BIBI---Respondent

Regular First Appeal No.934 of 2011, decided on 17th December, 2014.

Insurance Ordinance (XXXIX of 2000)---
---Ss. 118 & 124---Payment of liquidated damages on late settlement of claims---Appellant Insurance Corporation impugned order of Insurance Tribunal whereby application of claimant under S. 118 of the Insurance Ordinance, 2000 was allowed and she was held entitled to receive insurance claim along with liquidated damages---Contentions of appellant

Insurance Corporation were that the deceased had died due to an accident while handling of inflammable materials, of which the insured did business and that such business was not disclosed to the Insurance Corporation at time of purchasing of policy, therefore no claim could be paid out---Held, that at the time of issuance of insurance policy; the appellant Insurance Corporation itself undertook investigation through its own medical expert and other sources, but nothing was brought on record which prohibited the Insurance Corporation from issuing the insurance policy---When the appellant Insurance Corporation issued repudiation of the insurance policy, the said letter did not contain any sound reasoning for refusal of claim, except that the insured did not disclose certain material facts at time of purchase of policy---In view of S. 118 of the Insurance Ordinance, 2000; neither the scrutiny of the claimant's case was finalized during the ninety days period, nor any payment was made and the policy was repudiated by the appellant Insurance Corporation after expiry of such period; therefore the claimant was rightly held to receive liquidated damages as well---Appellant Insurance Corporation had failed to prove its case by non-production of any witness; and its plea was therefore found not to be correct---No illegality existed in the impugned order---Appeal was dismissed, in circumstances.

Ali Akbar Qureshi and Ibrar Ahmad with Safdar Ali Qureshi, Law Officer for Appellants.

Liaqat Ali Butt for Respondent.

Date of hearing: 11th September, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---The learned Insurance Tribunal Punjab, vide judgment dated 22-10-2011, accepted the application of present respondent-Mst. Manzoor Bibi, filed before the said Tribunal, under the provisions of section 118 of the Insurance Ordinance, 2000, and the applicant was held entitled to receive the insurance amount of Rs.1,00,000 and the benefits regarding accidental death amounting to Rs.1,00,000 along with accrued bonuses, if any, and the liquidated damages at the prevailing rate under section 118 of the said Ordinance.

2. The appellant-State Life Insurance Corporation of Pakistan, has preferred this appeal under section 124 of the Insurance Ordinance, 2000, mainly on the plea that the deceased-insured Muhammad Afzal died due to some burning happened on account of careless handling of some inflammable material, which business was being carried out by the deceased. It was the further plea of the appellant-Corporation that at the time of purchase of insurance policy, the business of the deceased-insured was described as one furniture polishing and driving of Rickshaw and the fact of involvement of said deceased in the business of inflammable material was concealed. Further that now in order to obtain insurance amount, a wrong plea of short circuiting of electricity in the premises, where the deceased had been working at the crucial time, has been given, which all facts disentitled the respondent, herein, to claim any insurance amount.

3. During the trial before the learned Tribunal, the appellant-Corporation produced a sole witness, namely, Muhammad Ramzan, who appeared as R.W.1, and according to his

statement, he conducted the investigation/inquiry, after the death claim of the deceased-insured was placed before the Corporation and in such process, he recorded the statements of inhabitants of the locality, where the deceased used to reside during his life time and as a result of his such inquiry, he found that the deceased Mohammad Afzal was involved in the handling of some fire works and died due to the explosion in such material. He further stated that the insured got insurance policy by suppressing true and material facts by concealing his actual business.

4. The applicant before the learned Tribunal not only appeared herself as A.W.1, but also produced supporting evidence by production of A.W.2 and A.W.3.

5. The learned Tribunal, vide impugned judgment, has observed that the appellant-Corporation has failed to establish on record by producing any reliable evidence that the insurance policy was obtained by late husband of present respondent/insured by suppressing any material fact or by making any fraudulent declaration. It is an admitted position that at the time of issuance of insurance policy/subject-matter of present litigation, the appellant-Corporation, itself, undertook the investigation through its own Medical Expert and other sources, but nothing brought on record to prohibit the Corporation in issuance of insurance policy to deceased husband of the respondent. When the appellant-Corporation conveyed the repudiation of the insurance policy, the said letter did not contain any sound reasoning as to the refusal of the claim of the applicant, except that the insured did not disclose certain material facts at the time of purchase of policy.

6. The insured passed away on 5-4-2007, whereas, the death claim by the present respondent/his widow, was filed with the Corporation on 27-6-2007. The policy was to commence from 1-3-2006, and when the fact of the death of insured along with all required documents were placed before the Insurance Corporation on 27-6-2007, there was a period of 90-days with the Corporation in view of Section 118 of the Insurance Ordinance, 2000, to make the payment, which became due. Nether in such period of 90-days, the process of scrutiny of the case of the applicant was finalized nor any payment was made and the policy was repudiated after expiry of such period i.e. 19-12-2007; therefore, the applicant before the Tribunal was rightly held entitled to receive the liquidated damages also in addition to the insurance amount.

7. The learned Tribunal is right in holding that the Corporation has miserably failed to prove its case by non-production of any witness, who appeared before the Inquiry Officer and, therefore, the plea of the death of insured on account of some explosion in an inflammable material was not found correct by the Tribunal and analyzing the facts in view of the evidence produced before it.

8. The learned counsel for the appellant-Corporation has failed to point out any illegality in the impugned judgment dated 22-10-2011, entitling the respondent/widow of the deceased-insured for the sum insured and accidental death along with accrued bonuses and the liquidated damages w.e.f. 27-6-2007 to 22-10-2011 (the date, when the claim papers were received by the Corporation furnished by the applicant and the date of judgment announced by the Insurance Tribunal).

9. In view of above, finding no illegality in the impugned judgment, the same is upheld and this appeal having no force is dismissed.

KMZ/S-1/L Appeal dismissed.

2015 C L D 645
[Lahore]
Before Muhammad Ameer Bhatti and Ibad-ur-Rehman Lodhi, JJ
HAROON TRADERS, BHAUN CHOWK CHAKWAL through Proprietor and 2 others---Appellants
versus
K.A.S.B. BANK LIMITED through Manager---Respondent

R.F.A. No. 77 of 2014, decided on 13th October, 2014.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---
----Ss. 9 & 10---Suit for recovery of bank loan---Remand of proceedings---Non-compliance of direction---Judgment and decree passed by Banking Court was set aside by High Court and matter was remanded with direction to plaintiff bank to file complete statement of accounts---Bank, in post remand proceedings failed to file complete statement of accounts as directed by High Court---Effect---Directions contained in order of High Court were not complied with in letter and spirit and plaintiff bank failed to produce any evidence in a legally permissible manner, therefore, it was a case of no evidence---Plaintiff bank was provided ample opportunity to substantiate its claim by production of its evidence but failed to avail such opportunity, therefore, plaintiff bank was not entitled to any leniency---Plaintiff bank failed to establish its claim with the help of any evidence, therefore, judgment and decree passed by Banking Court, in favour of the bank was not sustainable and was set aside---Appeal was allowed in circumstances.

Sardar Muhammad Ashfaq Abbasi for Appellants.
Mushtaq Ahmed Mohmand for Respondent.
Date of hearing: 13th October, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---In the first round of litigation, when the suit of the respondent-Bank was decreed by the learned Judge Banking Court on 13-10-2004, the same was assailed in R.F.A. No.217 of 2004 and a learned Division Bench of this Court vide judgment dated 18-6-2008, allowed the appeal by setting aside the impugned judgment and decree, holding that petition for leave to defend the suit will be deemed pending before the learned Judge Baking Court. It was further directed that the learned trial Court, after receiving a complete statement of accounts on the file, will decide the suit. The reasons for such conclusion, as noted in the said order, would be beneficial for understanding the

present issue. Relevant portion of the findings of this Court on 18-6-2008, for ready reference, are reproduced hereinbelow:--

"6. It is settled law that a suit in the banking jurisdiction, can be initiated through a plaint, which is to be supported by a statement of account. Here the statements of accounts are incomplete and no suit without the support of a complete statement of account, can be decreed".

2. The finings arrived at by this Court on 18-6-2008 were never further challenged by any side, as such, it can safely be held that both plaintiff and the defendants in the suit, accepted what was held in the said judgment.

3. Not only that the learned trial court was bound to comply with the directions contained in such remanding judgment, but also it was incumbent upon the plaintiff to bring its suit within the conformity of the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001. A clear guiding indication was provided by this Court for all concerned that in post remand proceedings, the complete statement of accounts should have been furnished along with the plaint, which necessarily meant to file an amended plaint with the complete document, i.e., at least complete statement of accounts in order to meet the requirement of a valid suit in the banking jurisdiction and also to provide an opportunity to the defendant to contest as to what has been pleaded against him by filing his written statement and extending any defence in corresponding paragraph to that of the plaint, wherein the claim of the plaintiff-Bank was raised with the help of complete statement of accounts.

4. What happened in the post remand proceedings was somewhat in complete negation of the directions contained in such remand order. Instead of asking the plaintiff-Bank to file an amended plaint, after incorporating the exact claim of the Bank as against the loanee/defendant with the help of a complete statement of accounts, the plaintiff felt it enough to insert some documents in record on file of suit, stated to have been a statement of accounts and when learned trial court, after putting a stamp on the said document in token of its receipt in the record, it was felt sufficient by the plaintiff that he has performed his duty but such document was never legally put to the defendants by inviting a Written statement qua such fresh development in the suit by providing him an opportunity to place his defence, if any, to such statement of accounts. It is further astonishing that the statement of account was received by the learned Judge Banking Court in evidence as Exh.P.14 and Exh.P.15 in the statement of learned counsel for the plaintiff-Bank.

5. The practice usually adopted by the trial courts by permitting the learned counsel representing the parties to bring on record certain documents, which even are not public documents and are not per-se admissible, is not permissible under any law. The counsel representing a party cannot assume the status of a 'witness' and naturally he cannot be cross-examined by the adversaries, as such, a document, which is not a public document and is not per-se admissible, cannot be allowed to be taken in evidence in the statement of a learned counsel representing a party to the litigation.

6. P.W.1-Muhammad Sidique was produced by the plaintiff-Bank, but he is completely an unconcerned person and even said sole witness of the plaintiff deposed to the following effect:-

7. The learned counsel for the appellants has further pointed out that the plaint of the suit was filed by the Bank through two officers, namely, Mrs. Sheema Hamdani, Vice-President/Chief Manager and S. Naeem Bukhari, Assistant Vice President/Operation Manager/Attornies of the Bank and further argued that such persons never appeared before the court in any capacity and never verified the contents of Annexures-A and B to the plaint, i.e. attorney executed in favour of such persons. P.W.1, in this regard, has further deposed to the following effect:--

8. Although the learned counsel for the appellants has disputed the contents of the statement of accounts by maintaining that the mark-up by means of such statement was being charged after 30-4-2000, which was the cut of date after which the Bank was not competent to charge any mark-up, which fact has been admitted by the said P.W.1, but since we do not consider the process adopted in production of Exh.P.14 and Exh.P.15, as legal one and are not going to give any weight to such document; therefore, are not going to dilate upon such argument of the learned counsel for the appellants.

9. Since the directions contained in order dated 18-6-2008 have not been complied with in letter and spirit and the plaintiff-Bank has failed to produce any evidence in a legally permissible manner; therefore, we consider it a case of no evidence. The plaintiff-Bank was provided ample opportunity to substantiate its claim by production of its evidence, but he has failed to avail such opportunity, therefore, we consider it that the plaintiff-Bank is not entitled to any further leniency. Since the Bank has failed to establish its claim with the help

of any evidence; therefore, impugned judgment and decree dated 12-2-2014, passed by the learned Judge Banking Court, Rawalpindi, in favour of the plaintiff-Bank is not sustainable. The same is, therefore, set aside by allowing this appeal with no orders as to costs.

MH/H-23/L Appeal allowed.

2015 C L D 1155
[Lahore]
Before Muhammad Khalid Mehmood Khan and Ibad ur Rehman Lodhi, JJ
Mst. NASEEM BIBI---Appellant
versus
STATE LIFE INSURANCE CORPORATION OF PAKISTAN through Chairman and another---Respondents

Regular First Appeal No. 186 of 2008 decided on 17th December, 2014.

(a) Insurance Ordinance (XXXIX of 2000)---
----Ss. 118 & 124---Appellant/claimant impugned order of Insurance Tribunal whereby claim of additional liquidated damages of appellant was rejected and she was only held entitled to receive the amount of liquidated damages already paid to appellant by the Insurance Corporation---Held, that an additional amount as liquidated damages was received by the appellant from the Insurance Corporation but there was dissatisfaction on part of the appellant as to the quantum of such amount of liquidated damages, but neither any period as to the entitlement of the appellant to receive such liquidated damages nor any amount, except one which was calculated by the Insurance Corporation and paid to the appellant, were provided by the appellant---In absence of any exact calculation to the contrary, the Insurance Tribunal was right in depending upon calculation made by the Insurance Corporation towards the entitlement of the appellant in respect of the amount of the liquidated damages---Appeal was dismissed, in circumstances.

(b) Insurance Ordinance (XXXIX of 2000)---
----S. 118---Limitation Act (IX of 1908), Art. 86(a)---Computation of period of limitation for filing of claim/application before the Insurance Tribunal under S. 118 of the Insurance Ordinance, 2000---Claims arising before the constitution of the Insurance Tribunal under S. 118 of the Insurance Ordinance, 2000---Insured died on 12-10-2001 and application of claimant under S. 118 of the Insurance Ordinance, 2000; before Insurance Tribunal was rejected on the ground that the same was barred by time---Held, that period of limitation of three years provided in Art. 86(a) of the Schedule to the Limitation Act, 1908 was to run from date when the sum insured was payable after proof of death had been given or received by the insurer---Insurance Tribunal came into existence with effect from 20-6-2006 and before said date; the claimant had been approaching different forums like the Ombudsman, the President, the High Court and immediately after the constitution of the Insurance Tribunal, under the Insurance Ordinance, 2000; the claimant within three months approached the Insurance Tribunal therefore claimant could not be held guilty of any delay in lodging of application under S. 118 of the Insurance Ordinance, 2000 despite the fact that

the insured had passed away on 12-10-2001---High Court observed that in the present case, limitation could not be treated to commence from date of death of the insured; rather the same would start from 20-6-2006 when the forum for lodging of such application under S. 118 of the Insurance Ordinance, 2000 was established; and therefore application of appellant under S. 118 of the Insurance Ordinance, 2000 was not barred by time.

Liaqat Ali Butt for Appellant.

Ali Akbar Qureshi and Ibrar Ahmad with Safdar Ali Qureshi, Law Officer, State Life Insurance Corporation for Respondents.

Date of hearing: 11th September, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This is an appeal arising out of judgment passed by the learned Insurance Tribunal Punjab, Lahore, on 29-3-2008, whereby, the application of present appellant-Mst. Naseem Bibi, was dismissed.

2. The appellant's husband Farrukh Bashir was associated with the State Life Insurance Corporation of Pakistan, who died on 12-10-2001, where-after a claim under Policy FSG-00015 (Field Self Subscribed Group Insurance) was lodged with the Insurance Corporation, which was declined on 21-10-2003.

3. In absence of any Insurance Tribunal, which in fact, came into an existence w.e.f. 20-6-2006, the present appellant; firstly, approached the Ombudsman and complaint of the appellant was decided by the Ombudsman in her favour on 8-3-2003, and the respondent-Corporation was held bound to pay liquidated damages in addition to group insurance policy proceeds to the appellant.

4. From the record, it is evident that on 30-7-2003, an amount of Rs.11,95,500 was paid by the Corporation to the appellant towards insurance policy amount, whereas, an additional amount of Rs.1,24,278 towards liquidated damages was paid by the Corporation to the appellant on 19-1-2004, on account of Writ Petition No.18024 of 2003, which was filed before this Court, seeking implementation of the findings of the learned Ombudsman, and the same was disposed of on 29-3-2014. A representation before the worthy President was also made by the appellant arising out of the findings of the Ombudsman, which was, however, rejected on 1-9-2005, and again when a Constitutional petition was pending in this Court, on account of the constitution of the Insurance Tribunal on 20-6-2006, the appellant filed an application under section 118 of the Insurance Ordinance, 2000, before the Tribunal on 30-9-2006.

5. The application was contested by the Corporation on merits as also on the point of limitation.

6. The learned Insurance Tribunal, vide impugned judgment dated 29-3-2008, has not only dismissed the application on merits, but also held the same as being barred by time in view of Article 86(a) of the Limitation Act, 1908.

7. On merits, we are in agreement with the findings of the learned Insurance Tribunal, as admittedly the amount of Rs.1,24,278 was received by the appellant in addition to the policy amount from the Corporation. Although, there seems to be some dissatisfaction on the part of the appellant as to the quantum of amount of liquidated damages, but neither any relevant period as to the entitlement of the appellant to receive such liquidation damages nor any other amount, except, which was calculated by the Corporation and paid to the appellant, were provided by the appellant. In absence of any exact calculation, the learned Insurance Tribunal was right in depending upon the calculation made by the Corporation towards the entitlement of the appellant in respect of the amount of liquidated damages.

8. However, on the point of limitation, we have some reservations as to the findings of the learned Insurance Tribunal. In this matter, the application for obtaining the policy amount along with all other allied benefits was filed by the appellant before the learned Insurance Tribunal on 30-9-2006.

9. The husband of the appellant, who was insured with the Insurance Corporation died on 12-10-2001, and by keeping these two dates before it, the learned Insurance Tribunal has, in a cursory manner, held the application before it as being barred by time in view of the provisions of Article 86(a) of the Limitation Act, 1908. In the said Article, description of suit is provided in the following words:-

"On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers".

and, therefore, it is clear that the limitation of three years is to be run from the date either, when the sum insured is payable after proof of the death has been given or received by the insurers.

10. The learned Insurance Tribunal came into an existence only w.e.f. 20-6-2006 and before that, after the death of the insurer, the appellant had been approaching the different forums, like; the Ombudsman, the President, the High Court, and immediately after the constitution of the Insurance Tribunal under the Insurance Ordinance, 2000, she, within three months, approached the learned Insurance Tribunal; therefore, she cannot be held guilty of any delay in lodging her claim by means of an application under section 118 of the Insurance Ordinance, 2000, despite the fact that her husband/deceased insured, passed away on 12-10-2001. The claim of the appellant, which was lodged before the learned Insurance Corporation, was declined by the Corporation on 21-10-2003, and in this particular case, the limitation could not be treated to commence from the date of death, rather it would start from 20-6-2006, when the forum for lodging such application under section 118 of the Insurance Ordinance, 2000, was provided and if from such point of time, the limitation is counted, the application moved before the learned Insurance Tribunal was not barred by any time, as such, the findings arrived at by the learned Insurance Tribunal on Issue No.3, holding that the application under section 118 of the Insurance Ordinance, 2000, was barred by time are reversed and it is held that the application moved before the learned Insurance Tribunal was within time.

11. On merits, the appellant was rightly held as not entitled to claim any additional amount of liquidated damages in absence of any exact claim towards such entitlement put forth by her before the Tribunal.

12. Result is that the appeal merits dismissal and the same is, therefore, dismissed.

KMZ/N-1/L Appeal dismissed.

2015 M L D 210
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
SHAZIA SAMAD---Petitioner
Versus
Malik TARIQ MEHMOOD AKHTAR and another---Respondents

Writ Petition No.710 of 2014, decided on 24th March, 2014.

West Pakistan Family Courts Act (XXXV of 1964)---
---S. 5, Sched & S.14---Constitution of Pakistan, Art. 199---Constitutional petition---Dissolution of marriage on the basis of Khula "in lieu of dower"---Forum of appeal to challenge such condition---Scope---Wife could challenge the condition attached with the decree for dissolution of marriage by filing an appeal under S. 14 of West Pakistan Family Courts Act, 1964 if so advised---Constitutional petition was disposed of accordingly.

Naila Azmat v. Judge Family Court and others 1999 MLD 3090; Farzana Shaheen v. Malik Muhammad Iqbal 1989 MLD 3888 and Bashira Bibi v. Muhammad Rafiq and 2 others 1982 CLC 1200 rel.

Majeeb-ur-Rehman Kiani for Petitioner.

ORDER

IBAD-UR-REHMAN LODHI, J.---A suit for dissolution of marriage was filed by the present petitioner mainly on the ground of cruelty, inhuman attitude of the defendant and hatred inculcated in the petitioner's mind as against respondent No.1/defendant on account of unbecoming and nefarious conduct of the respondent. The defendant/ respondent No.1 was proceeded against ex parte in the said suit.

In ex parte evidence, when the petitioner appeared as her own witness, she, in addition to the stance taken in the plaint, has also made statement to the effect that she also demanded the dissolution of marriage on the basis of 'Khula'. The learned Judge Family Court, Rawalpindi while proceeded to decree the suit, granted the same on the ground of 'Khula' in lieu of dower.

2. The petitioner has challenged the said findings through the present Constitutional petition before this Court by making the following prayer:--

"It is, therefore, respectfully prayed that while exercising writ jurisdiction conferred upon this honourable court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, this honourable court may graciously be called upon to declare the impugned judgment and decree dated 13-2-2014 as illegal and without jurisdiction and decree for divorce be awarded on the grounds enumerated in the plaint."

From the contents of the above prayer and also the manner of arguments advanced by learned counsel for the petitioner, the intention of the petitioner seems to be to avoid the condition attached with the decree for dissolution of marriage for return of dower, as otherwise no challenge would be available to the petitioner to call in question the decree granted in her favour.

3. In order to determine as to whether any challenge to the conditional decree as was granted by the learned Judge Family Court, Rawalpindi would be available within the meaning of section 14 of West Pakistan Family Courts Act, 1964 or only the Constitutional remedy within the meaning of Article 199 of Constitution of the Islamic Republic of Pakistan, 1973 is the remedy in given situation, the examination of section 14(2)(a) of West Pakistan Family Courts Act, 1964 and section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939 would be relevant. Both said Sections are reproduced herein below for ready reference:--

"Section 14(2)(a) of West Pakistan Family Courts Act, 1964: for dissolution of marriage, except in the case of dissolution of reasons specified in clause (d) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939,

Section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939: disposes of her property or prevents her exercising her legal rights over it, or"

4. This Court, in case of Naila Azmat v. Judge Family Court and others (1999 MLD 3090), has held that where dissolution is qualified by condition of certain consideration for `Khula' and unless that condition is fulfilled, dissolution would not attain finality and, as such, said decree is not hit by section 14(2)(a) of the West Pakistan Family Courts Act, 1964 and a person aggrieved of such condition can competently file an appeal under section 14 of the Act and also move application for condonation of delay, if there is any delay in filing of such appeal.

Earlier in case of Farzana Shaheen v. Malik Muhammad Iqbal (1989 MLD 3888), it was held that where marriage was dissolved by Family Court on the ground of `Khula', lady has a right to challenge the same before the appellate Court to the extent of conditions attached to such a decree regarding return of benefits to husband without impairing integrity of decree for dissolution of marriage.

Similar was the view of this Court in case of Bashira Bibi v. Muhammad Rafiq and 2 others (182 CLC 1200), when it was held that a decree for dissolution of marriage by way of

'Khula' on condition of return of 5-tolas gold ornaments or in alternative payment of Rs.3600 is appealable.

5. In the present case the position is almost same as in the reported cases noted hereinabove, thus it would be left at the discretion of the petitioner to challenge the condition attached with the decree for dissolution of marriage by filing an appeal in view of section 14 of the West Pakistan Family Courts Act, 1964, if so advised.

6. The learned counsel for petitioner has also raised his grievance that on 13-2-2014, no statement whatsoever was got recorded of the petitioner by the learned Judge Family Court and the petitioner was only asked to put her signature on a blank paper and subsequently whatever was recorded it was given the status of her statement, wherein the decree on the basis of 'Khula' was also included in her such statement.

7. I would not comment in detail on this aspect of the matter lest it may prejudice the case of either side before the appellate Court in case any appeal is filed against the order of learned Judge Family Court, however, the manner in which the signatures are shown to have been obtained on the stated statement of petitioner on 13-2-2014 do reveal that the same were not obtained after completion of writing on the relevant paper. However, it would be for the learned appellate Court to adjudicate upon such matter if in the appeal (if filed) this issue would be raised.

8. With these observations, the present petition is disposed of.

AG/S-52/L Petition disposed of.

2015 M L D 320
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD USMAN ARSHAD---Petitioner
Versus
VICE-CHANCELLOR B.Z.U., MULTAN and others---Respondents

Writ Petition No.3696 of 2013, decided on 11th March, 2014.

Constitution of Pakistan---
----Arts. 25 & 199---Educational institution---Discrimination in respect of previous and subsequent grading system for calculation of Cumulative Grade Point Average (CGPA) to MBA students of Bahauddin Zakariya University---Validity---Petitioners, at the time of admission, was fully aware of such grading system and on completion of his course of MBA had accepted the result without raising any objection or reservation---Discrimination could always be pleaded in between similarly placed persons, but in petitioner's case no one had been given any extra benefit from prevailing grading system and it was the previous and subsequent sessions for which the rules were revised---Plea of discrimination was not available to the petitioner in circumstances---Neither any substantive right of the petitioner

had been infringed, nor any jurisdictional defect had been pointed out---Petition was dismissed.

Muhammad Mudassir Hassan Samra for Petitioner.
Malik Muhammad Tariq Rajwana for Respondents.

ORDER

IBAD-UR-REHMAN LODHI, J.---The petitioner got admission in the respondent-University in MBA (I) (Morning) for the Session 2008-2010 and on completion of his course in 2010, he was awarded result card, showing that he obtained 2.99 Cumulative Grade Point Average (CGPA). After expiry of three years, this petition was filed by the petitioner, complaining some discrimination on the allegation that in the previous courses of MBA and also subsequent courses of MBA 3.00/4.00 CGPA was considered as equivalent to 65% whereas for the session of 2008-2010 in which the petitioner got admission, the grading system for calculation of CGPA was revised and 3.00/4.00 as CGPA was rendered equivalent to 70% marks.

2. The petitioner when got admission, he was fully aware of such grading system and accepted his such admission in session 2008-2010 and then on completion of his course in 2010 accepted the result without raising any objection or reservation. It does not lie in the mouth of the petitioner to plead discrimination, for, the discrimination can always be pleaded in between similarly placed persons. In the session of MBA for the year 2008-2010, no one has been given any extra benefit from prevailing grading system and it was the previous session and the subsequent session for which the rules were revised to the effect that 65% marks were considered equivalent to 3.00/4.00 CGPA, thus the plea of discrimination is not available to the petitioner. No substantive right of the petitioner has been infringed and the petitioner has failed to point out any jurisdictional defect in the impugned proceedings, the petition thus is not sustainable and is dismissed.

SA/M-90/L Petition dismissed.

2015 M L D 818
[Lahore]
Before Mahmood Ahmad Bhatti and Ibad-ur-Rehman Lodhi, JJ
ARSLAN ALI---Petitioner
versus
UNIVERSITY OF HEALTH SCIENCES through Vice-Chancellor and others---Respondents

Writ Petition No.13935 of 2013, decided on 12th December, 2013.

(a) Prospectus for Government Medical and Dental Institutions of Punjab for the Session 2013-14---

----R. II, Cls. b, c & f---Constitution of Pakistan, Art. 199---Constitutional petition---Educational Institution---Admission in M.B.B.S. programme against reserved seats for

disabled students---Criteria---Ineligibility of candidate for disability seats due to findings of Medical Board constituted by the Chairman Admission Board---Scope---Aggregate of petitioner was 81.0762% and his name was not included in the list of selected candidates against the seats reserved for disabled candidates---Petitioner was shown at serial No. 12 of the list showing the candidates not found eligible for disability seats---Petitioner was not found a disabled person in view of Medical Board constituted by the Chairman Admission Board and twenty other candidates were found eligible for admission on the basis of medical examination conducted by a Board constituted by the Chairman Admission Board---Student placed at serial No. 1 of the list of successful candidates had obtained aggregate of 88.0260% whereas last one placed at serial No. 20 of the said list obtained the aggregate of 68.6662%---Petitioner should have been placed after serial No. 7 in the said list but he was ignored in the merits and his name was included in the list of candidates not eligible for disability seats on the findings of Medical Board constituted by the Chairman Admission Board which did not find the petitioner having suffered from any disability---Petitioner provided a certificate issued by Social Welfare Woman Development and Bait-ul-Maal (Provincial Council for the Rehabilitation of Disabled Persons) in Government of Punjab wherein he was assessed by the Board constituted to adjudge the disability---Disability of petitioner shown in the said certificate was "Left Ankylosed Elbow" which was permanent in nature---Clauses b & c of Rule II of Prospectus for Government Medical and Dental Institutions of Punjab for the Session 2013-14 were inter-contradictory as clause-b provided that the candidate was required to attach a certificate from a government certified specialist about his disability which only would make him eligible to apply against the reserved seat whereas clause-c had provided that a Medical Board constituted by the Chairman Admission Board would make final decision about the eligibility against the said seats---Candidates were required only to submit a certificate issued by a specialist working in Government Hospital when applications were invited from them and role of Medical Board was restricted only to the extent that it should verify such disability---Re-assessment of disability or nature thereof had no where been provided within the competence of Medical Board constituted by the Chairman Admission Board---Once the Board in the Government Hospital had (already) assessed the type of disability and nature thereof, the same should have been considered sufficient compliance of the required criteria---No final opinion of the Medical Board constituted by the Chairman Medical Board with regard to permanent disability of the petitioner had been disclosed---Petitioner, in circumstances, was entitled to be given admission in M.B.B.S. programme in Public Sector Medical Institutions for the session 2013-14---Respondent-University was directed to arrange admission of the petitioner against the seats reserved for disabled students forthwith however it was clarified that students already admitted should not be disturbed or dislodged---Constitutional petition was accepted in circumstances.

(b) Prospectus for Government Medical and Dental Institutions of Punjab for the Session 2013-14---

---R. II, Cl. f---"Disability"---Meaning---"Disability" was a physical impairment that had a substantial and permanent adverse effect on candidate's ability to carry out normal day-to-day activities and put him at disadvantage as compared to a normal person for acquiring education before entering a medical institution.

(c) Prospectus for Government Medical and Dental Institutions of Punjab for the Session 2013-14---

----R.II, Cl. f---"Disability" 'substantial' and 'permanent'---Meaning---Substantial disability was neither minor nor trivial whereas permanent disability was such which would affect permanently the rest of life of the person's life.

(d) Prospectus for Government Medical and Dental Institutions of Punjab for the Session 2013-14---

----R. II, Cl. f---"Normal day to day activities"---Meaning---"Normal day to day activities" would include the mobility and manual dexterity.

(e) Constitution of Pakistan---

----Art. 37 (a) & (c)---Promotion of social justice and eradication of social evils---Scope---Every organ and Authority of the State and each person performing functions were bound to act in accordance with the Principles of Policy---State was bound to promote special care, the educational and economic interests of backward classes and areas and to make technical and professional education equally accessible to all on the basis of merit.

Ahmed Nadeem Khan Chandia for Petitioner.

M.A. Hayat Haraj for Respondents Nos.1 to 3.

ORDER

IBAD-UR-REHMAN LODHI, J.---The petitioner was amongst those applicants, who applied for their admission to M.B.B.S programme in Public Sector Medical and Deftal Institutions of the Punjab for the Session 2013-14 against the seats reserved for Disabled Candidates. In the public notice inviting such applications in addition to other conditions with regard to disabled candidates by means of clause-2(i) under the head of "Procedure for submission of admission forms", it was provided that disabled candidates shall submit a certificate issued by a specialist, working in Government Hospital describing the nature of disability, which shall be verified by a Medical Board. The petitioner was found eligible to sit in the entrance examination held under the control of University of Health Sciences, Punjab.

2. The academic carrier of the petitioner can be summed up as follows:--

Matric 995/1050

F.Sc 944/1100

Entry Test 820/1100

and thus the aggregate percentage of the petitioner came to 81.0762%.

2. By means of list of selected candidates against the seats reserved for disabled candidates for the Session 2013-14, issued on 16-11-2013, the petitioner's name was not

included, rather in another list showing the candidates not found eligible for disability seats for the Session 2013-14, the petitioner was shown at Sr. No.12. On probe, it transpired that the petitioner was not found a disabled person in view of the Medical Board constituted by the Chairman Admission Board and thus twenty other candidates were found eligible for admission in the said academic session on the basis of the medical examination conducted by a Board constituted by the Chairman Admission Board. The candidate placed at serial No.1 of the list of successful candidates shown to have obtained aggregate of 88.0260%, whereas, the last one placed at serial No.20 of the said list was shown to have obtained the aggregate of 68.6662%. Keeping in view the aggregate percentage of the petitioner, he should have been placed after serial No.7 in the said list but ignoring his such merit, he was included in the list of the candidates not eligible for disability seats in the said session simply on the stated findings of the Medical Board constituted by the Chairman Admission Board which statedly did not find the petitioner having suffered from any disability.

3. The petitioner provided along with his application form for getting admission in M.B.B.S programme in Public Sector Medical and Dental Institutions of the Punjab for the Session 2013-14, a disability certificate issued on 8-10-2013 by Social Welfare Women Development and Bait ul Maul (Provincial Council for the Rehabilitation of Disabled Persons) in Government of the Punjab wherein the petitioner was assessed by the Board particularly constituted to adjudge the disability. Type of disability in the said certificate was shown as "Left Ankylosed Elbow" whereas nature of disability was shown as `Permanent'.

4. The learned counsel appearing for University of Health Sciences has placed much reliance on the Rules and Regulations for Various Categories of Seats provided in the Prospectus for Government Medical and Dental Institutions of the Punjab for the Session 2013-14. Rule (ii) deals with the seats for disabled-students. The relevant portion of the said rules are re-produced herein below for ready reference:-

(ii) Seats for Disabled Students:

(a) The admission against these seats shall be carried out strictly on merit from amongst the Punjab-domiciled candidates who apply for these seats and who have already appeared in the Entrance Test for the session and passed HSSC/F.Sc. (Pre-Medical) or equivalent examination with a minimum of 60% (660/1100) marks.

(b) The candidates shall have to attach a certificate from a government certified specialist about the nature of his/her disability. Such certificate, however, will only make him/her eligible to apply against the reserved seats.

(c) A Medical Board constituted by the Chairman Admission Board will make final decision about the eligibility of the candidate for admission against the reserved seats.

(d) The Medical Board shall consist of following committees each comprising 3 to 5 experts in the relevant field:

(i) Physical Disability Committee

(ii) Visual Disability Committee

(iii) Hearing Disability Committee

(f) Disability for the purpose of admission to medical and dental institutions is defined as a physical impairment that has a substantial and permanent, adverse effect on candidate's ability to carry out normal day-to-day activities and puts him/her at disadvantage as compared to a normal person for acquiring education before entering a medical or dental institution. Here:

* 'substantial' means neither minor nor trivial

* 'permanent' means that the effect of the impairment is likely to last for the rest of the person's life

* 'normal day-to-day activities' include mobility, manual dexterity, speech, hearing, seeing, understanding danger, and memory.

(g) The threshold of disability will be judged by the Medical Board, according to a structured criterion.

Clauses b and c of the above rules are inter-contradictory, for, clause-b provides that the candidate is required to attach a certificate from a government certified specialist about his disability which only makes him 'eligible' to apply against the reserved scat whereas clause-c provides that a Medical Board constituted by the Chairman Admission Board will make the final decision about the 'eligibility' of the candidate for admission against the reserved seats. This duplication of exercise is beyond understanding. Further it is noted with great concern that when applications were invited from the candidates, they were required only to submit a certificate issued by a Specialist working in Government Hospital and the role of Medical Board was restricted through that public notice only to the extent that it shall verify such disability. Re-assessment of disability or nature thereof has no where been provided as a job within the competence of the Medical Board constituted by the Chairman Admission Board and once the Board in the Government of Punjab has already assessed the type of disability and nature thereof, the same should have considered sufficient compliance of the required criteria. Clause-f of the above reproduced Rules is of much significance in this regard, which provides that a disability for the purpose of admission to Medical Institutions is defined as a physical impairment that has a substantial and permanent adverse effect on candidate's ability to carry out normal day-to-day activities and puts him at disadvantage as compared to a normal person for acquiring education before entering a medical institution. The term 'Substantial' with reference to such disability has been explained as neither minor nor trivial whereas term 'permanent' has been explained with reference to such disability as having effect of the impairment likely to last for the rest of the person's life. The term 'normal day-to-day activities' has been defined so as to include the mobility and manual dexterity.

5. It is not disclosed as to what is the final opinion of the Medical Board constituted by the Chairman Admission Board with regard to the permanent disability of the petitioner and how the petitioner as not classified as a disabled person by the said Board ignoring the above quoted rules.

6. The people of Pakistan through their representatives in National Assembly adopted and enacted the Constitution in 1973. Chapter-2 where of sets out the principles of policy and it is the responsibility of each organ and authority of the State and of each person performing functions to act in accordance with the said principles in so far as they relate to the function of the organ or the authority. By means of Article 37(a), it is the duty of the State to promote with special care, the educational and economic interests of backward classes and area, whereas by means of clause-c it is the duty of the State to make technical and professional education generally available and higher education equally accessible to all on the basis of merit. In view of the principle laid down in case of 'Haji Nizam Khan v. Additional District Judge, Layallpur and others' (PLD 1976 Lahore 930), any organ of the State can be directed by an order of the Court to observe the Principles of Policy in their respective spheres of working.

7. A disabled student, brilliant otherwise with a hope in his eyes to have a bright future carrier is entitled to be considered a member of a "backward class" and thus for a special treatment instead of creating hurdles in his way, we must locate the opening of new venues for such a brilliant student who by overcoming his such permanent disability has competed with the normal and able students and obtained a much higher aggregate than that of a number of other students, who were accommodated for such professional education. The petitioner is victim of a colourable exercise on the part of the Admission Board constituted by the Chairman Admission Board and a strange power was exercised by such Board by reassessing his eligibility of being a disabled candidate or otherwise ignoring the one process through which he was already determined by a competent Board as permanent disabled constituted by the Government of Punjab. The Board even failed to assign any reason of its reassessment about the eligibility of the petitioner for admission against the reserved seat.

8. We must inculcate some confidence in our new generation with regard to their future. We must look into our inner sides and to get answer from our conscience as to what is going to be delivered as a legacy to the future of Pakistan, disappointment or a ray of hope. We have seen the uncertainty about his future in the eyes of the petitioner, a representative of our that generation which is going to hold the affairs of Pakistan in the future. We have to convert such uncertainty into a hope and certainty. That cannot be achieved through such hyper technical and bureaucratic obstacles being introduced in our different spheres of life.

9. The petitioner, in our considered view not only on the basis of his permanent disability but also on account of his achieved merit is entitled to be given admission in M.B.B.S. programme in Public Sector Medical Institutions of the Punjab for the Session 2013-14. As such by allowing this writ petition, we direct the respondents to arrange admission of the petitioner against the seat reserved for disabled student for the Session 2013-14 forthwith. It is further made Clear that by granting admission to the petitioner, those students from Serial Nos.1 to 20 in the list of selected candidates against seats reserved for disabled students who

have already admitted in the said programme against seats reserved for disabled students for the Session 2013-14 shall not be disturbed or dislodged.

AG/A-27/L Petition allowed.

2015 M L D 878
[Lahore]
Before Muhammad Khalid Mahmood Khan and Ibad-ur-Rehman Lodhi, JJ
Sh. MUHAMMAD MAHMOOD and 2 others---Appellants
versus
KALEEM-UD-DIN and 6 others---Respondents

Regular First Appeals Nos.540 and 556 of 2006, heard on 29th May, 2014.

Partition Act (IV of 1893)---
----S. 4---Suit for partition---Properties mentioned in the plaint were joint between the parties to the suit---Preliminary decree passed by the Trial Court determining the shares of parties and identifying the joint properties was in accordance with law which was maintained---Local commission would see the partiability or otherwise of the joint properties according to shares of legal heirs of the deceased---Appeal was dismissed in circumstances.

Waqar-ul-Hassan Butt for Appellants.
Agha Nayyar Latif for Respondent.
Date of hearing: 29th May, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This appeal as also RFA No.556 of 2006 are to be disposed of together, as judgment and decree dated 19-7-2006 (the date "21-9-2006" was signed by the learned trial Judge in the decree-sheet), has been challenged in both the appeals.

2. A suit for partition was filed by respondent No.1 on 19-6-1999, seeking partition of joint properties, detail hereunder:--

(i). House Nos. 156, 157, 158, 159, situated in Block-C, Gulshan-e-Ravi, Lahore.

(ii) Shop No.386, situated at Pakistan Cloth Market, Lahore.

(iii) House No.F-2397, situated in Chuna Mandi, Lahore.

(iv) Shop No.49, Pakistan Cloth Market, Lahore (3/4 share).

(v) 1/6th Commercial and residential share of Chamber Lane Road, Lahore.

claiming that Sheikh Iqbal Hussain, who at the time of his death, left the suit properties as his estate was survived through the parties to the partition suit, being legal heirs of deceased, who were entitled to their shares i.e. 1/6th to each son of Sheikh Iqbal Hussain, whereas, 1/12th to each daughter of said Sheikh Iqbal Hussain.

3. A Punchayat was also referred as has been held with regard to the partition of the estate of Sheikh Iqbal Hussain amongst the parties to the suit and a writing arrived at by that Punchayat was also placed on record, whereby, rights of all the legal heirs of deceased Sheikh Iqbal Hussain were accepted by each of them.

4. Defendants Nos. 1, 4 and 5 contested the suit by filing their written statement and also pleaded collusion of the plaintiff with defendants Nos.2, 3, 6 and 7. Regarding House Nos.157 and 159, situated in Gulshan-e-Ravi, Lahore, defendants Nos.1 and 4 claimed to have purchased by their own capital and, as such, according to their version, these houses were out of the joint pool of the estate left by Sheikh Iqbal Hussain. Regarding other properties, only possession of some defendants was pleaded, but without any exclusive title thereof.

5. The learned trial court, after trial, passed a preliminary decree on 19-7-2006, whereby the respective shares of the parties to the suit were determined and joint properties were identified by exclusion of the property noted as against 2(iv) in the plaint and a local commission was appointed to give a report, after inspection of the suit properties, subject-matter of the partition, not only with regard to their market value but also their partability or otherwise.

6. Defendants Nos.1, 4 and 5, who contested the suit, challenged the preliminary decree as was passed by the learned trial court by means of the present appeals.

7. The plaintiff or other defendants, however, neither has filed any separate appeal or cross-objection challenging the exclusion of property mentioned at serial No.2(iv) in the plaint from the effect of preliminary decree passed by the learned trial court.

8. In support of the appeals, the learned counsel for the appellants has reiterated his version as was taken in the written statement, whereas, the preliminary decree has been defended by the respondents.

9. Ex.P.1 is a document, which was admittedly written by the elder of the family, namely, Haji Abdul Ghafoor, wherein all the joint properties, left by Sheikh Iqbal Hussain, were subject-matter of the considerations and deliberations made by the said Punchayat, wherein, it has specifically been noted that all the five brothers have consented to the partition of the properties mentioned therein. This document contains signatures of all the legal heirs of deceased Sheikh Iqbal Hussain, including the contesting defendants; however, they have tried to wriggle out from their signatures over the said document by stating that their

signatures were obtained on a blank paper, whereas, neither, from any other evidence nor from perusal of Exh.P.1, such stance of the said defendants got any support.

10. PW.1-Saeed Ahmad, when appeared in the witness box, was cross-examined by the contesting defendants and during that process, on a question put by the cross-examiner, said witness made a statement that for purchase of the suit properties, father of the parties to the suit i.e. Sheikh Iqbal Hussain, provided all finances. Such stance brought on record during process of cross-examination is meaningful and depicts the case of the defendants; therefore, it would be deemed as an admission by the defendants in regard to each property, subject-matter of the suit. It was Sheikh Iqbal Hussain, predecessor-in-interest of the parties to the suit, who invested and, thus, after his death, same became a part of the joint pool of the properties, to be partitioned amongst the parties to the suit according to their respective shares.

11. Mohammad Mahmood-defendant No.1 appeared as DW.4 and in acceptance of Exh.P.1, findings of the Punchayat, deposed as under:--

12. Sheikh Shabbir Ahmad, defendant No.3, although filed a conceding written statement, but subsequently by resiling from the said concession, appeared in the witness box as DW.5 and made a statement completely in negation to his version taken in the written statement.

According to the principles of pleadings and evidence, his such stance, which is violative to his own pleadings, cannot be looked into, even after resiling from his stance taken in the written statement, when he appeared as DW.5 has made some disclosures, which are relevant. He admitted that the elders, who assembled as a Punchayat got the signatures of the parties on a blank paper and Ex.P.1 was admitted as that of such blank paper. He further stated that the members of said Punchayat reduced their decision on some other paper, which will be produced later on (however it is a fact that no other paper was produced by any of the defendants). With regard to the commercial property, this witness admitted in clear terms that the same was still in the name of his father.

13. From the evidence available on record, it is thus clear that properties mentioned at serial No.2(i), 2(ii), 2(iii), and 2(v) are joint in nature in between the parties to the suit and the preliminary decree passed by the learned trial court determining the shares of the parties and identifying the joint properties, has been passed in accordance with law and the appeals filed thereagainst have no merits. The same are, therefore, dismissed by maintaining the preliminary decree.

14. The learned trial court is directed to proceed with the matter from the stage, when it was stopped and a local commission be directed to proceed with the directions, as were noted in the impugned judgment.

15. We are going to modify the reference noted at serial No.2, whereby the local commission was directed to report as to whether the properties, which were held as joint properties amongst the parties to the suit, were liable to be partitioned or not. The learned trial court has, itself, held that the said properties were liable to be partitioned and it was not

the job of the local commission to determine the liability of the properties to be partitioned. The local commission is to see the partability or otherwise of the joint properties according to their respective shares; therefore, such reference is modified and would be read as under:-

"Whether the properties mentioned-above are partable or otherwise and if partbale, the mode of partition be also suggested along with the plan according to shares of the parties".

16. With these observations, both the appeals stand dismissed.

AG/M-328/L Order accordingly.

2015 M L D 1459
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Khawaja BASHIR AHMED AND SONS (PVT.) LTD., MULTAN---Petitioner
versus
Messrs MARTRADE SHIPPING AND TRANSPORT, GmbH through Brokers/Local Agents and another---Respondents

C.R. No.260 of 2007, heard on 11th March, 2014.

(a) Civil Procedure Code (V of 1908)---
----O.I., R.10 & O.XXIII, Rr.1(2) & 2(b)---Pending suit for permanent injunction, an application was moved with two distinct prayers i.e. one for deletion of one of the defendants from the array of defendants and the other for withdrawal of the suit with permission to file a fresh suit---Trial Court acceded to the request of applicant/petitioner for deletion of the said defendant from the array of the parties to the suit, but dismissed the application seeking permission to withdraw the suit with further permission to file a fresh one---Relief claimed for in the application could not be considered as one and indivisible---Application moved for withdrawal of suit with permission to file fresh one was completely silent as to any justification, reason or formal defect which ought to be removed by filing a fresh suit and which were not possible to be introduced by way of amendment in already pending plaint---Under O.XXIII, R. 2(b), C.P.C., the existence of sufficient grounds is condition precedent for allowing the plaintiff to institute a fresh suit and the application did not disclose any justification for extending permission to the petitioner to file a fresh suit on the subject matter---Order of the Trial Court was declared unexceptionable---Civil Revision was dismissed in the circumstances.

(b) Civil Procedure Code (V of 1908)---
----O.XXIII, R.2(b)---Withdrawal of suit with permission to file fresh suit---Condition precedent---Existence of sufficient grounds is condition precedent for allowing the plaintiff to institute a fresh suit.

Malik Muhammad Tariq Rajwana for Petitioner.
Muhammad Khalid Farooq for Respondents.

Date of hearing: 11th March, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The revision petition is still at pre-admission stage but on account of long pendency as the same has been filed in the year 2007, with the concurrence of learned counsel for the parties, this revision petition is being heard as Pacca case today.

2. In a suit for permanent injunction which was pending before the learned trial Court, the present petitioner moved an application under Order XXIII, Rule 1, C.P.C. read with Section 151, C.P.C. but in view of contents of the same, it contained two distinct prayers, one for deletion of defendant No.2 from the array of defendants and that was to be considered an application under the provisions of Order I Rule 10, C.P.C., whereas the other prayer was made to withdraw the suit with permission to file a fresh one. The learned trial Court vide order dated 15-2-2007 acceded to the request of the applicant/petitioner for deletion of defendant No.2 from the array of the parties to the suit but dismissed the application seeking permission to withdraw the suit with further permission to file a fresh one.

3. The learned counsel for petitioner, by placing reliance on the case of Kulsoom and another v. Trustees of Port of Karachi through Chairman K.P.T., Karachi and 2 others (2002 SCMR 718) and Raja Bashir Ahmad Khan v. Azad Government and another (1998 CLC 213) has argued that the learned trial Court was supposed to either reject the application in toto or accept in the same manner. The piecemeal disposal is not in accordance with law.

4. In both the reported matters, he application moved under the provisions or Order XXIII Rule 1, C.P.C. was partly accepted by the learned trial Court by permitting the withdrawal of the suit but did not accede to the remaining prayer whereby the permission to the fresh one was also sought for and the Hon'ble Courts have held that for the reasons that the application was one and indivisible, the learned trial Court could not accept one prayer and reject the other.

5. In the case in hand, the position altogether is different. The petitioner in the application has made two distinct prayers, one under Order I Rule 10, C.P.C. and the other one under Order XXIII, Rule 1, C.P.C. The prayer as a whole within the meaning of Order I Rule 10, C.P.C. was allowed whereas the other one under Order XXIII, Rule 1, C.P.C. was rejected in its totality. The relief claimed for in the application cannot be considered as one and indivisible. The application moved for withdrawal of suit with permission to file fresh one is completely silent as to any justification, reason or formal defect which ought to be remove by filing a fresh suit and were not possible to be introduced by way of amendment in already pending plaint. In view of Order XXIII, Rule 2(b) C.P.C. the existence of sufficient grounds is condition precedent for allowing the plaintiff to institute a fresh suit and as noted earlier the application discloses no justification for extending permission to the petitioner to file a fresh suit on the subject matter. The learned trial Court was thus right in refusing the permission to the petitioner to withdraw the suit with permission to file a fresh one and thus court finds no exception warranting interference in the well reasoned order of the learned

trial Court. No illegality has been attributed to the learned trial Court while passing the impugned order.

6. For what has been discussed above, this petition having no force is therefore dismissed.

SA/B-8/L Petition dismissed.

2015 M L D 1745
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD TUFAIL---Petitioner
versus
ADMINISTRATOR, TMA, MURREE and 2 others---Respondents

Writ Petition No.871 of 2014, decided on 8th April, 2014.

Punjab Local Government Ordinance (XIII of 2001)---
----Ss. 141, 142, 143, 145 & Sixth Sched. Serial No.72---Constitution of Pakistan, Art. 199---Constitutional petition---Insanitation of seepage and disposal of water from the sewarage line of the petitioner's Guest House---Sealing of premises---Notice, service of---Scope---Tehsil Municipal Administration sealed the premises of petitioner on account of insanitation of seepage and disposal of water from the sewerage line of the same---Validity---Notice requiring owner or occupier of any building to proceed in view of the requirement raised by Municipal Administration was sine qua non for initiation of any action---Sealing of premises had nowhere been provided as a competent act to be taken by local government---No power had been provided to the local government to take any step in case of failure on the part of owner or occupier of a building to comply with the directions contained in Serial No. 72(1)(a)(b) & (c) of Sixth Schedule to Punjab Local Government Ordinance, 2001---Sealing of premises had nowhere been provided either by way of punishment or by way of any remedial step in consequence of alleged nuisance constituted by the owner or occupier of a building---No material was on record to establish that notice was served upon the petitioner---Action of sealing of premises had been taken without issuance of notice to the petitioner which was result of business rivalry---Impugned act was without lawful authority having no legal effect---Constitutional petition was accepted in circumstances---Municipal authorities were directed to de-seal the premises of petitioner forthwith.

Tariq Mehmood Mirza for Petitioner.
Masood Ahmad Abbasi, Legal Advisor for Respondents.
Sami-Ullah, Town Officer (Regulation), Murree with Shaukat Abbasi Clerk.

ORDER

IBAD-UR-REHMAN LODHI, J.---The action by the respondents, whereby, the Guest House of the petitioner, on a land measuring 2-kanals, and 4-marlas, situated at Mauza Charhan, Tehsil Murree, under the name of 'Valley View Guest House' near the Chair Lift

New Murree, was sealed on 14-9-2013, has been challenged through this writ petition, and the respondents were issued notices and, particularly, the Administrator, TMA Murree (respondent No.1) was ordered to appear in person alongwith complete record showing justifica-tion of sealing of the premises of the Guest House, noted herein-above.

2. Town Officer (Regulation) from Tehsil Municipal Administration, Murree, appeared along with record with an explanation that the Administrator, TMA Murree/Assistant Commissioner, Sub-Division, Murree, is on a during service course at Lahore. The learned Legal Advisor, as also the Officer appearing on behalf of the respondents have reiterated their version on account of the insanitation of seepage and disposal of the water from the sewerage line of the petitioner's Guest House and justified the sealing of petitioner's Guest House.

3. According to the respondents, initially, notices were issued on 16-8-2013 and 20-8-2013, requiring the petitioner to rectify such offending acts; otherwise, there was a threat of punitive action, particularly, in view of Eighth Schedule read with section 141 (Sr.Nos.10 and 22) of the Punjab Local Government Ordinance, 2001.

4. The learned Legal Advisor representing the respondents has argued first with reference to Section 72 of the Punjab Local Government Ordinance, 2001, which reads as under:--

"Insanitary buildings and lands.---(1) The concerned local government may, by notice, require the owners or occupier of any building or land which is in insanitary or unwholesome state:--

(a) to clean or otherwise put in it in a proper state;

(b) to make arrangements to the satisfaction of the local government for its proper sanitation; and

(c) to limewash the building and to make such essential repairs as may be specified in the notice.

(2) If in the opinion of a local government any well, tank, reservoir, pool, depression, or excavation, or any bank or tree, is in a ruinous state or for want of sufficient repairs, protection or enclosure a nuisance or dangerous to persons passing by or dwelling or working in the neighbourhood, the concerned local government may by notice in writing, require the owner or part-owner or person claiming to be the owner or part-owner thereof or, failing any of them, the occupier thereof to remove the same, or may require him to repair, or to protect or enclose the same in such manner as it thinks necessary; and, if the danger is, in the opinion of the concerned local government imminent, it shall forthwith take such steps as it thinks necessary to avert the same".

and tried to justify the action on the part of the respondents in sealing the Valley View Guest House.

5. Eighth Schedule (sic) provided under sections 141, 142, 143 and 145 of the Ordinance provide the punishment for different offences. From the notices, stated to have been issued by the respondents to the petitioner, it reveals that the respondents proceeded under Serial Nos.10 and 22 of Eighth Schedule. The offence noted against Serial No.10 of Eighth Schedule is to the effect that without the previous sanction of Tehsil Municipal Administration or, in a City District, the City District Government.- (i)-laying out a drain or altering any drain in a street or road; (ii)-connecting any house drain with a drain in a public street; (iii)-Drawing off, diverting or taking any water except with the permission required under this Ordinance, the maximum punishment provided for such offence is the imposition of fine of Rs.1,000. Similarly, the offence noted at serial No.22 of Eighth Schedule is watering cattle or animals, or bathing or washing at or near a well or other source of drinking water for the public, and the amount of fine to be imposed for such offence is Rs.500.

6. Before taking any action for the alleged offences, a notice as envisaged under Section 72 of the Ordinance (sic), requiring the owner or occupier of any building to proceed in view of the requirement raised by any Municipal Administration, is a sine qua non for initiation of any action. Subsection (1) of Section 72 of the Ordinance (sic) deals with the situation of insanitation or unwholesome state, requiring the owner or occupier of a building or land to clean or otherwise put in it in a proper state or to make arrangements to the satisfaction of the local government for its proper sanitation or to make such essential repairs, as specified in the notice. Initially, either in Section 72(1) of the Ordinance (sic) or with regard to the offences mentioned at serial Nos.10 and 22 of Eighth Schedule, sealing of the offending premises has nowhere been provided as a competent act, to be taken by any local government.

7. The learned Legal Advisor in order to justify the process of sealing, has placed much reliance on Section 72(2) of the Ordinance (sic), which ended with the words "it (local government) shall forthwith take such steps as it thinks necessary to avert the same", and the process of sealing has been termed as "such act" in view of the provisions of the Punjab Local Government Ordinance, 2001.

8. What has completely been ignored from subsection (2) of Section 72 of the Ordinance, is that the same deals with the situation, where in the opinion of a local government, any well, tank, reservoir, pool, depression or excavation, or any bank or tree, is in a ruinous state or for want of sufficient repairs, protection or enclosure a nuisance or dangerous to persons passing by. It is, thus, clear that the power of a Local Government to take any further necessary steps in order to avert the situation with which surroundings are affected, but such power has not been provided to a Local Government in view of subsection (1) of Section 72 of the Ordinance (sic) to take any necessary steps in case of failure on the part of the owner or occupier of a building to comply with the directions as noted in clauses (a) to (c) of Section 72(1) of the Ordinance (sic).

9. The learned Legal Advisor, during arguments, has placed on record copies of notices, stated to have been sent to the petitioner on 16-8-2013 and 20-8-2013, requiring the petitioner to arrange remedial steps to avoid the seepage of sewerage water.

10. Both the learned Legal Advisor as also the Town Officer have failed to demonstrate as to in what manner service of the petitioner with regard to the notices issued was effected. The officer from the Municipal Authority has verbally answered that the notices were sent through Inspector of Town Municipal Administration. From nowhere it is borne out as to which Inspector of TMA, Murree was assigned such duty to effect the service upon the petitioner on the notices, stated to have been issued by TMA. Also there is no indication from the record produced by the respondents today as to whether such notices were duly served upon the petitioner or any other person acting on his behalf; receipt of such notices by the petitioner is not, at all, proved; thus, no validity can be attached to such notices. The action of sealing of the premises of Valley View Guest House is, thus, established to have been taken without first issuance of notices to the petitioner.

11. Even otherwise, as per the showing of the respondents, the petitioner was proceeded against in view of the offences mentioned at Serial Nos.10 and 22 of Eighth Schedule. Maximum punishment for both such offences is imposition of fine amounting to Rs.1000 and Rs.500, respectively. The sealing of the premises is nowhere provided either by way of punishment or by way of any remedial step in consequence of the alleged nuisance constituted allegedly by the owner or occupier of a building.

12. Action of sealing of the premises, prima facie, seems to be a result of business rivalry, as it is borne from the record that the action, under challenge, was initiated on the asking of Tourism Development Corporation Punjab (TDCP), which is maintaining their own Rest Houses, adjacent to the petitioner's Rest House.

13. From whatever angle the present case is analyzed, the action on the part of the respondents in sealing the premises of Valley View Guest House is an act, which is without lawful authority and of no legal effect. The same is declared as such by accepting this writ petition with a further direction to the respondents to de-seal the premises of petitioner's Valley View Guest House forthwith.

ZC/M-141/L Petition allowed.

2015 P Cr. L J 166
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MAJID KHAN---Petitioner
Versus
The STATE---Respondent

Criminal Revision No.238 of 2012, heard on 27th February, 2013.

Juvenile Justice System Ordinance (XXII of 2000)---
---Ss. 7 & 2(b)---Determination of age---Ossification test---Accused moved an application seeking declaration to be a juvenile at the time of commission of crime which was dismissed

by the Trial Court after an inquiry and ossification test conducted by the Medical Board---Contention of the accused was that he was less than the age of eighteen years at the time of commission of crime---Validity---Accused applied for a declaration of his being a juvenile and he himself suggested the ossification test through a Medical Board and the same had been termed by him as a mandatory step within the meaning of S. 7 of the Juvenile Justice System Ordinance, 2000---Medical Board declared the accused as 22-23 years of age which had not been challenged by him and he had never demanded re-examination by creating doubts on opinion of Medical Board---Accused was not a child when occurrence took place within the meaning of S. 2(b) of the Juvenile Justice System Ordinance, 2000 and findings of the Trial Court were justified and did not call for any interference---Revision was dismissed.

Muhammad Anwar v. Muhammad Suffyian and another 2009 SCMR 1073 and Sultan Ahmed v. Additional Sessions Judge-I, Mianwali and 2 others PLD 2004 SC 758 rel.

Malik Waheed Anjum for Petitioner.

Muhammad Usman Mirza, Deputy Prosecutor-General Punjab for the State.

Date of hearing: 27th February, 2013.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Through this criminal revision, Majid Khan-petitioner challenges the findings of the learned trial Court dismissing the application moved on his behalf seeking declaration to be a juvenile at the time of commission of crime. The occurrence took place on 20-11-2010 and when the present petitioner along with two others appeared before the learned trial Court facing trial of the said offence, an application under section 7 of the Juvenile Justice System Ordinance, 2000, was moved on behalf of the present petitioner stating therein that he was less than the age of eighteen years at the time of the alleged commission of crime and thus, he be declared as a juvenile. This application was supported with Birth Entry of the petitioner and School Leaving Certificate.

2. The learned trial Court ordered an inquiry and as one step of such inquiry, the matter was referred to a Medical Board, which Board after conducting of ossification test rendered a unanimous opinion with regard to the age of the petitioner and he was declared 22/23 years of age. In addition to such medical test, learned trial Court has also examined the witnesses on that limited question including the Principal of Standard Public School, Railway Workshop Road, Rawalpindi and a Secretary from Union Council and after such inquiry, the application moved on behalf of the petitioner for treating him as a juvenile was dismissed by means of the impugned order dated 12-9-2012, which is under challenge in the present revision petition.

3. Learned counsel for the petitioner has placed much emphasis on the documents viz. Birth Entry in the Union Council and School Leaving Certificate and has argued that such

entries must be given preference to the unanimous opinion of Medical Board conducted ossification test of the petitioner and insisted that he be declared a juvenile.

4. Learned Deputy Prosecutor-General for the State has opposed the petition and argued that it is a medical test which should have been given preference and when report of such Board has not been challenged and the petitioner has never demanded any re-examination, there is no justification in asking to completely ignore such findings of ossification test or to give preference to the documents i.e. Birth Certificate and School Leaving Certificate.

5. It is a fact that the petitioner applied for a declaration of his being a juvenile and in Para.4 of his petition moved under section 7 of the Juvenile Justice System Ordinance, 2000, he himself suggested the ossification test through a Medical Board and the same has been termed by the petitioner as a mandatory step within the meaning of section 7 ibid. It is also noteworthy that the findings arrived at by the Medical Board declaring the petitioner as 22-23 years of age on 7-7-2011 have nowhere been challenged by him and he has never demanded any re-examination by creating doubts on such opinion of Medical Board.

6. The Hon'ble Supreme Court of Pakistan in a case reported as "Muhammad Anwar v. Muhammad Suffyian and another" (2009 SCMR 1073) while dealing with the similar issue has held that the documents such like the Birth Entry or School Leaving Certificate could not be found to be conclusive proof of the age of concerned person as the same were not prepared on independent sources of information about the age of the person concerned but all such documents are creation of the information rendered by the concerned person himself or someone connected with him. The ossification test was done at the request of the petitioner himself and findings so arrived at by the Medical Board, as noted above, were never further challenged, thus, attained finality. Learned trial Court also recorded statements of the Principal of concerned school and Secretary of the Union Council as A.W.1 and A.W.2, respectively and what borne out from such statements is that School Leaving Certificate was got prepared on 22-4-2011 after commission of crime on the information extended either by the petitioner or any person connected with him. Secretary Union Council, when appeared in the witness-box as A.W.2, has stated that in the relevant column of his record the name of mid-wife was not written rather the word RGH (Rawalpindi General Hospital) was mentioned. This necessitated the summoning of C.W.1 a Record Keeper from RGH presently known as Benazir Bhutto Hospital who, after consultation of his record, has deposed that entry of Birth of the petitioner in the year 1993 is not available in the relevant record maintained by the Hospital. Accumulative effect of the documents and statements of the witnesses makes it a dubious matter to place any reliance on such documents.

7. Learned counsel for the petitioner has placed much reliance on a judgment reported as "Sultan Ahmed v. Additional Sessions Judge-I, Mianwali and 2 others" (PLD 2004 SC 758) and, according to learned counsel for the petitioner, the Hon'ble Supreme Court of Pakistan in such reported matter has nowhere mentioned that birth entries must be given preference to the medical test.

8. Learned counsel for the petitioner is badly mistaken, for, the Hon'ble Supreme Court of Pakistan in the reported matter has remanded back the matter to the learned trial Court for fresh decision in accordance with the provisions of section 7 of Juvenile Justice System Ordinance, 2000, including a reference to a competent Medical Board for examination of the accused regarding his age and further held whenever a question of the age of an accused person is raised or arises, he must be subjected to a medical test unless strong reasons existed or could be offered for not doing so.

9. In view of the above, when occurrence took place on 20-11-2010 the petitioner was not a child within the meaning of section 2(b) of Juvenile Justice System Ordinance, 2000, thus, findings arrived at by the learned trial Court by means of the impugned order dated 12-9-2010 are justified and do not call for any interference in revisional jurisdiction of this Court.

10. Resultantly, I see no force in this petition, which is dismissed.

AG/M-127/L Petition dismissed.

2015 P Cr. L J 923
[Lahore]
Before Zafarullah Khan Khakwani and Ibad-ur-Rehman Lodhi, JJ
MAQSOOD YAMEEN---Petitioner
versus
R.P.O. MULTAN and others---Respondents

Writ Petition No. 10748 of 2014, decided on 29th October, 2014.

(a) Anti-Terrorism Act (XXVII of 1997)---
----Ss. 7 & 19---Penal Code (XLV of 1860), Ss. 302 & 324---Constitution of Pakistan, Art. 199---Constitutional petition---Word 'Government' appearing in S. 19 of Anti-Terrorism Act, 1997---Connotation---Joint Investigation Team, constitution of---Competence---Petitioner was accused of committing terrorism, qatl-i-amd and attempt to qatl-i-amd---Superintendent of Police (Investigation) constituted Joint Investigation Team to investigate the case---Validity---Within the meaning of S.19 of Anti-Terrorism Act, 1997, only Secretary, Home Department of Provincial government was authorized to pass order for constituting a Joint Investigation Team in case registered under the provisions of Anti-Terrorism Act, 1997---High Court declared order passed by Superintendent of Police (Investigation) to be illegal and without lawful authority and the same was set aside, as a result of which investigation carried out by Joint Investigation Team was also declared to be without lawful authority---High Court directed that investigation would be carried out by a police officer not below the rank of Inspector as per mandate of section 19 of Anti-

Terrorism Act, 1997, from the date when FIR was registered or by a Joint Investigation Team constituted by Government under S. 19 of Anti-Terrorism Act, 1997---Petition was allowed in circumstances.

(b) Maxim---

----A communi observantia non est recedendum---Meaning---When law requires a thing to be done in a particular manner, it has to be done in that manner and not otherwise.

Atta Muhammad Qureshi v. The Settlement Commissioner, Lahore Division, Lahore and 2 others PLD 1971 SC 61; Tehsil Nazim, T.M.A. Okara v. Abbas Ali and 2 others 2010 PLC 259 and Ignees Maria and another v. District Coordination Officer, District Bahawalnagar and 2 others 2012 PLC (C.S.) 772 rel.

(c) Void order---

----Subsequent orders---Status---If on the basis of a void order subsequent orders are passed or proceedings are taken the same must fall to the ground---Such subsequent orders or proceedings have a little legal foundation as void order on which they are founded.

Sardar Mehboob and Chaudhry Faqir Muhammad for Petitioner.

Aurang Zeb Khan, Assistant Advocate-General with Iftikhar Ahmad D.S.P. and Muhammad Yaqoob S.-I.

Ch. Qaiser Abbas for Respondent No.7.

Zia-ur-Rehman Randhawa for Respondents Nos.7 to 13.

ORDER

Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, Maqsood Yamin, petitioner has called in question validity of two orders dated 6-6-2014 both passed by Superintendent of Police (Investigation)/respondent No.3, vide which two Joint Investigation Teams one after the other were constituted to investigate case FIR No.124 dated 5-6-2014 under sections 302/324/148/149/109, P.P.C. read with section 7 of the Anti-Terrorism Act, 1997 registered at Police Station Dehli Gate, Multan.

2. Brief facts of the case are that one Abdul Sattar son of Muhammad Ramzan got registered the above mentioned FIR on 5-6-2014 at Police Station Dehli Gate, Multan. The S.P. Investigation/respondent No. 3 vide impugned orders dated 6-6-2014 constituted Joint Investigation Team to conduct investigation. During investigation of the said case the Joint Investigation Team opined that nominated accused persons were not found involved. The complainant also made a statement in favour of said nominated accused persons who were consequently declared innocent. The Joint Investigating Team further opined that the present petitioner, his brother and others were involved in the commission of crime. Feeling aggrieved of constitution of Joint Investigation Team the petitioner has challenged the orders dated 6-6-2014 of the Superintendent of Police (Investigation) through this petition.

3. Learned counsel for the petitioner while reiterating his grounds mentioned in the constitutional petition submits that the S.P. Investigation Multan/respondent No.3 was not

competent to constitute a joint investigation team rather it was the Provincial Government who could constitute a joint investigation team and that the impugned order passed by respondent No. 3 is alien to law and as such liable to be set aside. Further submits that the joint investigation team joined hands with the nominated accused persons and unlawfully declared them innocent and in their place the petitioner and his family members have been made scapegoat and even the complainant of the FIR has joined hands in glove with the said accused person and that the said joint investigation team is not backed by law as such any opinion formed by them is not sustainable under the law and is liable to be declared illegal.

4. Conversely, Learned Law Officer vehemently opposed the petition and submits that the orders dated 6-6-2014 were rightly passed by respondent No.3 and finally prayed for dismissal of this petition.

5. Report and parawise comments were called for from Superintendent of Police Investigation, Multan/respondent No. 3 which have been received and perused. It has been reported by the S.P. that since the offence punishable under the Anti Terrorism Act, 1997 was also committed, so he constituted a Joint Investigation Team vide his office letter No. 872-75/PA dated 6-6-2014 consisting on D.S.P./S.D.P.O. Dehli Gate and an Inspector of C.T.D. The S.P. further reported that investigation was not yet started by the said J.I.T. when the accused party submitted an application to the Addl. S.P. City Division, Multan requesting therein that the J.I.T. may be constituted under the headship of any Gazetted police officer outside the Circle Dehli Gate upon which the said Addl. S.P. reported the matter to him vide letter No. 2998-5A dated 6-6-2014 requesting that since there was high conflict between both the parties as such J.I.T. may be constituted under the supervision of any officer of the Investigation Center. Consequently, vide order dated 887/PA dated 6-6-2014 he constituted another J.I.T. comprising D.S.P. Investigation No. II, Multan and Inspector C.T.D., Multan.

6. As noted above, case FIR No.124 of 2014 was registered under the provisions of Pakistan Penal Code as also under section 7 of the Anti-Terrorism Act, 1997. Section 19 of the Anti-Terrorism Act, 1997 inter alia provides procedure to carry out investigation of a case registered under the said Act. Relevant portion of this provision is as follow:

"19. Procedure and powers of (Anti-Terrorism Court.)-The offences under this Act shall be investigated by a police officer not below the rank of inspector. The Government, if deems necessary may constitute a Joint Investigation Team (JIT) of the officers from other law enforcement agencies including intelligence agencies for assisting the investigation officer. The investigating officer or the JIT shall complete the investigation in respect of cases triable by the court within thirty working days and forward a report under section 173 of the Code directly to the Court."

(emphasis and underlining are ours)

A bare perusal of this provision of law would reveal that the offences punishable under this Act have to be investigated by a police officer not below the rank of inspector. It further unveils that keeping in view facts and circumstances of a case, if the Government feels

necessitated that the case should be investigated not by an inspector or higher police officer alone, it may constitute a Joint Investigation Team of the officers who shall not be from the police force but from other law enforcement agencies including intelligence agencies and the said JIT shall assist the investigating officer. Now the question arises as to whether the Superintendent of Police (Investigation) was a "Government" within the meaning of this provision of law and was competent to constitute a JIT and whether the members of JIT constituted by him were from the law enforcement agencies other than the Police Force.

7. Chapter 3 of the Constitution of Islamic Republic of Pakistan, 1973 deals with the formation of Provincial Governments. As per Article 129, the Provincial Government consists of the Chief Minister and Provincial Ministers, who shall exercise executive authority of the Province in the name of the Governor of the Province. Article 139 of the Constitution empowers the Provincial Government to make rules for the allocation and transaction of its business. The Punjab Government Rules of Business, 2011, framed under this provision of the Constitution deal with the business to be carried out by the Punjab Government. According to Rule 3(3) ibid the business of the Government shall be distributed amongst several Departments in the manner indicated in the Second Schedule. According to Rule 4, each department of the Provincial Government shall consist of a Minister, a Secretary and such other officers as the Government may nominate. Functions of the Minister have been given in Rule 6 whereas Rule 10 specifies the functions and duties of the Secretary and allocation of business has been given in Schedule-II. According to clause 57(lxiv) of the Second Schedule it is obligation/business of Home Department to deal with administration of the Anti Terrorism Act, 1997 and the rules framed thereunder on behalf of and in the name of the Government. The business of the Government of Punjab is carried out in accordance with the rules referred above and the Secretary of the concerned department is the person to pass any order on behalf of the Government. Thus, within the meanings of section 19 of the Anti-Terrorism Act, 1997, only the Secretary, Home Department of the Government of Punjab is authorized to pass an order for constituting a joint investigation team in the case registered under the provisions of the Anti-Terrorism Act, 1997.

8. There is nothing on record to show that the Home Department of the Government of Punjab has passed any order to constitute a Joint Investigation Team or for the sake of argument, has delegated powers to the Superintendent of Police (Investigation) to constitute a JIT. Thus by no stretch of imagination the Superintendent of Police (Investigation) can be called to be competent or authorized so as to constitute a Joint Investigation Team and the JIT constituted by him vide orders dated 6-6-2014 is not backed by law. There is chain of authoritative pronouncements of the superior courts based on the famous legal maxim, "A communi observantia non est recedendum" that when law requires a thing to be done in a particular manner, it has to be done in that manner and not otherwise. The Hon'ble Supreme Court in the case titled Atta Muhammad Qureshi v. The Settlement Commissioner, Lahore Division, Lahore and 2 others (PLD 1971 SC 61) observed as under:

"It is well settled that the neglect of the plain requirements of a statutory enactment, which prescribes how something is to be done, will invalidate the thing being done in some other manner if the enactement is absolute but not if it is merely directory. The real question

which thus arises for consideration is when an enactment is to be considered as absolute and when as merely directory?

It is not possible to lay down a general rule of universal application in this behalf but the one which is suggested by reported authorities in this connection is the affirmative or negative character of the language in which the provision is couched. If it is negative, that is to say, if the statute enacts that certain action shall be taken in a certain manner and in no other manner, it has been held that the requirements are absolute and that neglect to attend them will invalidate the whole procedure. If on the other hand, the language is affirmative, it may be considered as a directory provision.

Reference may also be made to the cases of Tehsil Nazim, T.M.A. Okara v. Abbas Ali and 2 others (2010 PLC 259) and Ignees Maria and another v. District Coordination Officer, District Bahawalnagar and 2 others (2012 PLC (C.S.) 772).

Bearing the principle quoted above in mind, we have reached the conclusion that section 19 of the Anti-Terrorism Act, 1997 is mandatory in character and places a restriction on certain police officers to investigate cases under the said Act and also makes it obligatory only for the Government, if it thinks appropriate, to constitute a joint investigation team and no other person or authority has been vested with such powers. Needless to mention here that if on the basis of a void order, subsequent orders are passed or proceedings are taken, the same must fall to the ground, as such subsequent orders or proceedings have as little legal foundation as the void order on which they are founded.

9. In view of above discussion and observation, this petition is accepted. The impugned order dated 6-6-2014 passed by respondent No.3 whereby he constituted Joint Investigation Team is declared to be illegal and without lawful authority and is consequently, set aside as a result of which the investigation carried out by the Joint Investigating Team is declared to be without lawful authority and is also set aside. The investigation shall be carried out by a police officer not below the rank of Inspector as per mandate of section 19 of the Anti-Terrorism Act, 1997 from the date when the FIR was registered, or by a Joint Investigation Team to be constituted by the Government under section 19 of the Act.

10. We have been informed that in different Districts of Province of Punjab joint investigation teams in the cases registered under the Anti-Terrorism Act, 1997 are being constituted without adhering to section 19 of the Act, so a copy of this judgment be sent to the Inspector-General of Police, Punjab for information and for onward transmission to his subordinates for future guidance.

MH/M-402/L Petition allowed.

2015 P Cr. L J 1066
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Mian TARIQ AZIZ---Petitioner
versus
The STATE and another---Respondents

Criminal Miscellaneous No. 15353-B of 2013, decided on 23rd June, 2014.

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

----S. 498---Penal Code (XLV of 1860), S.462-C---Oil and Gas Regulatory Authority Ordinance (XVII of 2002), Ss.2(iv), (xi), (xii), (xxxii), 22, 25 & 29---Explosives Act (IV of 1884), Ss.3 & 4---Gas (Theft Control and Recovery) Ordinance (II of 2014), S.5(7)---Tampering with auxiliary or distribution pipelines of petroleum, undertaking any regulated activity including stealing petroleum in contravention of Oil and Gas Regulatory Authority Ordinance, 2002---Pre-arrest bail, refusal of---Quashment of FIR, application for---Accused contended that Oil and Gas Regulatory Authority Ordinance, 2002 which was a special law would prevail over Penal Code, 1860, a general law and that after lapse of Gas (Theft Control and Recovery) Ordinance, 2014, proceedings under S.462-C, P.P.C. were illegal---Validity---Gas (Theft Control and Recovery) Ordinance, 2014 having been extended for a further period of 120 days, was still holding the field---Preamble of any law was key to ascertain the intention of legislature---Oil and Gas Regulatory Authority Ordinance, 2002 was promulgated to protect public interest and provide effective and efficient regulations for petroleum industry---Under Ss.22 and 23 of the Oil and Gas Regulatory Authority Ordinance, 2002 regulated activity was confined to the supply of natural gas, process of transmission, distribution and sale---"Licensee" and "consumer" were two different terms---Accused was a consumer but he wanted to gain the status of licensee in order to get benefits of various provisions of the Oil and Gas Regulatory Authority Ordinance, 2002---Section 25 of the Oil and Gas Regulatory Authority Ordinance, 2002 related to/applied to any "regulated activity" and a licensee could be held responsible for violation of any such offence including the stealing of petroleum---Consumer could not take the plea that applicability of the provisions of the Oil and Gas Regulatory Authority Ordinance, 2002 to his case barred application of Penal Code---Theft of gas was a pilferage of public property---Crime allegedly committed by accused was offence against entire society---Accused alleged political victimization but did not point out any political interference with the help of material available on record---Accused was connected with the crime which fell within the prohibitory clause of S.497, Cr.P.C.---In the absence of mala fides of prosecution, accused was not entitled to the extraordinary benefit of pre-arrest bail---Bail already granted was recalled.

(b) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----S. 25---Application of S. 25, Oil and Gas Regulatory Authority Ordinance, 2002---Section 25 of the Oil and Gas Regulatory Authority Ordinance, 2002 applied to any 'regulated activity' and a licensee could be held responsible for violation of any such offence including the stealing of petroleum.

Sardar Muhammad Latif Khan Khosa for Petitioner.

Sarfraz Ahmed Khatana, Deputy Prosecutor-General Punjab for the State with Asif, Inspector/I.O. with record.

Rana Zia-ul-Islam Manj for the Complainant-Gas Department.
Mian Irfan Akram, Deputy Attorney-General for Pakistan.
Muhammad Nasir Chohan, Assistant Advocate-General Punjab.
Zaheer Iqbal, XEN (SNGPL) and Bilal Asghar, Superintendent Engineer with Record.

ORDER

IBAD-UR-REHMAN LODHI, J.---Mian Tariq Aziz-petitioner seeks pre-arrest bail in case FIR No.697, dated 25-7-2013 offence under section 462-C, P.P.C. read with sections 3/4 of the Explosives Act, registered at police station Liaqat Abad, District Lahore. The petitioner has also filed Writ Petition No. 20344 of 2013 for quashment of the aforesaid FIR. Both these matters are being disposed of through this single order.

2. According to the allegations in the First Information Report, the petitioner is owner of an Industrial concern known as Tariq Aziz Box (Pak Board) situated at Peeco Road, Kot Lakhpat, Lahore, on receipt of information that in the said Industrial Unit, the natural gas was being theft and in order to accomplish that pilferage different apparatus were applied for getting additional and direct gas by bye-passing evaluating process installed in shape of meter. A raiding party including the technical experts conducted a raid and found the commission of offence under section 462-C, P.P.C. and found tampering with distribution pipeline of natural gas by applying different equipments at the site in order to facilitate the commission of such offence in an unauthorized and illegal manner. It was found that the gas load of 64-MCF per hour was in use, whereas, sanctioned load for the said Industrial Unit was 04-MCF per hour. On the allegation that the natural gas, which was being procured through illegal means, was being stored in reservoirs provided for such purpose in shape of storage tanks, which in absence of any pre-cautionary measures were termed as an open challenge of being exploded at any time.

3. Learned counsel for the petitioner has contended that after promulgation of Ordinance No.XVII of 2002 (Oil and Gas Regulatory Authority), Ordinance, 2002, the provisions of General Law i.e. Pakistan Penal Code would not be operative and provisions of Special Law would prevail and in this regard refers provisions of sections 22, 25 and 29 of the said Ordinance. With reference to different FIRs subsequently registered by the police not only against the present petitioner but also his real son as to a campaign against Dengue Larwa, learned counsel for the petitioner pleads mala fides on the part of the prosecution. He has also termed the petitioner a victim of political victimization, as according to him, the petitioner was a candidate for the Constituency of Punjab Provincial Assembly, PP-153 against the panel of a present ruling party and MNA elected from the said panel was subsequently assigned the job of detecting the gas and energy pilferage cases. He also argued that previously the petitioner had been in litigation with Gas Department with regard to the connection of natural gas provided in a hotel owned by the petitioner and having such grudge the present false case has been registered. It is also an argument of learned counsel for the petitioner that the meter installed at the premises in question had a number of time been changed/replaced, which indicates defective supply of the gas to the premises in question. Learned counsel for the petitioner further contended that at the time of raid at the

factory, there was load-shedding of natural gas, therefore, allegation of use of the gas would not arise.

4. Learned counsel for the petitioner has vehemently argued that since the President has promulgated Ordinance II of 2014 known as the Gas (Theft Control and Recovery) Ordinance, 2014 and not only special procedure but also special forum for trial of the persons involved in such theft was provided in the said Ordinance and after 120-days when the same lapsed, the effect of such lapse would bring section 462-C, P.P.C. as redundant and no proceedings can be initiated subsequent thereto even under section 462-C, P.P.C. Learned counsel for the petitioner has termed the present proceedings under section 462-C, P.P.C., thus, as an illegal and mala fide.

5. Lastly, learned counsel for the petitioner while arguing the petition has also submitted that his such arguments may also be considered in Writ Petition No.20344 of 2013 seeking quashment of FIR.

6. Responding to said contentions, learned Legal Advisor representing the Gas Department as also learned Deputy Prosecutor General Punjab appearing for the State have argued that after lapse of Ordinance No.II of 2014, it was re-promulgated and in view of section 5(7) of the said Ordinance, all proceedings pending in any other court shall stand transferred to, or be deemed to be transferred to and heard and disposed of by, the Gas Utility Courts having jurisdiction under the said Ordinance, therefore, according to learned counsel representing the prosecution even by implication, section 462-C, P.P.C. has not become redundant. With the technical assistance of the Engineers present for the Gas Department, learned counsel contended that when compressor was functioning at the time of raid it necessarily mean that the gas was being used. They have further argued that the petitioner is admittedly owner of the Industrial Unit and has already been involved in case of theft of gas even in 1998. They have referred the first version of the petitioner recorded during investigation on 16-8-2013, whereby, he admitted the use of compressor and boiler with the aid of extra load of the natural gas.

7. After hearing the learned counsel for the parties and going through the record, in order to clarify the position as to present state of the Gas (Theft Control and Recovery) Ordinance, 2014, Research Center of this Court was directed to provide the latest position, who have placed a notification dated 15-5-2014 issued by the Secretary, National Assembly Secretariat showing that the National Assembly in its meeting held on 14th May, 2014 passed by the following resolution:-

"That the National Assembly resolves to extend the Gas (Theft Control and Recovery) Ordinance, 2014 (Ord.No.II of 2014) for a further period of one hundred and twenty days w.e.f 23rd May, 2014 under proviso to sub paragraph (ii) of paragraph (a) of clause (2) of Article 89 of the Constitution of the Islamic Republic of Pakistan."

Hence, when Ordinance II of 2014 has been extended for a further period of 120-days w.e.f. 23rd May, 2014, it cannot be argued that presently such Ordinance is not holding the field.

As far the argument of learned counsel for the petitioner as to the applicability of the Special Law i.e. Ordinance XVII of 2002 having prevailing effect upon General Law i.e. Pakistan Penal Code is concerned, it would be expedient to see the legislative intent of Ordinance XVII of 2002 and its scope. Preamble of any law is the key to such law and in order to see the intention of legislature with regard to any particular promulgation, the preamble is to be looked into. With reference to the said Ordinance, by its preamble it has been notified that the same was promulgated in order to foster competition, increase private investment and ownership in the midstream and downstream petroleum industry, protect the public interest while respecting individual rights and provide effective and efficient regulations and for matters connected therewith or incidental thereto. Section 22 of the said Ordinance provides a process of licensing system, which shows that the Authority shall have the exclusive power, to be exercised in the manner prescribed in the rules, to grant, issue, renew, extend, modify, amend, suspend, review, cancel and reissue, revoke or terminate, a licence in respect of any regulated activity. "License" has been defined in section 2(xi) which means a licence granted under this Ordinance, whereas, "regulated activity" has been defined in section 2(xxxii) which means an activity requiring a licence. Section 22(2) and (3) of the Ordinance provides that if a licensee is of the opinion that it is not financially viable for it to supply natural gas to a particular area based on the tariff applicable to it, it shall give reasons to the Authority and if the Authority agrees with the licensee for such stated reasons it shall report the matter to the Federal Government and the licensee shall not be obligated to supply natural gas to the said area unless suitable financial arrangements are made by the Federal Government. Section 23 of the Ordinance provides certain conditions for issuance of licence for the purposes of transmission, distribution or sale of natural gas.

8. What emerges from the joint reading of sections 22 and 23 is that regulated activity under the said Ordinance is confined to the supply of natural gas and also process of transmission, distribution and sale. There is a vast difference in between "licensee" and "consumer". The petitioner, who claims himself to be a consumer of natural gas, by referring different clauses of Oil and Gas Regulatory Authority Ordinance want to attain the status of a licensee and to get benefit of different provisions of OGRA Ordinance, which having the status of a consumer, cannot be permitted to avail. Learned counsel for the petitioner, by referring Section 25 of the said Ordinance, has argued that only punishment for theft of petroleum is two years as provided in section 25 of OGRA Ordinance, but presumably he has failed to realize that the offence provided in section 25 relate to any "regulated activity" and a licensee can be held responsible for violation of any such offence including the stealing of petroleum but a consumer is not permitted under the law to argue that the provisions of OGRA Ordinance are applicable as against him and that the offences provided in Pakistan Penal Code are not applicable.

9. This Court in Criminal Miscellaneous No. 5171-B of 2013 decided on 18-6-2013 has already held that theft of gas is a pilferage of public property. Again this Court in Criminal Miscellaneous No.13342-B of 2013 has held that keeping in view the prevailing energy crisis, the crime allegedly committed by the petitioner, may be deemed an offence against the society as a whole, for, every consumer is hit by the scarcity of the gas supply, which is mainly due to the factum of pilferage and malpractices. The political victimization, as has been argued by learned counsel for the petitioner as a mala fide, cannot be considered as

available to the petitioner as the raiding party raided the premises of the Industrial concern of the petitioner was consisted upon engineering staff of the Gas Department and, prima facie, no political interference has been pointed out by the petitioner with the help of any material available on record.

10. For the present, the petitioner is connected with the crime which falls within the prohibitory clause of section 497 of Cr.P.C. and he has provided no justification for alleged theft of gas and in absence of any obvious mala fides with the prosecution, the petitioner do not deserve to the extra ordinary benefit of pre-arrest bail.

11. Resultantly, this petition is dismissed and interim pre-arrest bail already granted to the petitioner on 13-11-2013 is hereby recalled.

12. As far as the quashment of FIR is concerned, for the reasons mentioned above, no case for quashing the FIR is made out and the writ petition is also dismissed.

ARK/T-15/L Petition dismissed.

2015 P Cr. L J 1406
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Syed MUHAMMAD ASIF---Petitioner
versus
The STATE---Respondent

Criminal Miscellaneous No.1060-B of 2014, decided on 21st July, 2014.

Criminal Procedure Code (V of 1898)---
----S. 497---Electronic Transactions Ordinance (LI of 2002), Ss.2(e), 22, 36, 37 & 38---Penal Code (XLV of 1860), S.109---Pakistan Telecommunication (Re-organization) Act (XVII of 1996), S.32---Violation of privacy of information, damage to information system, etc.---Bail, grant of---Raid by Federal Investigation Agency without warrant of search required under S.32 of the Pakistan Telecommunication (Re-organization) Act, 1996---Under S.22 of the Electronic Transactions Ordinance, 2002, Pakistan Telecommunication (Re-organization) Act, 1996 was applicable to proceedings under provisions of Electronic Transactions Ordinance, 2002---Premises raided by the Federal Investigation Agency did not belong to accused---Mere presence and collective confession of accused was very weak type of circumstances to connect the accused with alleged crime---Assertion of S.109, P.P.C. had diminished the gravity of offence against accused---Accused could not be connected with alleged offences at bail stage---Accused was no more required for further investigation-

--Offences under Ss.36 and 37 of the Electronic Transactions Ordinance, 2002 having been made punishable with fine independently (alternatively), case of accused did not fall within prohibitory clause of S.497, Cr.P.C.---Pre-trial punishment was not intention of law---Detention of accused was nothing but pre-trial punishment---Bail petition was allowed.

Raja Ikram Ameen Minhas for Petitioner.

Tariq Bilal, Legal Advisor for FIA with Syed Fakhir Hussain Shah, SI along with record.

ORDER

IBAD-UR-REHMAN LODHI, J.---The petitioner, who has been involved by the Federal Investigating Agency, Cyber Crime Circle, Rawalpindi in case FIR No.20 dated 19-6-2014 registered under sections 36, 37 of the Electronic Transactions Ordinance, 2002 read with sections 419, 420, 468, 471 and 109, P.P.C. has moved the present petition seeking his release on post arrest bail.

2. According to the contents of the FIR, after permission of "competent authority" a raiding party of Federal Investigating Agency conducted a raid at a flat in Bahria Town, Rawalpindi and found three laptop computers along with one Wi-Tribe, one PTCL EVO, one external Hard Disk and seven credit cards. The present petitioner as per showing of the FIR was amongst those three persons who were found present at the time of raid in the said premises and allegedly after admitting their guilt as to the unauthorized access/issuance of online air tickets through stolen/hacked credit cards, surrendered their email accounts/websites along with passwords which were taken into the possession through some seizure memo. According to the technical analysis report, the accused persons were found involved in illegal and unauthorized issuance of online air tickets through hacked/stolen credit cards of different issuer companies.

3. The learned counsel for the petitioner, while referring the provisions of sections 36 and 37 of the Electronic Transactions Ordinance, 2002, has contended that no offence whatsoever has prima facie been made out at least against the present petitioner. He further questioned the raid conducted by the FIA raiding party and termed it violative to the provisions of section 32 of the Pakistan Telecommunication (Re-organization) Act, 1996. He further contended that no aggrieved person came forward with any complaint to whom, allegedly any air tickets were issued as a result of use of hacked credit cards. By referring the attraction of section 109, P.P.C. as an offence against the petitioner, the learned counsel contended that maximum as against the present petitioner the allegation of abetment is the case. Finally by referring the sentence provided under sections 36 and 37 of Electronic Transactions Ordinance, 2002, he argued that as the sentence of fine has independently been provided as a punishment, thus the case does not fall within the prohibitory clause of section 497, Cr.P.C.

4. As against the contentions of the learned counsel for petitioner, the learned counsel appearing for FIA has argued that the allegations contained in FIR are serious in nature and hackers should not be given any concession even in kind of the release on bail. By referring

section 38 of Electronic Transactions Ordinance, 2002, the learned counsel has contended that the offences under said Ordinance are non-bailable.

5. After hearing the learned counsel for the parties and going through the record, it is evident that the raid was shown to have been conducted by the Federal Investigating Agency/Raiding Team after permission of "competent authority". "Appropriate Authority" although has been defined in section 2(e) of Electronic Transactions Ordinance, 2002 but in whole of the said law "competent authority" has no where been defined. When the learned counsel for petitioner argued as to the non-compliance of section 22 of Pakistan Telecommunication (Re-organization) Act, 1996 in non issuance of any search warrant, the FIA controverted said argument on the plea that provisions of Act, 1996 or any other law e.g. Wireless and Telegraphy Act, 1933 or Prevention of Electronic Crime Ordinance, 2009 are not applicable on the proceedings to be taken under ETO, 2002.

Section 22 of ETO, 2002, however negates the version of FIA as the provisions of Act, 1996 are made applicable with regard to proceedings to be taken under the provisions of ETO, 2002.

When asked, the learned counsel for FIA has frankly conceded that no email accounts/websites along with password related to present accused/petitioner has been taken into possession by the raiding party. The premises of flat which was raided, admittedly never belong to the present petitioner. By showing mere presence of the petitioner and alleged collective confession as to the guilt are very weak type of circumstances in order to connect the petitioner prima facie with the criminality involved in the criminal case.

6. The assertion of section 109, P.P.C. in the FIR, decreases the gravity of offence at least against the present petitioner and only an alleged abettor cannot be connected with the main offence.

7. Section 36 of Electronic Transactions Ordinance, 2002 provides that any person, who gains or attempts to gain access to any information system with or without intent to acquire the information contained therein or to gain knowledge of such information, whether or not he is aware of the nature or contents of such information, when he is not authorized to gain access shall be guilty of an offence under the Ordinance.

Whereas, Section 37 of the Electronic Transactions Ordinance, 2002 provides that any person who does or attempts to do any act with intent to alter, modify, delete, remove, generate, transmit or store any information through or in any information system knowingly that he is not authorized to do any of the foregoing, shall be guilty of an offence under the Ordinance.

8. In absence of any material connecting the petitioner with the alleged crime prima facie the petitioner, on the face of it, cannot be connected at this stage with any offence either under section 36 or 37 of ETO, 2002. The petitioner has been arrested and has been on physical remand and is not required for further purposes of investigation. The imposition of sentence of fine independently for both the offences under sections 36 and 37 of ETO, 2002

brings out the case of the petitioner from the prohibitory clause of section 497, Cr.P.C. The pre-trial punishment is not intention of the law and present period of detention is nothing but a pre-trial punishment which cannot be sanctioned under the law.

9. Resultantly, this petition is allowed and petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.2,00,000 with one surety each in the like amount to the satisfaction of learned trial Court.

ARK/M-283/L Bail granted.

P L D 2015 Lahore 20
Before lbad-ur-Rehman Lodhi and Abdul Sami Khan, JJ
Syed MUBBASHAR RAZA---Petitioner
Versus
GOVERNMENT OF PUNJAB through Secretary Home Department and 2 others--Respondents

Writ Petition No.906 of 2014, decided on 9th April, 2014.

(a) West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960)--------Ss. 3(1), 6 & 26---Constitution of Pakistan, Arts. 199, 4, 9, 10, 13(a) & 15---Constitutional jurisdiction of High Court under Art.199 of the Constitution---Scope---Power to arrest and detain suspected persons---Scope---State had to jealously safeguard the liberty of every citizen---Government action in restricting the liberty of a citizen was not immune to the scrutiny of High Court under Art.199 of the Constitution---Detenus had been granted bail in the case registered against them---Criminal activity of the detenus was already subject-matter of criminal case, their detention on almost the same allegations amounted to vexing the detenus twice---Detention order under S.3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 against a person against whom criminal proceedings were already pending was violative of Art.13(a) of the Constitution---Authorities failed to establish that detenus were acting in a manner prejudicial to integrity of Pakistan or public order---Liberty of citizens could not be curtailed merely on presumptions; High Court was empowered to declare such (presumptive) orders to have been passed without lawful authority and of no legal effect---Section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 required 'satisfaction' of the Authority issuing detention order as to some preceding events on the basis of which such order could be passed---Detention order did not demonstrate/indicate/reflect satisfaction of the Authority-Where the order passed against detenu was coram non judice and nullity in the eyes of law, detenu was not required to file representation before government---Remedy of representation had always been considered an illusion---Constitutional petition was allowed declaring detention orders illegal and without lawful authority.

Arbab Akbar Adil v. Government of Sindh through Home Secretary, Government of Sindh, Karachi PLD 2005 Kar. 538; Muhammad Nadeem v. Government of Punjab through Home

Secretary and another PLD 2010 Lah. 371 and Haq Dad Khan v. District Magistrate, Mianwali 1997 PCr.LJ 1288 rel.

(b) Constitution of Pakistan---
----Arts. 199, 4, 9 & 10---Constitutional jurisdiction of High Court under Art.199 of the Constitution---Government action restricting the liberty of a citizen was not immune to the scrutiny of High Court under Art.199 of the Constitution---Liberty of citizens could not be curtailed merely on the basis of presumptions, High Court was empowered to declare such (presumptive) orders of detention to have been passed without lawful authority and of no legal effect.

Abdul Rasheed Bhatti v. Government of Punjab PLD 2010 Lah. 468 rel.

(c) Constitution of Pakistan---
----Art. 13(a)---West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960), S.3(1)---Scope of Ordinance---Detention order under S.3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 against a person against whom criminal proceedings were already pending, was violative of Art.13(a) of the Constitution.

Raja Ikram Ameen Minhas for Petitioner.
Syed Zulfiqar Abbas Naqvi for Petitioner (in W.P.No.918 of 2014).
Wali Muhammad Khan, Asstt. A.-G. with Sajid Zafar Dall, District Coordination Officer, Rawalpindi (Respondent No.2).

ORDER

This order shall dispose of the instant writ petition, as also Writ Petition No.918 of 2014 (Najam-ul-Hasnain Zaidi), as in both the petitions, orders dated 1-4-2014 and 2-4-2014, passed by the District Co-ordination Officer, Rawalpindi, have been challenged.

2. Through this Constitutional petition, the petitioner challenged the orders passed on 1-4-2014, and 2-4-2014, by the District Coordination Officer, Rawalpindi (respondent No.2), under the provisions of section 3(1) read with Section 26 of the West Pakistan Maintenance of Public Order Ordinance, 1960, as well as, Notification of the Home Department No.SO(IS-I) 3- 12/2007, dated 9th of August, 2008, where-under, the brother of the petitioner and other relatives, have been ordered to be detained for a period of 15 days, vide orders Nos.549, 527, 547, 541, 538, 537, 551, 552, 545, 529, 528, 539, 544, 546, 548, 550, 553, 554, 555, 525, 526, 530, 531, 532, 533, 534, 535, 536, whose names are as under:--

(1) Syed Farasat Kazmi son of Syed Iqbal Kazmi.
(2) Tanveer Hussain Butt son of Gul Mohammad Butt.
(3) Tayyab Abbas son of Altaf Hussain Shah.
(4) Syed Yasir Kazmi son of Syed Ejaz Hussain Shah.
(5) Asif Hussain Shah son of Mulazim Hussain
(6) Imran Hussain Butt son of Abdul Rasheed Butt.
(7) Syed Aun Abbas Kazmi alias Auni vs. Syed Qurban Hussain.
(8) Syed Imran Ali Kazmi son of Syed Qurban Hussian.

(9) Syed Sibt-e-Hassan son of Matloob Hussain.
(10) Ali Ansar Butt son of Khadim Hussain.
(11) Irfan Haider alias Fani v. Khadim Hussain.
(12) Syed Zia-ur-Raza son of Syed Abu-Ali-Qasim.
(13) Junaid Hussain son of Mumtaz Hussain.
(14) Zahid Iqbal son of Mohammad Iqbal.
(15) Muhammad Sohail Abbas son of Dilshad.
(16) Kamran Haider son of Gulzar Ali.
(17) Syed Touseef Abbas alias Saifu son of Tanvir Hussain Shah.
(18) Syed Imran Abbas Naqvi son of Tas"adaq Hussain Naqvi.
(19) Fayyaz Hussain son of Aulad Hussain Shah.
(20) Syed Khawar Abbas son of Syed Ghulam Abbas.
(21) Naqash Raza son of Pervaiz Hussain.
(22) Raja Zulfiqar son of Bishrat.
(23) Dilawar Abbas son of Ghulam Abbas.
(24) Zameer-ul-Hassan alias Babbu Shah son of Mustehsan Zaidi.
(25) Syed Qamar Ali Shah son of Syed Shah Kazmi.
(26) Tahir Hussain Balti son of Mohammad Hussain.
(27) Nasir Hussain Shah son of Shah Faqeer.
(28) Syed Afraz Ali Shah son of Syed Ijaz Hussain Shah.

It is worthy to mention here that this Court allowed Writ Petitions Nos.139, 234, 267, 278 and 279 all of 2014, on 19-3-2014, and as a consequence thereof, the persons involved in case F.I.R. No.385 of 2013, as accused, were ordered to be released on bail.

3. On the basis of said findings of this Court, the learned Assistant Advocate-General has conceded that similar orders in respect of other accused persons involved in the case, have also been passed by court of original jurisdiction.

4. The persons in respect of whom, the District Co-ordination Officer, on the basis of report furnished by the City Police Officer, has issued detention orders under section 3(1) read with Section 26 of the West Pakistan Maintenance of Public Order Ordinance, 1960, for 15-days, is on the face of it, a crude attempt to negate the effect of bail granting order dated 19-3-2014.

5. The grounds for detention have never been furnished to the detenus and an order, omnibus in nature, was passed by the District Co-ordination Officer, Rawalpindi, on the grounds that there is likelihood of the detenus being involved in subversive, illegal and sectarian activities, in case of their release from prison. Some meeting of eminent Leaders of Shia Sect in the Jail premises with the detenus, has also been made a ground for passing the impugned detention order.

6. The District Co-ordination Officer, who is present in person, has failed to justify the passage of impugned order and to show his independent application of mind. The impugned orders have been passed by verbatim reproduction of the police report and application of judicious Mind of the detaining authority is not evident.

7. This Court in Abdul Rasheed Bhatti v. Government of Punjab (PLD 2010 Lahore 468), in case of similar nature, has held that the liberty of every citizen is to be protected and guaranteed under Articles 4, 9 10 and 15 of the Constitution of the Islamic Republic of Pakistan, 1973, and the State has to jealously safeguard liberty of every citizen wherever he may be; and any action without sufficient cause depriving or restricting liberty of a citizen is not envisaged by the Constitution of the country and any such action taken by the Government or any of its functionary is not immune from scrutiny of High Court in exercise of its power under Article 199 of the Constitution.

8. It is an admitted position that criminal case against all the detenus has already been registered, and the detenus have been granted bail in such registered case. The criminal activity of the detenus is, thus, already subject-matter of such criminal case and almost on the same allegations, their detention is not justified in law, as the same would amount to vexing the detenus twice. Such detention order under I section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960, against a person against whom some criminal proceedings are already pending, is also violative to Article 13(a) of the Constitution. The respondent authorities have failed to justify as to how the detenus were acting in a manner prejudicial to the integrity, security or defence of Pakistan, or public order or maintenance of supplies or services. Liberty of citizens cannot be curtailed merely on presumptions, and it is the power of this Court in exercise of Constitutional Jurisdiction I to declare such detention orders as having been passed without lawful authority and of legal effect.

9. Section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 necessitates the "satisfaction" of the order issuing authority on the strength of some events preceded the passage of such order.

10. A Division Bench of Karachi High Court in case of Arbab Akbar Add v. Government of Sindh through Home Secretary, Government of Sindh, Karachi (PLD 2005 Karachi 538) has dealt with a detention matter and through an authoritative view has held as under:---

> "Initial burden lies on the Detaining Authority to show the legality of the preventive detention. Detaining Authority must place the whole material upon which the detention order is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide. Order of detention must be made .by the Authority prescribed in the law relating to preventive detention. Each of the requirements of the law relating to preventive detention should be strictly complied with. Satisfaction must in fact exist with regard to the necessity of preventive detention of the detenu. Grounds of detention should have been furnished within the period prescribed by law, and if no such period is prescribed then as soon as may be. Grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the Authority prescribed by law. Grounds of detention should be within the scope of the law relating to preventive detention, i.e., the same should not be irrelevant to the aim and object of the law and

the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice.

Detention order taking away the liberty of a citizen is not sustainable on subjective considerations. Objectivity should exist in the detention order which can be demonstrated by giving necessary details and particulars therein.

Application of mind essential. Word "satisfied" used in S.3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960, indicates that the Authority issuing the detention order should apply his mind to the facts forming basis of the same. Until and unless there is something tangible in the detention order the Authority issuing it cannot be said to have applied his mind objectively and his opinion based on reasons.

Similar view was taken by this Court in case of **Mohammad Nadeem v. Government of Punjab through Home Secretary and another** (PLD 2010 Lahore 371).

11. In the case, in hand, the wording of the impugned orders show that even in the order, the District Coordination Officer has not demonstrated as to whether there is any satisfaction on his part before issuance of such detaining order. Even no grounds of detention were provided to the person detained.

12. The learned Assistant Advocate-General has taken an objection with regard to the maintainability of the present Constitutional petition in presence of a remedy available to the petitioner under section 6 of the West Pakistan Maintenance of Public Order Ordinance, 1960 by way of representation before the Government.

13. This question has been dealt with by this Court in case of Haq Dad Khan v. District Magistrate, Mianwali (1997 PCr.LJ 1238) where similar objection was raised by the learned Assistant Advocate-General, F which was answered in the manner that since order passed against the detenu was coram non judice and nullity in the eye of law, therefore, there was no need for detenu to file representation before the Government, because such representation could only be made, when order of detaining authority was passed within the four corners of provisions of section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960. The remedy by way of a representation before the I Government has always been considered as an illusion and a Constitutional petition straightaway has always been entertained.

14. The result of the above discussion is that this petition is allowed; the impugned orders of detention dated 1-4-2014 and 2-4-2014, passed by the District Co-ordination Officer, Rawalpindi, are declared illegal and without lawful authority and the same are set aside. The detenus, whose names are given in pars 2 of this order, are ordered to be released forthwith.

ARK/M-120/L Petition allowed.

P L D 2015 Lahore 391
Before Abad-ur-Rehman Lodhi, J
JAMSHED NAWAZ---Petitioner
versus
SESSIONS JUDGE, RAWALPINDI and 2 others---Respondents

Writ Petition No.4579 of 2010, decided on 17th July, 2014.

(a) Constitution of Pakistan---
----Art. 45---President's power to grant pardon etc.---Words 'any', 'sentence' and 'court'---Omnibus order---Scope---Word used 'any' prior to 'sentence' and 'court' denotes to particular sentence awarded by particular Court or Tribunal---President is competent to grant any stated relief to a deserving person with reference to any particular sentence passed by any Court or Tribunal or other authority by exercising such constitutional domain---Omnibus order granting such relief to whole of the class of condemned prisoners without any specification is not intention of the Constitution.
(b) Criminal Procedure Code (V of 1898)-------S. 381 & Sched. V, Form XXXV---Memorandum U.O. No.1(8)/DS(IA-I)1998, dated 17-8-2013, issued by Prime Minister's Office---Constitution of Pakistan, Arts.45 & 199---Constitutional petition---President's power to grant pardon etc.---Warrant of Execution on sentence of death---Delay in execution---Real brother of petitioner was murdered by respondent/convict who was awarded death sentence---Grievance of petitioner was that sentence awarded to respondent/convict had not been executed---Plea raised by authorities was that in view of Memorandum U.O. No.1(8)/DS(IA-I)1998, dated 17-8-2013, issued by Prime Minister's Office, death sentences had been held in abeyance---Validity---High Court declared it as highly non-serious attitude on the part of constitutional authorities to deal with such delicate and serious issue---Exercise of discretion by President under Art.45 of the Constitution was to meet at the highest level requirements of justice and clemency, to afford relief against undue harshness or serious mistake or miscarriage in judicial process---If such general amnesty was provided against judicial decisions, it would amount to attach clog of miscarriage in all judicial process adopted in cases, as a result whereof, accused of murder cases were awarded death sentences---Such was not intention of law and Constitution also---No Presidential Order was in field granting any pardon, reprieve and respite with regard to any death sentence passed by courts of law---High Court declared inaction on the part of authorities in executing death sentence upon respondent/convict, as act without lawful authority having no legal effect---Petition was allowed in circumstances.

Muhammad Ilyas Siddiqi for Petitioner.
Mirza Viqas Rauf, Dy. Attorney-General for Federation.
Khurshd Ahmad Satti, Asstt. Advocate-General Punjab with Tahir Saddique, Asstt. Superintendent Central Jail, Rawalpindi.

ORDER

IBAD-UR-REHMAN LODHI, J.---Through this Constitutional Petition, the petitioner, whose real brother Qais Nawaz was murdered on 21-1-1996, seeks a direction of this Court for execution of death sentence to Shoaib Sarwar, the death convict.

2. Precisely, history of the matter is that the trial of the murder of above noted Qais Nawaz resulted into a judgment, passed by the learned Sessions Judge, Rawalpindi, on 22-7-1998, holding Shoaib Sarwar son of Ghulam Sarwar responsible of the said death and he, after conviction was sentenced to death.

3. The Murder Reference within the meaning of section 374, Cr.P.C. was answered in affirmative by this Court on 2-7-2003, when Criminal Appeal No.188 of 1998, filed by the convict was dismissed.

4. The Hon'ble Supreme Court of Pakistan in Criminal Petition for leave to appeal No.364 of 2003 refused to grant leave to the convict on 3-4-2006.

5. The unsuccessful petitioner sought review through Criminal Review Petition No. 10 of 2006, of such leave refusing order, which too was dismissed by the Hon'ble Supreme Court of Pakistan on 5-10-2006.

6. In order to avoid the execution, the convict with a plea of his being juvenile at the time of commission of offence, preferred fresh proceedings seeking benefit of section 7 of the Juvenile Justice System Ordinance, 2000, but remained unsuccessful before the original forum, when his such plea was refused to be accepted on 29-3-2008.

7. The said findings were challenged by Shoaib Sarwar before this Court by way of Writ Petition No.384 of 2008, which was dismissed on 7-4-2008.

8. Leave against such findings was refused by the Hon'ble Supreme Court of Pakistan on 22-7-2008, when Civil Petition No.432 of 2008 was filed.

9. After affirmative answer to the Murder Reference by this Court on 2-7-2003, the learned Sessions Judge, Rawalpindi, on 22-8-2003, issued warrant of execution of sentence of death as required under section 381, Cr.P.C. read with Schedule-V Form-XXXV, authorizing the Superintendent Central Jail, Rawalpindi to carry the said sentence into execution by causing the said Shoaib Sarwar to be hanged by neck until he be dead at the place of execution i.e. Central Jail, Rawalpindi, on Wednesday 10th of September, 2003.

10. The death convict managed his shifting from Central Jail, Rawalpindi to District Jail, Abbotabad in September, 2006.

11. From a communication dated 23-7-2007, the Interior Ministry in Government of Pakistan, Islamabad, informed the Home Secretary (N.-W.F.P.) Peshawar (as it then was) intimating that the President was pleased to reject the Mercy Petition of condemned prisoner Shoaib Sarwar son of Ghulam Sarwar confined at the relevant time in District Jail, Abbotabad, and the Provincial Government was directed to carry out the execution of

condemned prisoner. Before the execution was carried out, from Aiwan-e-Saddar, Islamabad, it was intimated to all concerned that the President was pleased to stay the execution of condemned prisoner Shoaib Sarwar till 23-8-2007. This grace time was further extended till 19-9-2007 and subsequently upto 18-9-2010.

12. Subsequent thereto, the Ministry of Interior in Government of Pakistan through communication dated 17-8-2010, informed all the Provincial Home Secretaries and all Inspector Generals of Prisons in all the Provinces about the direction of the President of Pakistan to stay the execution of death sentences upto 31-12-2010 of all condemned prisoners, except those involved in acts of terrorism or anti-State activities.

13. The respondents in their respective comments to the writ petition, placed reliance on the said exemption granted by the President of Pakistan. A copy of letter addressed to the Home Secretaries in all the Provinces from the Government of Pakistan in Ministry of Interior dated 29-3-2013 is also on record, intimating that along with others, the death convict Shoaib Sarwar in the present case, has been given further extension in time upto 30-6-2013 by postponing the execution of death sentence upon the said condemned prisoner.

14. Today, when the learned Deputy Attorney-General appeared, he was asked to verify as to what is the present position as to the policy of the Federal Government upon execution of death sentences, to which after some gap of time, he produced a U.O.No.1(8)/DS(IA-I)1998, dated 17-8-2013, by the Secretary to the Prime Minister, which reads as under:--

"PRIME MINISTER'S OFFICE ISLAMABAD.

Subject:- EXECUTION OF DEATH SENTENES.

On the basis of various applications received in the President's Secretariat, by or on behalf of convicts, for the stay of execution of death sentences, Secretary to the President vide U.O. No.5(3)2010 (Legal Vol-IV) (Part), dated 15-08-2013 (copy attached) has conveyed desire of the President to discuss the subject matter with the Prime Minister.

2. President's Secretariat has been conveying similar communications from time to time. Since, the President is currently out of country and discussion on the subject between the President and the Prime Minister is pending, therefore, in due deference to the wish of the President, it has been desired that all executions of death sentences may be held in abeyance till the discussion takes place between the Prime Minister and the President".

on the subsequent day of issuance of above U.O. i.e. 18-8-2013, the Additional Secretary in Ministry of Interior, Government of Pakistan, has forwarded such desire of the Prime Minister of Pakistan to all Provincial Home Secretaries.

15. The Government of Pakistan in Ministry of Interior vide U.O. No.8/11/2008-Ptns (Part File), dated 29-12-2011, has extended the sanction of the President of Islamic Republic of Pakistan in postponing the execution of death sentences up to 31-3-2012 of all condemned prisoners, except those involved in acts of terrorism or anti-State activities.

16. From the above narrated facts, what emerges is that after 30-6-2013, with particular reference to Shoaib Sarwar, the death convict in the present case, the execution was never postponed and presently, the said condemned prisoner is getting benefit of U.O note dated 17-8-2013, issued by the Secretary to the Prime Minister and as office memorandum from Ministry of Interior in Government of Pakistan dated 18-3-2013 consequently issued conveying such desire of the President to all concerned.

17. Article 45 of the Constitution of Islamic Republic of Pakistan, 1973, empowers the President to grant pardon, reprieve, and respite and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

18. The word used "any" prior to "sentence" and "court" denotes to a particular sentence awarded by a particular court or tribunal and, thus, the President would be competent to grant any stated relief to a deserving person with reference to any particular sentence passed by any court or tribunal or other authority by exercising such constitutional domain. An omnibus order granting such relief to whole of the class of condemned prisoners without any specification is not the intention of the Constitution.

19. What is restraining the relevant authorities to execute death sentence to the condemned prisoner is the U.O note dated 17-8-2013 of the Secretary to the Prime Minister, wherein the President has never been shown to have exercised his such Constitutional Jurisdiction as provided under Article 45 of the Constitution to grant any available relief within the meaning of said Article.

20. The desire of the President to discuss the subject-matter with the Prime Minister, at any cost, could not be treated as a formal and final order passed by the President within the meaning of Article 45 of the Constitution. When on 7-8-2013, the desire of the President was conveyed, as noted hereinabove, it was further noted that the President was currently out of country and until his return and on account of due deference to the wish of the President, it was desired by the Prime Minister that all execution of death sentences may be held in abeyance till the discussion takes place between the Prime Minister and the President.

21. According to the learned Deputy Attorney-General, U.O note dated 17-8-2013 is the last document available on the subject, which is holding the field and on the strength of which the execution of death sentences has been held in abeyance.

The reasons noted in such U.O note must have been come to an end by now and it believes that after 17-8-2013, the President must have been returned to home land, but according to the learned Law Officer, proposed discussion never took place and the legal sentences confirmed at the level of the Hon'ble Supreme Court of Pakistan are not being executed, rather held in abeyance on account of unconstitutional and unauthorized exercise of jurisdiction conveyed by the Secretary to the Prime Minister almost a year ago.

22. This is highly non-serious attitude on the part of the constitutional authorities to deal with such delicate and serious issue. The exercise of the discretion by the President under Article 45 of the Constitution is to meet at the highest level the requirements of justice and clemency, to afford relief against undue harshness, or serious mistake or miscarriage in the judicial process. If such general amnesty is provided against judicial decisions, it would amount to attach the clog of miscarriage in all judicial process adopted in cases, as a result whereof, the accused of murder cases were awarded death sentences. This is not the intention of law and the Constitution also. For the present, there is no Presidential Order in field granting any pardon, reprieve and respite with regard to any death sentence passed by the courts of law.

23. The result of above discussion is that it is declared that inaction on the part of the respondents in executing death sentence upon the death convict Shoaib Sarwar son of Ghulam Sarwar, in view of warrant of execution issued by the learned Sessions Judge, Rawalpindi, on 22-8-2003, is an act, which is without lawful authority and having no legal effect; this writ petition is allowed directing the respondents to act upon the warrant of execution dated 22-8-2003, issued by the learned Sessions Judge, Rawalpindi, or any fresh warrant to be issue by learned Sessions Judge, Rawalpindi, as a consequence of decision of present writ petition.

MH/J-22/L Petition allowed.

P L D 2015 Lahore 681
Before Ibad ur Rehman Lodhi, J
Rana SURBLAND KHAN---Appellant
versus
B.K. ENTERPRISES through Director---Respondent

Regular Second Appeal No.79 of 2006, decided on 17th February, 2015.

Specific Relief Act (I of 1877)---

----S. 12---Contract Act (IX of 1872, S. 2(b)(c)(e)---Suit for specific performance of agreement---"Valid agreement", defined---Unilateral offer---Scope---Oral agreement, enforceability of---Principles---Plaintiff filed suit for specific performance of agreement on basis of document that was admittedly not signed by one of the parties to the suit---Suit was dismissed and appeal against was also dismissed---Plaintiff averred in revision that oral agreement could be specifically enforced---Validity---If plaintiff sought specific performance of an oral agreement he had to prove promise made by one party and acceptance of such promise by other party---Unilateral offer not accepted by other side could not be made basis of suit for specific performance---For constitution of valid agreement there must be at least two persons i.e. promisee and promisor who had agreed with their free consent for a lawful object and legal consideration and in absence of offer and acceptance thereof, such document could not be defined as agreement---Offer and acceptance reduced into writing if had not been signed or thumb-marked by one of parties

could not be termed as a valid contract enforceable under law---Revision was dismissed accordingly.

Mst. Gulshan Hamid v. Kh. Abdul Rehman and others 2010 SCMR 334; Syed Ahmed through Special Attorney v. Syed Muzaffar Hussain through L.Rs. 2008 CLC 175 and Faqeer Bakhsh v. Khan Muhammad 2013 MLD 955 rel.

Ch. Muhammad Anwar Bhinder for Appellant.

Mirza Shahid Baig for Respondent

ORDER

IBAD UR REHMAN LODHI, J.---The basis of the suit for specific performance, filed by the present appellant, was a document available at page 58 of the present appeal, which was entered in the evidence during trial as Exh.P.1, and according to the learned counsel for the appellant, was an agreement in between the parties to the suit.

2. In the courts below, the plaintiff-appellant remained unsuccessful, when firstly, his suit was dismissed on 12-7-2005, and thereafter the appeal was dismissed by the learned Additional District Judge on 15-3-2006.

3. The learned counsel for the appellant, at the start of his arguments, was asked to bring Exh.P.1 into the definition of an agreement, which admittedly was not signed by one of the party to the suit, to which the learned counsel has responded that even oral agreement can be asked to be specifically performed/enforced.

The learned counsel for the appellant is mistaken in this regard, for the reason that, if a plaintiff seeks specific performance of an oral agreement, he has to prove the promise made by one party and acceptance of such promise by the other side, but even in cases of oral agreement, unilateral offer not accepted by the other side could not have been made basis of a suit for specific performance.

4. We have to look into the definition of "agreement" in order to evaluate Exh.P.1 on the touchstone of the law on the subject. Section 2(b) of the Contract Act, 1872, provides the definition of "Promise", whereas, section 2(c) of the said Act provides the definitions of "Promisor" and "Promisee". The definitions whereof are reproduced herein-below:--

"Promise". When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes promises".

"Promisor" and "promisee". The person making the proposal is called the promisor, and the person accepting the proposal is called the 'promisee'.

and the term "agreement" is defined in section 2(e) of the Act, which is reproduced herein-below:--

"Agreement. Every promise and every set of promises, forming the consideration for each other, is an agreement".

The joint reading of the above definitions give us a picture that such unilateral document, not signed by one party, was not mutually enforceable, thus, no decree could have been passed on the basis of such document by treating it as an 'agreement".

5. On interpretation of such provision of law, the Hon'ble Supreme Court of Pakistan in Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334) has in clear terms held that, a unilateral agreement not signed by one party cannot be treated as an agreement. This Court in the case of Syed Ahmed through Special Attorney v. Syed Muzaffar Hussain through L.Rs. (2008 CLC 175) has in an unequivocal terms held that, for constitution of valid agreement, there must be at least two persons i.e. promisee and promisor who agree with their free consent for a lawful object and legal consideration, and in absence of offer and acceptance thereof, such document cannot ripe into an agreement.

Again this Court in case of Faqeer Bakhsh v. Khan Muhammad (2013 MLD 955), while interpreting section 2 of the Contract Act, 1872, has held that, offer and acceptance reduced into writing, if not signed or thumb marked by one of the parties, could not be termed as a valid "contract" enforceable under the law.

6. The learned courts below were, thus, right in non-suiting the plaintiff-appellant, and the learned counsel for the appellant has failed to point out any exceptional circumstances warranting interference by this Court in concurrent findings of courts below.

7. Resultantly, this appeal having no merits is dismissed.

MM/S-52/L Appeal dismissed.

2015 Y L R 47
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Ch. SHAMSHAIR ALI---Petitioner
Versus
KHALID MAHMOOD---Respondent

Civil Revision No.1648 of 2014, decided on 9th May, 2014.

(a) Civil Procedure Code (V of 1908)---
----O.XVII, R.3---Legal practitioners and Bar Councils Act (XXXV of 1973), S.56---Pakistan Legal Practitioners and Bar Councils Rules, 1976, Rr. 134 & 166---Closure of evidence---Strike by District Bar after 11-00 a.m.---Scope---Right to produce remaining evidence of plaintiff was closed after granting fifty two opportunities for the same---Contention of plaintiff was that District Bar was observing strike and no effective proceedings could have been taken and provisions of O.XVII, R.3, C.P.C. could not be applied---Validity---Party to a proceedings who had been held responsible to perform certain

acts would be liable to be penalized in case of default on the part of such party---Court might proceed to decide the suit forthwith where party to a suit to whom time had been granted had failed to produce his evidence notwithstanding such default---Call of strike was taken as a cover---Counsel was bound to appear in the court when a matter was called and if same was not so possible then to make satisfactory alternative arrangements---Counsel was bound to act without fear or favour for just cause of clients diligently---Counsel could not escape from proceedings before a Court of law---No illegality or irregularity had been pointed out in the impugned order---Revision was dismissed in circum-stances.

Amanullah v. Haq Nawaz and 3 others 2013 CLC 1152; Muhammad Aslam v. Nazir Ahmed 2008 SCMR 942 and Shambilid Ghori and another v. Mst. Tayyaba Begum PLD 1989 Lah. 478 ref.

(b) Words and Phrases---
----"Vakeel"---Meaning.

Tahir Mahmood Khokhar for Petitioner.

ORDER

IBAD-UR-REHMAN LODHI, J.---By means of this Civil Revision Petition, the petitioner has assailed the findings of the learned trial court arrived at on 20-2-2014, whereby the right to produce remaining evidence of the plaintiff/present petitioner was closed by invoking the penal provisions of Order XVII, Rule 3, C.P.C.

2. The suit was filed on 17-5-2006 and after taking written statement from the defendant side, issues were framed on 23-12-2006. In all, till 20-2-2014, the plaintiff availed fifty two (52) opportunities for production of his evidence and during this period, the statements of four witnesses were got recorded in interval of a considerable gap. On 26-9-2009, the statement of P.W.1 was recorded, on
9-2-2010 the statement of P.W.2 and after one year on 23-2-2011, P.W.3 appeared and got recorded his statement and lastly on 3-12-2011, the statement of P.W.4 was recorded. During this period, once the suit was dismissed for non-prosecution on 18-5-2010, which was restored on 9-5-2011. Fifty two opportunities provided for production of evidence includes a number of last and final opportunities. 17th February, 2014 was the immediate preceding date to 20th February, 2014, when the provisions of Order XVII, Rule 3, C.P.C., were applied. On 17-2-2014 the Clerks of the counsel for the parties appeared and in absence of any evidence of the plaintiff, a request was made on behalf of the plaintiff for adjournment and the matter was adjourned to 20-2-2014 with a clear understanding that it will be the last opportunity for remaining evidence of the plaintiff.

3. The interim order sheet maintained by the learned trial court reveals that on 20th February, 2014, the case was taken up four times. On first occasion only defendant made his appearance and the matter was kept in waiting. On second call in addition to the defendant, one summoned witness from Muslim Commercial Bank made his appearance and for the reason that from the plaintiff side none entered appearance, again the case was kept in

waiting. On third call, neither the plaintiff nor any witness appeared and when lastly at 3:30 p.m. on the same date the case was called, plaintiff appeared without any evidence. The plaintiff informed that even the summoned witness had left the premises of the court. Since it was the last opportunity provided to the plaintiff for production of remaining evidence, therefore, in case of failure on his part to comply with such directions, the order impugned herein was passed.

4. In support of the petition, the learned counsel for the petitioner has argued that the local Bar of District Sargodha was observing strike on 20th February, 2014 and, therefore, on account of non-appearance of the learned counsel for the plaintiff, no effective proceedings could have been taken and premium of that strike must be provided to the defaulting plaintiff and penal provisions of Order XVII, Rule 3, C.P.C. should not have been applied. Further contended that when summoned witness appeared before the court, it was the duty of the court to compel the said witness to get his statement recorded and even in case of failure of the plaintiff or his learned counsel to appear, the Presiding Officer of the court himself should manage the recording of evidence of said witness. The learned counsel for the petitioner, in support of his contentions, has placed reliance on "Amanullah v. Haq Nawaz and 3 others" (2013 CLC 1152), "Muhammad Aslam v. Nazir Ahmed" (2008 SCMR 942), "Shambilid Ghori and another v. Mst. Tayyaba Begum" (PLD 1989 Lahore 478). In Amanullah's case (referred above), the strike of Bar during the period from 2007 to 2009 was taken as a valid ground for non-appearance of the learned counsel for the parties and the penal action taken by the courts below during such period was held not to be justified, whereas, in the case of Muhammad Aslam (Supra) it was held that the word "forth-with" means without any further adjournment yet it cannot be equated with the words "at once pronounce the judgment" whereas in case of Shambilid Ghori and another (cited above) a general principle has been reiterated that "no party is to suffered for any act/omission of the Court". A single Bench of Peshawar High Court in Amanullah's case has held in a matter, wherein during the days falling in between 2007 to 2009, a trial court applied penal provision of Order XVII Rule 3 C.P.C as under:--

"As far as the period from March, 2007 till the impugned order dated 26-8-2008 was passed, the petitioner/plaintiff cannot solely be held liable for the non-production of his evidence as well as his learned counsel before the learned trial Judge. It is by now part of our history that when a tyrannical regime struck at the superior judiciary firstly in the month of March, 2007 and then on 3rd November, 2007 when emergency was imposed, the entire lawyers' community of the country went on one strike after another. During those days, invariably all the courts of the country wore a deserted look and the same continued till the lifting of the emergency and the restoration of the honourable judges of the honourble Superior Courts to their respective offices in a respectable manner."

No doubt the era from 2007 to 2009 was an extra-ordinary period and whole of the legal fraternity including Bench and Bar were committed for one noble cause i.e. the restoration of independence of Judiciary and release of Hon'ble Senior Judges, however, after once that goal is achieved, every one, the Lawyers and the Judges went back to their original and actual position and started playing their respective role in process of dispensation of justice.

However, it is a matter of common practice that we are being experienced strikes of Bar on one pretext or the other even after 2009 and even after the end of dictatorial regime.

5. In the history of Nations, periods full of events are experienced by the Nations and to cope with the extra ordinary situation, it was to be confronted with the Nation or a particular part of the Nation, every segment of society in general and the directly concerned persons, in particular, are expected to discontinue their normal routine of life and to provide energy and strength to the cause with which whole of the Nation at the relevant time is being confronted.

6. Our father of Nation "Quaid-a-Azam Muhammad Ali Jinnah" during crucial period of "Pakistan Movement" even demanded and allowed the students of Ali Garh Muslim University and Islamia College Peshawar to discontinue their process of education and to spread over in far-flung areas of undivided Sub-continent to mobilize the masses for creation of Pakistan, but once the noble goal of creation of Pakistan was achieved, it was the same Quaid-a-Azam, who directed the students to go back to their Educational Institutions and to devote their whole attention to get education as the politics and political activities were not part of their educational activities.

7. Similarly, once the dictator goes and our Judiciary has gained its earlier position of independent judiciary and the Hon'ble Judges in superior Judiciary got back to their respective position then for the both, Bench and Bar, it was high-time to revert back to their noble cause to contribute in the process of dispensation of justice. The young blood entered in the Bar during the period of such emergency in fact opened the eyes in agitation and strikes as the overall complexion of the Bar has been converted into some what militant Bar. To such young inductees in the Bar, it would be a difficult job to ask them to pay more attention to academics than to put their more energies towards agitation.

8. In every procedural law, it is the "Party" to a proceedings, who has been held responsible to perform certain acts and in case of default on the part of such party, the penalty is liable to be invoked upon such party. Similarly in Order XVII, Rule 3 C.P.C., where "party" to a suit to whom time has been granted, fails to produce his evidence, the court may notwithstanding such default proceed to decide the suit forthwith. Nowhere a latitude is provided in case the learned counsel representing a party does not appear.

9. In our common practice the lawyers and Advocates are known and called as "Vakeel' ( ). It is an Arabic word and in '( ) by " " published by " " the meanings of word " " have been provided as follows:-

In Pakistan, the Legal Practitioners and Bar Councils Act, 1973 was promulgated with certain modifications, re-enacting the law relating to Legal Practitioners and Bar Councils and to provide for certain incidental and ancillary matters.

10. In exercise of powers conferred by section 55 of the said Act, the Pakistan Bar Council makes the Rules known as Pakistan Legal Practitioners and Bar Councils Rules, 1976. Chapter XII thereof provides the canons of profession, conduct and etiquette of Advocates. Rule 134 whereof provides that it is duty of every Advocate to uphold at all times the

dignity and high standing of his profession, as well as his own dignity and high standing as a member thereof. Rule 166 provides that 'it is the duty of Advocates to appear in Courts when a matter is called and if it is not so possible to make satisfactory alternative arrangements'.

11. For Province of Punjab, the Punjab Bar Council in exercise of powers conferred by section 56 of the Legal Practitioners and Bar Councils Act, 1973 (Act XXXV of 1973), provides the Rules of Business of Bar Association-Memorandum of Association. Rule 4(i) of the said Rules provides the duties of the lawyers as to act without fear or favour for just cause of his clients and according to Rule 4(ii) of the said Rules, it is the duty of the lawyer to devote himself to the cause of his client diligently.

12. What emerges from the above discussion is that there is no escape for a lawyer, who has been engaged to look after the interest and cause of his client by disappearing or non-appearing in judicial proceedings before a court of law. The trend of strikes should not be stretched in any manner that on every second day, the courts are told that the lawyers are not performing their statutory duties. On every other day, we experience that it is being noted in the order sheets of the courts of law that lawyers are observing strike and for that reason, the judicial process is being interfered with and courts are not allowed to proceed with the matters in absence of the lawyers, who on every 2nd day on petty matters observe strike.

13. In the case in hand, the learned counsel for the petitioner in support of his contention that on 20th February, 2014, the Bar was observing strike has placed on record a copy of notice issued by Secretary, District Bar Association, Sargodha, which indicates that call of the Bar was to observe strike on 20th February, 2014 after 11:00 a.m. The courts in Punjab during those days started their working at 08:00 a.m. Had the plaintiff been sincere in getting the statement of his witness/witnesses recorded by availing the last opportunity provided in that regard, he would have ample opportunity from 08:00 a.m. to 11:00 a.m. to accomplish his job, but the call of strike had been taken as a cover for non-appearance of the learned counsel during whole of the day and thus, the learned trial court was left with no option but to exercise the jurisdiction vested with it under the provisions of Order XVII Rule 3 C.P.C., which has rightly been exercised.

14. The learned counsel for the petitioner has failed to point out any illegality or irregularity in the impugned order and thus no exception is possible to the same.

15. This petition having no force is dismissed.

AG/S-105/L Revision dismissed.

2015 Y L R 2230
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
GHULAM MUSTAFA---Petitioner
versus
The STATE and 5 others---Respondents

Writ Petition No.1876 of 2013, decided on 11th April, 2014.

Criminal Procedure Code (V of 1898)---
----Ss.174 & 176---Constitution of Pakistan, Art. 199--- Constitutional petition--- Disinterment--- Scope--- Petitioner's application for disinterment of the body of his aunt was dismissed---Validity---Deceased lady had been living with respondents (accused) without any complaint of maltreatment on the part of respondents---No FIR alleging the murder of deceased was registered at the time of her death---Neither any suspicion of unnatural death was raised nor any medico-legal report of deceased was available on record---In view of provisions of Ss.174 & 176, Cr.P.C. Police could proceed only after registration of case to collect evidence of crime---Without registration of criminal case, acts (done) in pursuance of Ss.174 and 176 of Criminal Procedure Code, 1898 were nothing but an academic exercise---One year had passed since death of deceased, alleged marks on the body of deceased would not be detected due to decomposition---Disinterment would be disrespect to deceased lady---Causing injury to Momin men and women without any justification was a great sin---Causing fracture to a dead person had the same effect as causing fracture to a living person---Islam accorded great respect to the dead body of a Muslim---Disinterment without justification was a sin in Islam---Order of exhumation must be based on detailed reasoning, logic and fairness to further the cause of justice---Findings of courts below did not warrant interference exercising constitutional jurisdiction---Petition was dismissed.

Zafar Iqbal alias Kaka v. Additional Sessions Judge and 3 others 2006 PCr.LJ 736; Surah Azhab Ayat No.58; Hadith No.1431 in Sunan Abu-Dawood Sharif, Hazrat Ayesha R.A.; Selection of Islamic Laws issues Nos.290 and 291 and Verdicts of His Eminence Ayatul-Lah Al-U'dhma Serial Nos.647 to 650 rel.

Malik Waheed Anjum for Petitioner.

Khurshid Ahmad Satti, Assistant Advocate-General.

Sardar Sohail Asmat Ullah for Respondents Nos. 2 to 5.

ORDER

IBAD-UR-REHMAN LODHI, J.---Through this Constitutional Petition, the petitioner has challenged the findings contained in two orders, first passed by a learned Magistrate, Rawalpindi, when he proceeded to dismiss the application, moved under the provisions of section 176(2), Cr.P.C., for disinterment of the grave and exhumation of the body of Mst. Masaib Bano (deceased) on 11-7-2013, and the other one, passed by a learned Additional Sessions Judge, Rawalpindi, on 31-7-2013, when the revision filed against magisterial order, was dismissed.

2. Facts relevant for the purposes of present petition are that, the present petitioner moved the local police on 14-6-2013, requiring the disinterment of the grave of his paternal aunt Mst. Masaib Bano, who according to him, expired on 29-5-2013, at the age of 75/80 years. According to the petitioner, the said lady was issueless and her husband Amanat Khan entered into a second marriage with Mst. Raj Begum and from the said wedlock, one daughter Mst. Mumtaz, and three sons Mohammad Ammad, Muhammad Riaz and Mohammad Sajjad, were born. Their mother Mst. Raj Begum died 15/22 years, and Mst. Masaib Bano has been residing with her such step-sons. The petitioner, according to his own claim, has been settled in the Kingdom of Saudi Arabia for the last 23/24 years. By alleging that on 15-3-2013, the stepsons of Mst. Masaib Bano with whom, she has been residing since a considerable period, got recorded her statement before the revenue authorities and managed transfer of 62-kanals of land of Mst. Masaib Bano in their own favour, the petitioner raised suspicion that at the time of final bath of the dead body of Mst. Masaib Bano, some bluish marks were found on the body of the deceased and on such information, he raised a suspicion of unnatural death of Mst. Masaib Bano.

3. The police, after reducing such stance of the petitioner in writing, placed the same before the learned Sessions Judge, Rawalpindi, and it was marked to the learned Ilaqa Magistrate.

4. The learned Magistrate, on 26-6-2013, got recorded the statement of the present petitioner, wherein he has reiterated his version, as was taken before the police; however, in his such statement on Oath, he restricted his allegation of presence of bluish marks only on the hands of Mst. Masaib Bano, by raising his suspicion over Mohammad Sajjad etc., as to the murder of said lady.

5. After recording such statement, the learned Magistrate, by means of order dated 11-7-2013, dismissed such request by holding that it was nothing, but a lust for the landed property already transferred in favour of the respondents, which prompted the petitioner to ask for exhumation of the corpse of his deceased paternal aunt.

6. Being unsuccessful, the petitioner preferred Criminal Revision before the learned Sessions Judge, Rawalpindi, which was taken up for hearing by a learned Additional Sessions Judge on 31-7-2013, and the same was dismissed; hence this petition before this Court.

7. The petitioner mentioned in his application moved before the police that he has been in the Kingdom of Saudi Arabia for the last 23/24 years and used to visit Pakistan after every two years. When on 14-6-2013, he approached the police for disinterment of the grave of Mst. Masaib Bano, he got recorded his stay in Pakistan for the last two months, meaning thereby that, since the mid of April, 2013, he has been in Pakistan, as such, on 29-5-2013, when Mst. Masaib Bano breathed her last, the petitioner was present in Pakistan. On record, it has never been disclosed as to which lady gave the last bath to the body of Mst. Masaib Bano and, as to when the alleged presence of bluish marks on the hands of the body of Mst. Masaib Bano were made known to the petitioner. Even the name of such lady has not been disclosed by the petitioner what to talk of recording the statement of such lady.

8. Admittedly, before her death, Mst. Masaib Bano had been living with the respondents for the last 30/40 years and there is no allegation as to any maltreatment on the part of the respondents with the said lady. There has been no criminal case registered as to the alleged murder of the deceased at the time of her death. There was no suspicion as to any unnatural death of said lady and naturally, there is no medico-legal report available on the record, because the body of the deceased was never sent for such examination purposes.

9. In view of the provisions of sections 174 and 176, Cr.P.C., it is only after registration of a criminal case that the police has to collect evidence for the purposes of proceeding further on the ground that a crime was committed.

10. This Court in Zafar Iqbal alias Kaka v. Additional Sessions Judge and 3 others 2006 PCr.LJ 736, in similar circumstances, has held that the FIR has its own implications, because a wrongly lodged FIR is triable under the law, whereas, without there being any criminal case registered, the acts under above-noted Sections of the Criminal Procedure Code, 1898, were nothing, but an academic exercise.

11. The date of death of Mst. Masaib Bano is 29-5-2013, and keeping in view the process of decomposition of the body, after expiry of almost one year, there is no possibility that the skin of the hands of the corpse would still be in the same condition, as to provide a circumstance for the exhumation to locate the alleged bluish marks on the hands of the body. The disinterment process, in such circumstances, would be nothing, but a disrespect to the body of Mst. Masaib Bano (deceased).

12. The Qur'anic Command as ordained in Surah Ahzab Ayat No.58 is to the effect that they, who cause any injury to the Momin men and Momin women without any justification, they commit a great sin. In view of the interpretation of such above noted Ayat, such order of Qur'an shall be effective both for the alive and dead Momeneen. In view of Hadith No.1431 in Sunan Abu-Dawood Sharif, Hazrat Ayesha R.A. narrated that Mohammad (P.B.U.H) has said that causing fracture of a dead person is just like causing fracture of an alive person.

13. An eminent Scholar from Sunni School of Thought Grand Ayatollah Yousaf Sannei, in a Selection of Islamic Laws, has dealt with the subject of exhumation and when issues Nos.290 and 291, were dealt with, it was responded in the following manner:--

"Issue 290: It is forbidden to exhume the dead body of a Muslim, that is, to open their grave even if it belongs to a child or an insane person. However, it does not matter to do so if the dead body has been decomposed and turned into dust.

Issue 291: To exhume the dead body of a Muslim is not forbidden in the following cases:

(1) When the dead body has been buried in a usurped land whose owner does not consent for the dead body to be buried there.

(2) When the shroud or any other thing buried with the dead body is a usurped property whose owner does not consent for it to remain with the dead body in the grave. Similarly,

when any part of the dead person's legacy for his heirs or heiresses is buried in the grave and the heirs and heiresses do not consent to let it remain with the dead body in the grave, but if the legacy is not considerable and costly, for instance, a ring and the like, especially if it does not inflict any considerable harm to the heirs and heiresses to let it remain with the dead body, it will be a case of Ta'ammul and Ishkaal, (i.e., a case of precaution not to do it). However, if the dead person has willed some certain written prayer, the Holy Quran, or a ring of theirs to be bureid with their dead body, it is not permissible to open the grave in order to take these things out provided that the willed thing to remain with the dead body do not exceed one-third of their property.

(3) When the dead body has been buried without the obligatory Ghusl or without a shroud; or when others learn that the Ghusl given to the dead body has been void or the dead body has not been shrouded according to religious rules, or when it is learned that the dead body has not been placed in the grave facing the Quiblah.

(4) When it is necessary to see the dead body in order to defend a right.

(5) When the dead body has been buried in a place where it is seen as disrespect to the dead person, for instance, in a place where garbage is thrown.

(6) When it is the matter of a legal purpose which is considered more important than exhumation, for instance, to open the grave in order to take a living baby out of the womb of a dead woman who has been buried.

(7) When it is feared that a predator would tear up the dead body or it will be taken away by flood or exhumed by enemies.

(8) To bury a part of a buried dead body, but as an obligatory precaution, it must be placed in the grave in such a way that the dead body is not seen.

14. On the other hand, an eminent Scholar from Shia School of Thought, As-Sayyid Ali Al-Husseini As-Seestani, in English Version of Tawdheehil-Masaae'I According to the Verdicts Of His Eminence Ayatul-Lah Al-U'dhma, has dealt with the issue of exhumation and at serial Nos. 647 to 650, in the following manner:--

"647. If it is proposed to transfer the dead body to some other town or its burial is delayed owing to some reason, the wahshat prayers should be deferred till the first night of its burial.

648. It is haraam to open the grave of a Muslim even if it belongs to a child or an insane person. However, there is no objection in doing so if the dead body has decayed and turned into dust.

649. Digging up or destroying the graves of the descendants of Imams, the martyrs, the Ulama and the pious persons is Haraam, even if they are very old, because it amounts to desecration.

650. Digging up the grave is allowed in the following cases:

· When the dead body has been buried in an usurped land and the owner of the land is not willing to let it remain there.

· When the Kafan of the dead body or any other thing buried with it had been usurped and the owner of the thing in question is not willing to let it remain in the grave. Similarly, if anything belonging to the heirs has been buried along with the deceased and the heirs are not willing to let it remain in the grave. However, if the dead person had made a will that a certain supplication or the Holy Qur'an or a ring be buried along with his dead body, and if that will is valid, then the grave cannot be opened up to bring those articles out. There are certain situations when the exhuming is not permitted even if the land, the Kafan or the articles buried with the corpse are Ghasbi. But there is no room for details here.

· When opening the grave does not amount to disrespect of the dead person, and it transpires that he was buried without Ghusl or Kafan, or the Ghusl was void, or he was not given Kafan according to religious rules, or was not laid in the grave facing the Qibla.

· When it is necessary to inspect the body of the dead person to establish a right which is more important than exhumation.

· When the dead body of a Muslim has been buried at a place which is against sanctity, like, when it has been buried in the graveyard of non-Muslim or at a place of garbage.

· When the grave is opened up for a legal purpose which is more important than exhumation. For example, when it is proposed to take out a living child from the womb of a buried woman.

· When it is feared that a wild beast would tear up the corpse or it will be carried away by flood or exhumed by the enemy.

· When the deceased has willed that his body be transferred to sacred places before burial, and if it was intentionally or forgetfully buried elsewhere, then the body can be exhumed, provided that doing so does not result in any disrespect to the deceased.

From the above, it must be clear that our Religion has given much respect to the dead body of a Muslim and without any justifiable cause, the disinterment of grave and exhumation of body would be considered as a sin, and being Muslims, we have to respect a dead body and only against serious accusations, should allow the disinterment. The order of exhumation must be based on detailed reasoning and it should be quite logical, fair and in order to further the cause of justice. Mere submission of an application and that too, after a considerable time of death of Mst. Masaib Bano (deceased), is not sufficient to ask for the disinterment and exhumation.

15. For what has been discussed above, the findings of both the courts-below seem to be just, legal and reasonable, which do not warrant any interference in Constitutional Jurisdiction of this Court.

16. This petition, having no merits is, therefore, dismissed.

ARK/G-19/L Petition dismissed.

PLJ 2015 Cr.C. (Lahore) 7 (DB)

Present: **MUHAMMAD ANWAAR-UL-HAQ AND IBAD-UR-REHMAN LODHI, JJ.**

MUHAMMAD AMIN--Appellant

versus

STATE & another--Respondents

Crl. Appeal No. 2850 of 2010, heard on 30.1.2014.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9(c)--Conviction and sentence--Recovery of Charas--Modification in sentence--Pray for reduction in sentence--Court dismiss this appeal to extent of appellants conviction recorded by trial Court, but allow same partly to extent of his sentence of imprisonment, which was hereby reduced to 9-years and 6-months as in our view same will meet ends of justice--Imposition of sentence of fine was maintained, however, appellant shall suffer simple imprisonment for three months, in default of payment thereof--Benefit of Section 382-B, Cr.P.C. shall remain intact as extended by trial Court with above modification of appellant, appeal stand disposed of. [P. 8] A

Prince Rehan Iftikhar Sheikh, Advocate for Appellant.
Ch. Muhammad Mustafa, DPG for Respondents.
Date of hearing: 30.1.2014.

JUDGMENT

Ibad-ur-Rehman Lodhi, J.--Muhammad Amin son of Sher Muhammad was tried by a learned Additional Sessions Judge, Depalpur, District Okara, in case FIR No. 619, dated 09.09.2008, registered under section, 9(c) of the Control of Narcotic Substances Act, 1997. The learned trial Judge by virtue of his judgment dated 26.10.2010, found him guilty of the said charge, convicted and sentenced him to undergo rigorous imprisonment for 14 years with a fine of Rs.50,000/- or in default thereof to further suffer simple imprisonment for 3-months. Benefit of Section 382-B, Cr.P.C. was, however, extended to him.

2. Feeling aggrieved of his conviction and sentence, the appellant has approached this Court by filing the instant appeal.

3. Precisely, the allegations against the appellant, according to the FIR, recorded at the instance of Shah Nawaz S.I., are that on receiving spy information, he constituted a raiding party and apprehended the appellant, and on his search, seven packets of *Charas* weighing 7 KGs were recovered.

4. At this stage, the learned counsel appearing for the appellant submits that he does not challenge the conviction of the appellant on merits; however, he prays for reduction in the sentence awarded to him to the period already undergone by him on the ground that he has already served out his substantive sentence of 10-years, 2-months and 23-days and that now he is serving the sentence of 3-years and 9-months in the instant case, which fact is confirmed by the report submitted by the Superintendent, Central Jail, Sahiwal, dated 23.12.2013.

5. The learned Deputy Prosecutor-General, for the State, does not seriously oppose the prayer made by the learned counsel for the appellant.

6. Keeping in view the aforesaid situations, we dismiss this appeal to the extent of appellants conviction recorded by the learned trial Court, but allow the same partly to the extent of his sentence of imprisonment, which is hereby reduced to 9-years and 6-months R.I as in our view the same will meet the ends of justice. The imposition of sentence of fine is maintained, however, the appellant shall suffer simple imprisonment for three months, in default of payment thereof. Benefit of Section 382-B, Cr.P.C. shall remain intact as extended by the learned trial Court.

6. With the above modification in the sentence of the appellant, this appeal stands disposed of.

(A.S.) Appeal disposed of.

PLJ 2015 Cr.C. (Lahore) 332 (DB)
[Multan Bench Multan]
Present: **SARDAR MUHAMMAD SHAMIM KHAN AND IBAD-UR-REHMAN LODHI, JJ.**
MUHAMMAD ARIF--Petitioner
versus
STATE and another--Respondents

Crl. A. No. 125 of 2012, decided on 18.9.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 426--Pakistan Penal Code, (XLV of 1860) Ss. 302(b)--Juvenile Justice System Ordinance, 2000, S. 11--Suspension of sentence--Conviction and sentence--Challenge to--Examination of Section 11 of Juvenile Justice System, Ordinance, 2000 that even after

conviction a juvenile is required to be treated differently than that of generally convicted persons in criminal cases--Such special procedure has been provided in said Special Law in order to provide an opportunity to such juvenile to mend himself in order to live in remaining life with some good conduct--When present juvenile accused was convicted, trial Court has not considered provisions of Section 11 of said Ordinance--Counsel representing complainant has although opposed suspension of sentence of petitioner but placed reliance of judgments wherein either cases of juvenile were not discussed or matters were relatable to entirely different offences--Petition was allowed. [P. 333] A, B & C

Malik Saeed Ahmad, Advocate for Petitioner.

Mr. Muhammad Zafar, Advocate for Complainant.

Mr. Muhammad Saeed Ahmad Mumtaz, Addl. P.G. Punjab for State.

Date of hearing: 18.9.2013.

ORDER

Crl. Misc. No. 1/2013

The petitioner was tried, considering him as a Juvenile and after conviction, in private complaint filed with respect to the occurrence which was earlier reported through FIR No. 152/2010 dated 18.03.2010 under Sections 302, 34, PPC registered at Police Station Saddar Kabirwala. He was sentenced to life imprisonment as Tazir with the direction to pay Rs. 2,00,000/- as compensation to the legal heirs of deceased Tahir Iqbal by means of judgment dated 30.01.2012 passed by the learned Addl. Sessions Judge, Kabirwala.

2. While arguing in support of the contention for release of the petitioner on bail after suspending his sentence, the learned counsel for petitioner has contended that the petitioner was arrested on 23.04.2010 and throughout the trial, he remained behind the bars and he was in custody when conviction was announced on 30.01.2012. Further contends that no fatal injury, resulting into the death of deceased in this case, has been attributed to the present petitioner.

3. We have noticed on examination of Section 11 of the Juvenile Justice System, Ordinance, 2000 that even after conviction a juvenile is required to be treated differently than that of the generally convicted persons in criminal cases. Such special procedure has been provided in said Special Law in order to provide an opportunity to such juvenile to mend himself in order to live in the remaining life with some good conduct.

4. We have noticed that when the present juvenile accused was convicted, the learned trial Court has not considered the provisions of Section 11 of said Ordinance.

5. The learned counsel representing the complainant has although opposed the suspension of sentence of the petitioner but placed reliance of the judgments wherein either the cases of juvenile were not discussed or the matters were relatable to entirely different offences.

6. Keeping in view the period of detention, already suffered by present juvenile convict, we consider it a fit case for suspension of sentence and resultantly we allow this petition, sentence being suffered by the petitioner as a result of judgment dated 30.01.2012 passed by learned Addl. Sessions Judge, Kabirwala is suspended and he is ordered to be released on bail subject to furnishing of bail bonds in the sum of Rs. 2,00,000/- with two

sureties each in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Bench.

(A.S.) Petition allowed.

PLJ 2015 Lahore 795
Present: **IBAD-UR-REHMAN LODHI, J.**
PAKISTAN CRICKET BOARD--Petitioner
versus
EXECUTIVE DISTRICT OFFICER (REVENUE), LAHORE & 2 others--Respondents

W.P. No. 10380 of 2006, decided on 29.4.2015.

Punjab Urban Immovable Property Tax Act, 1958--

----S. 4(b)--Definition--Play ground and stadium--Exemption from levy of property tax--Claiming an exemption from levy of property tax--Validity--Gaddafi stadium having capacity of hundred and thousands of people to be accommodated in tiers of seats, available on stairs, pavilion and allied facilities having commercial centres outside stadium under apprising stairs cannot be given status of playground--Stadium is not included in property exempted from levy of property tax within meaning of Section 4(e) of Act. [P. 799] A

Punjab Urban Immovable Property Tax Act, 1958--

----S. 10(2)--PCB claimed exemption from levy of property tax--Difference in between leases for national stadium and lease for Gaddafi Stadium--PCB cannot enjoy exemption from levy of property tax on leased property which is completely being administered by Board and in view of agreed term of lease, it is board which is responsible to pay all taxes and assessments of every description. [P. 799] B

M/s. Taffazul H. Rizvi and Haider Ali Khan, Advocates for Petitioner.

Mr. Anwaar Hussain, A.A.G., with *Naseer-ud-Din* ETO, *Salah-ud-Din* AETO and *Fida Khan*AETI for Respondents.

Date of hearing: 23.4.2015.

JUDGMENT

A piece of land measuring 180-*kanals* 1-*marla* in Property No. S-86-R-207, was leased out by the Government of Punjab in favour of Pakistan Cricket Board for construction of International Standard Cricket Stadium for holding the World Cup, 1996 by means of a lease deed registered on 03.05.1995 with the Sub-Registrar Model Town, Lahore, initially for a period of forty years against a token rent of Rs.1000/- per-year. This property is commonly known as Gaddafi Stadium.

2. The Taxation Department for the period from 1996 to 2004 demanded the property tax worth Rs.3663313.00 from the Pakistan Cricket Board with regard to the leased property.

3. Pakistan Cricket Board claiming an exemption from levy of property tax filed an appeal before Respondent No. 2-Director Excise and Taxation, Zone-VI, Lahore, which was dismissed on 30.09.2004.

4. Such dismissal of appeal was challenged by means of a Constitutional petition viz. Writ Petition No. 2185 of 2005, which was withdrawn on 01.06.2005, in order to enable the Cricket Board to file a revision petition as provided under Section 10(2) of The Urban Immovable Property Tax Act, 1958 (hereinafter to be referred as `the Act'), which was subsequently filed before the revisional authority i.e. Executive District Officer (Revenue), Lahore, which too was dismissed on 09.06.2006 and this time, the revisional order was called in question though the present Constitutional petition before this Court.

5. The learned counsel for the petitioner-Board has mainly depended his arguments in support of the exemption from levy of any property tax by referring Section 4(a) & (e) of the Act, which provides an exemption; firstly; with reference to the buildings and lands other than those leased in perpetuity by the Federal Government, and secondly public parks, playgrounds and libraries. The petitioner has mainly placed reliance on a case decided with reference to National Stadium Karachi by erstwhile Sindh High Court in case reported as *Pakistan Cricket Board through Manager, National Stadium, Karachi and others vs. Director-General Excise and Taxation and others* (2011 CLC 1894) with a submission that the petitioner-Board is placed similarly with reference to Gaddafi Stadium, as it was determined in *National Stadium's case*.

6. The learned A.A.G., on the other hand, appearing for the respondents, with reference to the definition of `property', playground and Stadium, lease in perpetuity and the effect of amendments in the Punjab Urban Immovable Property Tax Act, 1958, by virtue of Punjab Finance Ordinance, 2002, substituting Section 4(b) of the Act, providing exemption from levy of property tax to the buildings and lands other than those leased in perpetuity owned and administered by the Government of the Punjab, has argued that, no exemption is available to the petitioner, particularly, keeping in view clause-xii of the lease deed, it is the petitioner and none else, who is liable to pay the property tax as per demand of the respondents.

7. Admittedly, property detailed above was taken on lease by the Pakistan Cricket Board for a minimum initial period of forty years and clause-xii of the lease deed is of much significance, which is reproduced herein-below:

> "The lessee shall pay and discharge all rates, taxes, charges and assessments of every description which are now or may at any time hereafter be imposed, charged or assessed by the Government, Lahore Development Authority/Lahore Metropolitan Corporation on the property or the buildings, structure, amenities established or erected."

8. In order to better understand the proposition, under discussion, it would be advantageous to see the import of the exemption clause i.e. Section 4 of the Act, providing exemption to certain properties from levy of property tax. The National Stadium Karachi was given exemption from payment of property tax within the meaning of Section 4(a) of the Act. There is a vast difference in between two leases i.e. lease for National Stadium and lease for Gaddafi Stadium. In case of National Stadium, the Federal Government is the lessor, whereas, in case of Gaddafi Stadium, Provincial Government of Punjab is the lessor.

Within the meaning of Section 4(a) of the Act, the buildings and lands other than those leased in perpetuity owned by the Federal Government are exempted from levy of any property tax. Benefit of such exemption was extended in favour of the National Stadium in above-referred matter.

The case of Gaddafi Stadium is altogether different. It is the lease from Government of Punjab and with regard to such lease, exemption can be asked for under Section 4(b) of the Act.

9. Earlier to 25.06.2002, (the date of promulgation of Punjab Finance Ordinance, 2002), the leased properties administered by the lessees were kept outside of the exemption clause but by virtue of Section 3 of the Finance Ordinance referred-above, Section 4(b) of the Act was substituted and was reframed in the following manner:

> "buildings and lands other than those leased in perpetuity owned and administered by the Government of the Punjab or a local Government as defined in Section 2, clause (xvi) of the Punjab Local Government Ordinance, 2001 (XII of 2001)".

The addition of word "administered" created much difference.

10. The learned counsel for the petitioner, while arguing the matter, seems to be having this change in mind and perhaps for that reason, he was more interested in getting exemption for the period from 1996 to 2002 till the time, when on promulgation of the Punjab Finance Ordinance, 2002, the buildings administered by the Provincial Government, were exempted from the levy of property tax. Admittedly, the leased property, known as Gaddafi Stadium, is wholly being administered by the Pakistan Cricket Board. According to the schedule attached by the petitioner with the petition, there are 70 shops in the leased property, which are part of Qaddafi Stadium, out of which 24 (twenty four) are stated to have been leased out, whereas, 43 (forty three) are rented out and 3 (three) are in the use of the Cricket Board. The Stadium also having 12 (twelve) offices, 5 (five) out of which are leased out, 4 (four) are rented out and 3 (three) are in the use of the Cricket Board, as per showing of the Board, itself. Also there is a restaurant, which is leased out by the Board. It is the case of the Board, itself, that the shops, marriage halls and other commercial activities available at the site of Gaddafi Stadium, are being wholly administered by the Board and the Provincial Government has nothing to do even with such commercial activities or incomes being derived from such activities.

11. As far the exemption claimed under Section 4(e) of the Act, which is available for public parks, playgrounds and libraries is concerned, it is to be seen as to if Gaddafi Stadium falls within the definition of "playground". None, either the "Stadium" or "playground" is defined in the Act and for that we have to see the dictionary meanings of both these terms.

According to Concise Oxford English Dictionary Twelefth Edition the word "playground" means an outdoor area provided for children to play on, whereas, the same term has been under-mentioned meaning in Chambers 21st Century Dictionary "an area for children's recreation, especially one that is part of a school's grounds, whereas, the term "Stadium" has distinctly been given meaning in Concise Oxford English Dictionary as an athletic or sports ground with tiers of seats for spectators, whereas, in Chambers 21st

Century Dictionary, the term "Stadium" is defined in the following manner:- a large sports arena in which the spectators' seats are arranged in rising tiers.

Having such definition in consideration, it can easily be held that, Gaddafi Stadium having capacity of hundred and thousands of people, to be accommodated in the tiers of seats, available on the stairs, pavilion and other allied facilities also having commercial centres outside the Stadium under the uprising stairs cannot be given the status of a playground. The Stadium is not included in the properties exempted from levy of property tax within the meaning of Section 4(e) of the Act.

12. While this matter was being heard, another interesting aspect has been noted that in such fiscal statute, which is commonly known as Property Tax Act, the term "property" has not been defined in the principal statute; however we find the definition of such term of "property" in Rule 2(iv) of The Urban Immovable Property Tax Rules, 1958, which means buildings and lands situated within a rating area. The Act only provides definition of the rating areas under Section 3 thereof. Exhaustive definition of the word "property" in the Act is the requirement, which may be taken notice by the relevant legislature.

A learned Division Bench of Sindh High Court in the case referred above also has come to the conclusion that a Stadium is not a playground.

13. Reliance has also been placed by the petitioner on the case titled *Muhammad Shafi vs. Pakistan through Secretary, Ministry of Religious and Minority Affairs, Islamabad & 3 others* (2002 MLD 1270), but again it would be of no help to the petitioner, as in the reported matter, it was the Federal Government, whose property was leased out and exemption was being claimed under Section 4(a) of the Act, which as noted herein-above, is not the case of Gaddafi Stadium, which property was leased out by the Provincial Government.

14. The upshot of above discussion is that the petitioner-Pakistan Cricket Board cannot enjoy the exemption from levy of property tax on the leased property, which is completely being administered by the Board and in view of the agreed terms of the lease, it is the Board, which is responsible to pay all the taxes and assessments of every description. The demand of the respondents, however, before 2002, when the properties administered by the Provincial Government itself and not by the lessees, for the first time, were included in the exemption clause and, therefore, it is held that after 2002, the petitioner-Board is liable to pay the property tax (the property mentioned in detail in the opening of present order). The claim prior to 25.06.2002, as was raised by the respondents towards property tax would remain be exempted in favour of the petitioner-Board; however, thereafter, the petitioner-Board is bound to pay such property tax as is determined by the respondents.

15. With these observations, this writ petition, having no force, is dismissed.

(R.A.) Petition dismissed

PLJ 2015 Lahore 800

Present: **IBAD-UR-REHMAN, LODHI, J.**

CRESCENT JUTE PRODUCTS--Petitioner

versus

A.D.J., FAISALABAD & 2 others--Respondents

W.P. No. 1338 of 2014, decided on 27.4.2015.

Power of Attorney--

----Compulsory registered--Legal significance--It is also by now a settled position that contents of power of attorney shall strictly be construed and no power or authorization is to be read into same, which is not expressly set out therein. [P. 802] A

Ejectment Petition--

----Unauthorized person, who was not duly and specifically authorized to file, sign verify proceed ejectment petition--Power of attorney annexed with petition as valid document--Validity--Document annexed with ejectmentpetition empowering a law officer of Bank, does not conform to requirements of relevant law, providing a valid document of power of attorney--Bank, if required to initiate a legal proceeding, is under legal obligation to execute a separate and distinct power of attorney authorizing any of its officer in view of resolution of Board of Directors and every such power is to be distinctly provided--While construing present document strictly that does not make it a valid document, which can be called a power of attorney. [P. 803] B

M/s. Malik Ali Imran and Hassan Iqbal Warraich, Advocates for Petitioner.

Mian Nisar Mahmood, Advocate for Respondent No. 3.

Date of hearing: 27.4.2015.

ORDER

This judgment shall dispose of the following writ petitions:--

(i) Writ Petition No. 1338 of 2014 *(Crescent Jute Products vs. A.D.J., Faisalabad & 2 others)*

(ii) Writ Petition No. 2125 of 2014 *(M/s. Ittehad Chemical vs. A.D.J., Faisalabad & 2 others)*

(iii) Writ Petition No. 4211 of 2014 *(Shamas Textile Mills vs. A.D.J., Faisalabad & 2 others)*

as all these petitions have been filed against judgment dated 26.11.2013, passed by a learned Additional District Judge, Faisalabad.

2. In all these matters, the ejectment petition was filed by the Habib Bank Limited, Respondent No. 3 herein.

3. The tenant, present petitioner, in addition to other objections, objected to the maintainability of the ejectment petition on the ground that, it was filed by an unauthorized person, who was not duly and specifically authorized to file, sign, verify, proceed the ejectment petition and to appear in such particular ejectment matter on behalf of the Bank.

4. Issue No. 2 was specifically framed reflecting such controversy, and the learned Special Judge (Rent), while giving findings on said issue, decided in favour of the tenant and held the ejectment petition as not competent by means of order dated 30.09.2011.

5. The Bank preferred an appeal, which came up for hearing before a learned Additional District Judge, Faisalabad, on 26.11.2013, who by reversing the findings of the learned Special Judge (Rent), allowed the appeal and termed the power of attorney annexed with the petition as a valid document and, thus, the eviction of the tenant was ordered.

6. The learned counsel for the petitioner, while referring the document, shown as Officer's power of attorney submits that perusal thereof reveals that it is a cyclostyled proforma prepared at Central Office Karachi of the Bank and then circulated in all its regions and wherever it is required, the same is being used, after filling in the blanks by inserting the name of the Officer of the relevant Region, shown to have been appointed as attorney and in general terms, the powers were shown to have been extended in favour of such Officer of the Bank.

7. The Bank in the ejectment petition has introduced itself as a company incorporated under the Companies Ordinance, 1984, but the document styled as Officer's power of attorney has been filed without any resolution of the Board of Directors of the Bank, specifically authorizing such nominated person to represent the Bank and to use such power on behalf of the Bank. In absence of such resolution, which is a condition precedent for initiating any legal process on behalf of any legal person, the document calls Officer's power of attorney would not meet the requirement to initiate a valid proceeding.

8. The learned counsel for Respondent No. 3-Bank has mainly argued by highlighting the administrative problems of the Bank, to the effect that if the Bank, in every case, is required to execute a separate power of attorney providing specific powers in favour of the appointed attorney to initiate the legal proceedings, it would cause numerous difficulties and incur huge expenses.

This may be the administrative problem of the Bank, but without that, the legal requirements cannot be fulfilled. If the law requires to perform an act in a particular manner, that particular act is to be performed in that manner alone. The Bank keeping in view its stated administrative problems cannot be absolved from its legal duty.

9. The law of the power of attorney has developed to such extent that the Hon'ble Supreme Court of Pakistan in case of *Habib Bank Limited vs. Zelins Limited and another* (2000 SCMR 472) has held in clear terms that, if objection was raised about the competence of the Officer of the Bank instituting the ejectment proceedings against the tenants of the Bank, burden lies upon the Bank to establish that the person instituting the ejectmentproceedings was authorized by the Bank in that behalf. In case of *Messrs A.M. Industrial Corporation Limited vs. Aijaz Mehmood and others* (2006 SCMR 437), it was the authoritative view of the Hon'ble apex Court that the ejectment petition of petitioner-company was rightly dismissed on the sole ground that the person, who signed the ejectment petition, was not authorized by the petitioner-company through a resolution of Board of Directors nor any power of attorney was executed in his favour for institution of ejectment proceedings.

10. Viewing from another angle, the document introduced as power of attorney is not of any legal significance, as the same lacks its registration under the Registration Act, 1908, and Stamp Act, 1899. Such power of attorney is compulsorily registerable.

11. It is also by now a settled position that the contents of power of attorney shall strictly be construed and no power or authorization is to be read into the same, which is not expressly set out therein.

12. The document annexed with the ejectment petition empowering a law officer of the Bank, does not conform to the requirements of relevant law, providing a valid document of power of attorney. The Bank, if required to initiate a legal proceeding, is under legal obligation to execute a separate and distinct power of attorney authorizing any of its officer in view of the resolution of the Board of Directors and every such power is to be distinctly provided. While construing the present document strictly that does not make it a valid document, which can be called a power of attorney.

13. The findings on Issue No. 2 arrived at by the learned Special Judge (Rent) on 30.09.2011 were, thus, justified and having legal backing, which were erroneously reversed by the learned first appellate authority. The findings of the learned first appellate authority arrived at on 26.11.2013 are not sustainable, thus, the same are set-aside by restoring the findings and final order passed by the learned Special Judge (Rent).

14. The result of above peroration is that, all these petitions are allowed, and the ejectment petitions filed by the Bank are held as filed by an incompetent person on behalf of the Bank and, thus, were not proceedable.

(R.A.) Petitions allowed

PLJ 2015 Lahore 835

Present: **IBAD-UR-REHMAN LODHI, J.**

NEW HABIB KHAN ROAD LINKERS--Petitioner

versus

PROVINCE OF PUNJAB & 3 others--Respondents

Writ Petition No. 2188 of 2014, decided on 16.4.2015.

Motor Vehicle Rules, 1969--

----R. 34(2)--Transport--Particular to be printed on transport vehicle--Getting name exhibited on buses of owners--Hire purchase agreement--Difficulties of Govt. Agencies--Status of owner of buses--Validity-- It is a matter of common knowledge that buses, being plied on roads, carries different names, which creates not only confusion in public, but also would become very difficult for state machinery to ascertain responsibility of owners of vehicle, in case of any damage caused to public on account of some accident or irresponsible conduct of staff deputed on buses by owners--*Prima-facie*, such practice has been adopted and permitted to continue to be adopted, except by respondent, who issued impugned order to enforce law in its real spirit and behind such implied permission by Government functionaries, it seems that same is permitted for convenience of not only agencies created like petitioner, but also with connivance of state machinery. [P. 842] A

Mr. Salman Mansoor, Advocate for Petitioner.

Mr. Khawar Ikram Bhatti, Additional Advocate-General Punjab for Respondents No. 1 to 3.

Mr. Iftikhar Ahmad Mian, Advocate/Legal Advisor for Respondent No. 4-City District Government, Lahore.

Date of hearing: 16.04.2015.

ORDER

The petitioner has introduced itself as an entity involved in transport business and in such capacity has entered into various commercial agreements and arrangements with several other individuals to ensure to cater a continuous and up-to-date fleet of vehicles, buses, stage carriages etc., an in order to ensure the availability of buses at different halting points and bus-bays, entered into hiring agreements with various other private owners of the vehicle, who don't have the capacity to strictly run their own Transport Company and, thus, were willing to enlist their vehicles in the fleet of any "self-styled recognized and established transporters", and petitioner, itself, has termed as having such arrangements, which are commercially viable and profitable.

2. The petitioner went on to saying regarding its any competence that some private owners of the vehicles have handed over their such vehicles to the petitioner on the basis of such hiring agreements, and the same are being plied by the petitioner in transport business. The petitioner accepts its responsibility according to such hiring agreements to ply said vehicles in road worthy conditions and to pay the rent to its owners.

By admitting one aspect in clear terms that, the petitioner has not attained the status of the owner of the buses, being plied in the said fleet, it is also pleaded that the name of the petitioner was being exhibited on all such vehicles.

3. The grievance started for the petitioner, when the Administrator, General Bus Stand, City District Government, Lahore/District Officer Passenger & Freight Transit Terminal (Respondent No. 2) issued a direction to the following effect:--

The petitioner felt the said direction as an invasion on its right in exhibiting its own name on all the buses of different owners and challenged the issuance of said order.

4. After issuance of the above order, one bus bearing Registration No. FSD-7537 was statedly impounded by Respondent No. 2 and not only its release was prayed for, but the impugned order was sought to be set at naught.

Alongwith the writ petition, the petitioner has placed on record a number of documents either hiring agreements or authority letters, executed by the owners of the vehicles in favour of the petitioner and in order to ascertain and understand the things in clarity, one of such hiring agreement and one authority letter is reproduced herein-below:--

5. A report from the City District Government to the writ petition was filed elaborating the malpractices, which are being prevailed in the transport mafia, particularly, by the entities; like the petitioner, who have adopted the role of, in fact, Commission Agents, protectors to the illegal activities of the transporters and also highlighted the difficulties of the Government agencies in case of any fatal accident, wherein any vehicle is involved, and the matter of compensation to the aggrieved families of the victims of such road side accidents, which includes the determination of actual ownership of the vehicles, fixation of responsibility of the cause of accident and remaining allied matters.

6. The learned counsel for the parties have been heard and record has been perused.

7. In order to consolidate the laws relating to motor vehicles in all the Provinces, The Motor Vehicles Ordinance, 1965 (Ordinance No. XIX of 1965) was promulgated on 18.06.1965. The Provinces, thereafter in exercise of powers conferred by Sections 22, 43, 68, 69, 70, 74, 96 and 120 of the said Ordinance, have framed the rules called as Motor Vehicle Rules, 1969 (hereinafter to be referred as "the Rules")

8. The insistence of the petitioner is that, it being a licencee or at the most a lessee with regard to the motor vehicles, being supervised by it owned by different individuals can paint and colour the said vehicles by exhibiting the name of the petitioner, which has been prohibited by means of impugned order.

Rule 34 of the Motor Vehicle Rules, 1969 reads as follows:-

"34. Particulars to be printed on transport vehicles.--(1) Save in the case of motor cabs, delivery vans or trailers of the nature specified in clause (h) of sub-section (3) of Section 44, the particulars set forth below shall be exhibited in a fixed frame inside the vehicle in the driver's cab, in English letters and numerals:--

1. Registered No. of vehicle -------
2. Name and address of owner as set forth in the Certificate of Registration.-------
3. The Registered Unladen Weight in lbs. Denoted by U.W. -------
4. The Registered, Laden Weight in lbs. denoted by R.L.W. -------
5. Carrying capacity:--

(a) if a stage or a contract carriage, the number of the passengers of whom accommodation is provided. -------

(i) Upper Class

(ii) Lower Class -------

(b) and (b) if a goods vehicle, in lbs. -------

6. Registered Front Axle Weight in lbs. denoted by F.A.W. -------
7. Registered Rear Axle Weight in Lbs. denoted R.A.W. -------
8. Number and size of tyres: -------

(a) Front Axle -------

(b) Rear Axle -------

(c) Intermediate Axle, if any -------

Signature and name of the Motor Vehicle Examiner.

[Signature of the authorized person ----------

Seat of the licensed Automobile Workshop ----------

Licence No. ----------

Place of issue----------

(2) The full name of the company, society, firm or person owning the vehicle as set forth in its registration certificate shall be exhibited on both sides of every transport vehicle other than motor cabs, delivery vans and trailers, in block letter measuring four inches in height and three-fourth of an inch in thickness.

Provided that with the approval of the Regional Transport Authority concerned abbreviation of names may be used.

(3) In case of a motor cab, or a motor cab rickshaw, the word "TAXI" shall be printed in white in the middle of the wind screen as well as of the rear glass. The letters shall be not less than 2-1/2 inches high and 5/8th of an inch thick at any part. The word "Private" in block letters not less than 2-1/4 inches high and 5/8th of an inch thick at any part shall be painted in red in the middle of the wind-screen of a motor cycle rickshaw.

(4) This rule shall not apply to any vehicle registered under Section 40 or 41].

Above sub-rule (2) amply clarifies the position that, it is only the owner, (company, society, firm or person owning the vehicle) as set-forth in its registration certificate, whose name shall be exhibited on both sides of every transport vehicle, thus, the petitioner, who admittedly is not the owner of any vehicle, is not entitled to get its name exhibited on any vehicle.

In view of Rule 46 of the Rules, even in case of hire purchase agreements, the parties to an agreement are bound to declare such transaction in the form of a note endorsed on Form "F" to the effect that the vehicle is subject to such an agreement and the registering authority then shall complete and affix his signature to the note appended to Form "G".

9. The demand of the petitioner in getting its name exhibited on the buses of other owners is, thus, hit by Rule 34(2) of the Rules and at the same time, the hire purchase agreement does not qualify the petitioner to attain the status of owner, particularly, in presence of such an agreement, which does not fulfill the requirements of Rule 46 of the Rules.

10. It is a matter of common knowledge that the buses, being plied on the roads, carries different names, which creates not only confusion in the public, but also would become very difficult for the State machinery to ascertain the responsibility of the owners of the vehicle, in case of any damage caused to the public on account of some accident or irresponsible conduct of the staff deputed on the buses by the owners. *Prima-facie*, such practice has been adopted and permitted to continue to be adopted, except by Respondent No. 2, who issued the impugned order to enforce the law in its real spirit and behind such implied permission by the Government functionaries, it seems that the same is permitted for the convenience of not only the agencies created like the petitioner, but also with the connivance of the State machinery.

11. The act on the part of Respondent No. 2 is appreciable. It must not be end here. It is to be made an example for all others working in same capacities in all over the Province. The impugned action on the part of Respondent No. 2, which is challenged by means of this writ petition is upheld by dismissing this petition, which has no basis.

12. The Chief Secretary, Government of Punjab, to whom a copy of this judgment be delivered, is required to direct all the Regional Transport Authorities in the Province and all other responsibles to launch a campaign for strict compliance of Rule 34(2) of the Rules in whole of the Province and to remove the illegalities, wherever same are being adopted in violation of such rule.

13. It is expected that the required exercise be completed within next sixty day, compliance report of which be furnished to this Court through the Deputy Registrar (Judicial).

14. With these observations, this petition having no force is dismissed.

(R.A.) Petition dismissed.

PLJ 2015 Lahore 998
***Present*: IBAD-UR-REHMAN LODHI, J.**
MUHAMMAD SHABBIR--Petitioner
versus
ADDITIONAL DISTRICT JUDGE, GUJRANWALA and 2 others--Respondents

W.P. No. 21960 of 2012, heard on 18.5.2015.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional Petition--*Ex-parte* proceedings--Wrong presumption--Unless suit was decided no perfect title can be claimed--Suit filed on basis of agreement, dismissal of--No defence to contest--Validity--Contesting respondent has proceeded against *ex-parte* and since there is no defence or rebuttal to arguments of petitioner which otherwise carries weight and being uncontested, un-responded, same were believed, therefore, petition was allowed.

[P. 999] A

Mr. Muhammad Younas Bhullar, Advocate for Petitioner.

Ex-parte for Respondent No. 3.

Date of hearing: 18.5.2015.

JUDGMENT

The only contesting Respondent No. 3 has been proceeded against *ex-parte* on 14.10.2014 he has never attempted to join the proceedings at any subsequent stage.

2. In *ex-parte* arguments, the learned counsel for petitioner has contended that the Courts below on 11.07.2011 and 18.05.2012 has proceeded to non-suit the petitioner in his ejectment petition filed against Respondent No. 3 on wrong presumption by believing that a suit for specific performance of agreement to sell was pending before the Civil Court filed

on behalf of Respondent No. 3 and according to the Courts below since the title in favour of the present petitioner was not perfect and unless the suit is decided no perfect title can be claimed by the petitioner *qua* the property in question.

3. The learned counsel for petitioner has referred the judgment and decree passed by the learned Civil Judge 1st Class, Gujranwala in Civil Suit No. 618/2009 dated 17.01.2013 which shows that the suit filed by present Respondent No. 3 seeking declaration that the transfer of the property in favour of the present petitioner was illegal and unauthorized and as a further relief a decree for specific performance of alleged agreement to sell was also prayed for, stood dismissed. The learned counsel for petitioner has stated at bar that according to his instructions said dismissal of the suit has never further been challenged by Respondent No. 3.

4. In defence to the ejectment petition, the only plea, as was raised, was the claim of Respondent No. 3 on the strength of the stated agreement to sell, the suit filed on the basis of said agreement has been dismissed as noted herein above, henceRespondent No. 3 has left with no defence to contest the ejectment petition. As already noted that contesting respondent has proceeded against *ex-parte* and since there is no defence or rebuttal to the arguments of the petitioner which otherwise carries weight and being uncontested, un-responded, the same were believed, therefore this petition is **allowed,** the impugned judgments dated 11.07.2011 and 18.05.2012 passed by the learned Courts below are set aside and the ejectment petition filed by the petitioner before the learned Rent Tribunal on 22.9.2010 is allowed.

(R.A.) Petition allowed.

K.L.R. 2015 Civil Cases 130
[Lahore]
Present: **IBAD-UR-REHMAN LODHI, J.**
Shahida Shaheen, etc.
Versus
Mst. Asif Sultana

C.M. No. 1-C of 2014 in C.R. No. 1461 of 2009, decided on 14th January, 2015.

(a) Additional evidence---

---Power to allow additional evidence is confined only either to the Trial Court or the Appellate Court---Had the intention of the Legislature been to give the power to the revisional Court to permit the recording of additional evidence, it would not be difficult for such Legislature to add suitable provision in Section 115, CPC providing such powers to the revisional Court, which has not been done.

(Paras 10, 11)

(b) Appellate Court and Revisional Court---

---Exercise of powers---Distinct---Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by Code of Civil Procedure on Court of Original Jurisdictions in respect of suits instituted therein---Whereas, in

view of Order 41, Rule 24, CPC, where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding, the fact that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds---To the contrary, a revisional Court under Section 115, CPC is competent after calling the record of any case, which has been decided by any subordinate Court to exercise the revisional jurisdiction in cases, where it appears that the subordinate Court has not exercised a jurisdiction vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity and the revisional Court in such eventuality, may make such order in the case, as it thinks fit---No power to determine the suit finally or to take additional evidence etc. has been provided to the revisional Court like the Appellate Court.

(Paras 6, 7, 8)

PRODUCTION OF ADDITIONAL EVIDENCE --- (Powers of Revisional Court)

(c) Civil Procedure Code (V of 1908)---

---Ss. 115, 107, O. XLI, R. 24---Production of additional evidence---Power of revisional Court---Examination of statutory provisions---Power to allow additional evidence is confined only either to the Trial Court or the Appellate Court---Had the intention of the Legislature to give the power to the revisional Court to permit the recording of additional evidence, it would not be difficult for such Legislature to add suitable provision in Section 115, CPC providing such powers to the revisional Court, which has not been done---**Held:** Additional evidence could only be allowed by an Appellate Court and revisional Court, in no circumstances, was competent to allow the production of additional evidence of any kind---C.M. dismissed.

(Paras 13, 14)

Ref: 1979 All LJ 1065, AIR 2000 All 166, PLD 2009 Kar. 352, PLD 1989 SC 112, 2007 SCMR 231.

نگرانی عدالت ایزادی شہادت منظور کرنے کے لئے مجاز نہ ہے۔ درخواست خارج ہوئی۔

[Revisional Court is not competent to allow the production of additional evidence. C.M. was dismissed].

For the Petitioners: **Ahmed Waheed Khan, Advocate.**
For the Respondent: **Muhammad Anzak Raja, Advocate.**
Date of hearing: **14th January, 2015.**

ORDER

C.M. No. 1-C/2014

IBAD-UR-REHMAN LODHI, J. --- Through the present civil miscellaneous, moved under the provisions of Order XLI, Rule 27, CPC read with Section 151, CPC, the revision petitioners seek permission to adduce additional evidence.

2. The same has been contested by the respondent by maintaining that the present one is 3rd application in series seeking same relief. The earlier one was moved before the learned Trial Court under the provisions of Order XVIII, Rule 2 (Proviso), which was dismissed on 19.07.1999 and a revision petition filed against such dismissal was dismissed by the learned Addl. District Judge, Lahore on 01.06.2000. The revisional order was challenged through Constitutional petition i.e. W.P. No. 20745/2000 and the same was dismissed by this Court on 30.09.2002. Second attempt was made on behalf of the petitioners to lead additional evidence was again unsuccessful, when another application moved on 25.10.2003 in this regard was dismissed by the learned Trial Court on 04.12.2003. This time the findings of the learned Trial Court were never further challenged.

3. **In our system, this has become a tendency, which is being increased day by day that the parties in revisional jurisdiction make the prayer for production of additional evidence.** The competence of the parties to ask for such relief and the jurisdiction of revisional Court in this respect has not so far been satisfactorily answered.

4. The learned counsel for petitioners, although in support of his contentions for production of additional evidence at revisional stage has placed reliance on Mohabbat v. Asadullah Khan and others (PLD 1989 Supreme Court 112) and Ghulam Muhammad v. Mian Muhammad and another (2007 SCMR 231), which would be discussed, in detail, in the latter part of the order, however, even after going through the same, the controversy on the point in issue does not seem to have been finally resolved.

In Mohabbat's case, it was a pre-emption matter and a learned Single Judge of erstwhile Peshawar High Court on the point as to whether the pre-emptor had a superior right gave his findings, but the vendees in the said case by placing reliance on an unpublished judgment of a learned Division Bench of High Court argued that according to the relevant Jamabandi all the Khasra numbers situate in one Khata and as the pre-emptor did not establish his superior right with respect to some of the Khasras, the vendees remained as owners in the Khata and no superior right could be claimed as against the petitioners-vendees on the basis of contiguity and for this proposition reliance was placed on an unpublished judgment of the learned Division Bench of High Court rendered on 05.05.1970 in C.R.No. 02/1963 (Muhammad Sharif etc. v. Pir Bakhsh Khan).

On the other hand, on behalf of the pre-emptor reliance was placed on an unpublished judgment of a learned Division Bench of the same High Court rendered on 17.06.1971 in RSA No. 183/1971 (Hafiz Ghulam Khawaja v. Qazi Abdul Latif, etc.) to support the assertion that the vendees could not claim superior right under such circumstances. As the learned Single Judge was of the opinion that the latter authority did

not correctly lay down the law, he referred on 21.05.1975 a question after formulation to a Larger Bench, which was heard by a Bench of three Judges and Mr. Justice Qaiser Khan added his separate note. While hearing the revision, the learned Judge recorded the statement of Patwari as additional evidence and the learned counsel for the appellant before the Hon'ble Supreme Court of Pakistan objected to such process adopted by the learned Revisional Judge in recording additional evidence particularly, when there was no request by the counsel for the respondent nor was any such request made at the appellate stage and by contending that the learned Single Judge misdirected himself as if he was exercising the power of an Appellate Court and it was stressed that the revision was not a continuation of the suit like an appeal and, therefore, no additional evidence could be recorded on the merits of the case. Such contentions although noted by the Hon'ble Supreme Court of Pakistan in the reported judgment, but except the second last paragraph of the judgment (side line F), it was not answered in an authoritative manner. The second last paragraph however is reproduced herein below for ready reference:---

> **"Even if technically Order XLI, Rule 27, C.P.C. did not apply to the revision as it was not a continuation of the suit, I have no hesitation in holding that the High Court could in the exercise of its inherent jurisdiction under Section 151, C.P.C. admit such evidence for clarification in the ends of justice."**

The careful reading of the above findings leads one to conclude that the concept of additional evidence under Order XLI, Rule 27, CPC is alien to the revisional jurisdiction, however in exceptional circumstances by exercising power under Section 151, CPC and that too for a limited purpose only in order to clarify something such process can be adopted.

5. In Ghulam Muhammad's case (Supra), the question as was argued by the learned counsel for appellant in the reported case, as reproduced in para 4 of the reported judgment was to the effect that the additional evidence which was permitted at revisional stage was violative to the provisions of Order XLI, rule 27, CPC. Such contention was answered in para 8 of the reported judgment by holding that the documents received in additional evidence were public documents and their authenticity and genuineness could not be doubted and the same were admitted to be brought on record in view of the provisions contained in rule 27(1)(b) of Order XLI, C.P.C., which empowered the "Court" to allow production of additional evidence by giving an impression that the word "Court" includes the revisional Court, also but the reading of such rule would clearly indicate that such power to allow production of additional evidence is only restricted to the "Appellate Court" only and not the revisional Court.

6. To examine as to what are the powers of Appellate Courts and revisional Courts, one has to compare the provisions of Section 107, read with Order XLI, rule 24, CPC and Section 115 of the same Code to identify the distinctive powers of appellate and revisional Courts and the allied power to be exercised by Courts exercising such separate jurisdictions while dispensing justice.

In view of Section 107, CPC, the Appellate Court has the powers:---

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

and the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by Code of Civil Procedure on Court of Original Jurisdictions in respect of suits instituted therein.

Whereas, in view of Order XLI, rule 24, CPC, where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding the fact that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

7. To the contrary, a revisional Court under Section 115, CPC is competent after calling the record of any case, which has been decided by any Subordinate Court to exercise the revisional jurisdiction in cases, where it appears that the Subordinate Court has not exercised a jurisdiction vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity and the revisional Court in such eventuality, may make such order in the case, as it thinks fit.

8. No power to determine the suit finally or to take additional evidence etc. has been provided to the revisional Court like the Appellate Court.

9. It would be beneficial to examine the manner of taking evidence and examination of the witnesses as provided in CPC and for that purpose this Court has to examine the provision of Order XVIII, CPC carefully.

In view of rule 2 thereof, which deals with the production of evidence it has been added by means of explanation by this Court that the Court of its own accord or on the application of any party, for reasons to be recorded in writing, may direct any party to examine any witness at any stage.

Rule 5 of the said Order has specifically been framed to provide the manner of taking evidence in **appealable cases.**

Rule 12 thereof provides a power to the Court recording evidence and examining witnesses to record such remarks as it thinks material respecting the demeanour of any witness while under examination.

By virtue of rule 13 thereof, no much importance has been given to the evidence in un-appealable cases and it is not necessary to take down any evidence of the witnesses in writing at length by the Trial Judge himself in such cases, but the Judge, as the examination of each

witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Order XLI, CPC deals specifically with appeals from original decrees and rule 27 thereof provides a power to the "Appellate Court" to grant permission for additional evidence.

Rule 28 thereof provides a mode of taking such additional evidence, which may either be taken by the Appellate Court itself or a direction be issued to the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the "Appellate Court".

Whereas by virtue of rule 29, it is the duty of the "Appellate Court" where additional evidence is directed or allowed to be taken to specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

10. The brief resume of different rules of Order XVIII and Order XLI, CPC do reveal that the power to allow additional evidence is confined only either to the Trial Court or the Appellate Court.

11. Had the intention of the Legislature been to give the power to the revisional Court to permit the recording of additional evidence, it would not be difficult for such Legislature to add suitable provision in Section 115, CPC providing such powers to the revisional Court, which has not been done.

The plain reading of Section 115, CPC would clearly give a picture that a revisional Court after calling the "record" of any case would decide the illegality, irregularity or jurisdictional defect in the proceedings carried out before the subordinate Courts. The word "record" used in Section 115 CPC is of much significance, which although has not been defined in Civil Procedure Code, 1908; however, in order to better understanding the meaning of such term, we have to consult the legal dictionary. In Black's Law Dictionary, Sixth Edition, the term "record" has been defined in the following manner:---

(i) **<u>Record:</u> A written account of some act, Court proceeding, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates.**

(ii) **The term "records" means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type whether expressed in ordinary or machine language.**

(iii) **<u>Complete record.</u> Such encompasses clerk's record, record of proceedings and all evidence.**

(iv) **<u>Court record of proceedings.</u> The official collection of all the trial pleadings, exhibits, orders and word-for-word testimony that took place during the trial.**

(v) <u>Judicial record.</u> A precise history of civil or criminal proceeding from commencement to termination.

The record of a case decided by the subordinate Court necessarily includes the evidence produced by the parties and examination of the witnesses. Similarly, when a person makes an application under Section 115, CPC to the revisional Court, he is bound to furnish, in support of such application, the copies of pleadings, documents and order of the subordinate Court and the revisional Court in such eventuality would not ordinarily call for the record of the subordinate Court. The joint reading of the above provision of CPC, clearly indicates that the Appellate Court would have a vast and wide power, where in fact the suit is reopened and the Appellate Court is competent to cause addition in the record already maintained by the learned Trial Court, whereas, in comparison thereof, the revisional Court would restrict itself to examine the legality or irregularity in the proceedings carried out by the learned Trial Court by examining the record maintained by the learned Trial Court. The revisional Court would have no power to cause any addition in already maintained record of the case.

12. In the case of Muhammad Khan v. Mukhtiarkar Revenue, Kot Ghulam Muhammad, District Mirpurkhas and others (PLD 2009 Karachi 352), it has been held that additional evidence of the nature, which is being sought to be produced and/or brought on record cannot be allowed in revisional Court with the intent to fill in the lacuna. Scope of Order XLI, rule 27, CPC is limited to the extent of appeal and it could not allow to be extended while exercising the revisional jurisdiction.

From Indian jurisdiction, this Court can refer the view taken by D.K. Seth, J. in Allahabad High Court in the case of Km. Rakhi and another v. Ist Additional District Judge, Firozabad and others (AIR 2000 Allahabad 166), which held that a revisional Court is concerned with records and confined within the same and it could not look into the material besides the record.

In the case of Mohd. Sabir v. Mohd. Hussain (1979 All LJ 1065), although it has been held that additional evidence can be accepted even in revision, but the background in which such observation was made does not permit to conclude that it will be in the power of the revisional Court to allow additional evidence, for, in the reported matter, a compromise arrived at in-between the parties at revisional stage was allowed to be brought on record in written shape in order to avoid the delay in final conclusion of the settled issue in-between the parties. The compromise deed brought on record with the consent of the parties can in no way be treated as a piece of “evidence” or “additional evidence”.

13. The net result of the above discussion is none else but a conclusion that additional evidence can only be allowed by an Appellate Court and revisional Court, in no circumstances, is competent to allow the production of additional evidence of any kind.

14. With these observations, this C.M. is **dismissed.**

15. The office is directed to fix the main case on 21.01.2015.

C.M. dismissed.

2015 P.Cr.R. 33

[Multan]

Present: **IBAD-UR-REHMAN LODHI, J.**

Muhammad Iqbal

Versus

The State and another

Criminal Appeal No. 567 of 2010, decided on 20th October, 2014.

SUSPENSION OF SENTENCE (MURDER) --- (Rule of consistency)

Criminal Procedure Code (V of 1898)---

---S. 426---Pakistan Penal Code, 1860, Ss. 302/364/396/149---Murder appeal---Seeking suspension of sentence of life and release on bail---Rule of consistency---Validity---Co-convicts of appellant-petitioner had already been allowed bail by High Court---Petitioner was also entitled to same concession on same grounds---Impugned sentence was suspended.

(Para 2)

اصول موافقت کی بنیادپر بجرم قتل میں سزائے عمر قید معطل ہوئی۔

[Impugned sentence of life was suspended on rule of consistency in murder case].

For the Petitioner: **Prince Rehan Iftikhar Sheikh, Advocate.**

For the State: **Mohammad Abdul Wadood, Deputy Prosecutor-General.**

Date of hearing: **20th October, 2014.**

ORDER

IBAD-UR-REHMAN LODHI, J.--- Criminal Miscellaneous No. 1 of 2014.

Through this Criminal Miscellaneous, Muhammad Iqbal, the petitioner, seeks suspension of sentence and release on bail in case, where he was awarded sentences as under:

Under Section 302(b) read with Section 149, P.P.C.

Life imprisonment with a fine of Rs. 20,000/- and in default whereof to further imprisonment of six months' S.I.

Under Section 364, P.P.C.

Life imprisonment with a fine of Rs. 20,000/- and in default whereof to further imprisonment of six months' S.I.

Under Section 396 read with Section 149, P.P.C.

Life imprisonment with a fine of Rs. 20,000/- and in default whereof to further imprisonment of six months' S.I.

Under Section 148, P.P.C.

Three years with a fine of Rs.10,000/- and in default whereof to further imprisonment of three months' S.I.

Vide judgment dated 20.11.2008, passed by the learned Additional Sessions Judge, Sahiwal, in a case F.I.R. No. 560, dated 23.11.2005, under Sections 302, 364, 396, 149, P.P.C., Police Station Ghallah Mandi, District Sahiwal. All the sentences were ordered to run concurrently and benefit of Section 382-B, Cr.P.C. was also extended to him.

2. As a rule of consistency, since co-convicts of present petitioner-appellant, namely, Kashif, Maqbool Ahmad and Rab Nawaz, have already been allowed bail by this Court after suspending their sentence respectively on 02.08.2012 and 24.10.2012, the present petitioner is also allowed bail on the same grounds, and his sentence is ordered to be suspended subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Bench. However, the petitioner-appellant shall be appearing in person before this Court on all subsequent dates of hearing till pendency of the main appeal.

3. To be heard alongwith Criminal Appeal No. 331 of 2008.

Sentence suspended.

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[Lahore]

Present: **IBAD-UR-REHMAN LODHI, J.**

Mst. Shagufta Parveen and 7 others

Versus

Executive District Officer (Revenue) and 4 others

Writ Petition No. 16-R of 2003, decided on 21st April, 2015.

CONCLUSION

(1) 'A' convert changes not only his religion, but his personal law also.

CONVERT --- (Entitlement to inheritance)

Constitution of Pakistan, 1973---

---Art. 199---Pakistan (Administration of Evacuee Property) Act, 1957---Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975---Convert---Entitlement to inheritance---Subject property was considered as evacuee property and became a part of the pool and, therefore, against verified claims allotted to different persons---Closed and past transaction---"Pending cases"---After 30th of June, 1974, the evacuee laws lost their any relevance and only the pending cases before the authorities were to be taken into consideration---Notified Officer, thus, by means of a detailed and well-reasoned order had reached to the conclusion

that application moved by convert was not a matter to be treated as a "pending case"---Further held, it was the exclusive jurisdiction of the Custodian to decide as to whether a person/applicant before him, was entitled to have the property, and the question as to whether a property was evacuee or not could only be settled by the Custodian under settlement authority, having the jurisdiction to inquire into the character of the property---Custodian was never approached by petitioners or their predecessor-in-interest in order to have a declaration as to the status of the property---Further held, 'A' convert changes not only his religion, but this personal law also---A Muslim does not inherit from a non-Muslim, nor does a non-Muslim inherit from a Muslim---There seemed to be no illegality in impugned order passed by EDO (R)---Writ petition dismissed.

(Paras 11, 12, 13, 15, 17, 18, 19)

Ref: PLD 1958 Lah. 431, 2003 SCMR 629.

متوفی اسلام قبول کرنے کے بعد اپنے ہندو والد کی جائیداد میں وراثت کا حقدار نہ رہا تھا۔ ہائیکورٹ نے رٹ پٹیشن خارج کر دی۔

[Deceased after conversion to Islam was not competent to ask for inheritance share from property of his father, being Hindu. High Court dismissed writ petition].

For the Petitioners: **Syed Mukhtar Abbas, Advocate.**

For the Respondents Nos. 1 and 2: **Khawar Ikram Bhatti, Additional Advocate-General Punjab, Lahore.**

For the Respondent No. 3: **Inam Ullah Hashmi and Malik Abdul Wahid, Advocates.**

Date of hearing: **21st April, 2015.**

JUDGMENT

IBAD-UR-REHMAN LODHI, J. --- Malik Devi Dial, a Hindu by caste, was owner of 872-kanals, 9-marlas of agricultural land in different villages of District Jhang, in addition to his proportionate share in Shamlat Deh of said villages. He was having four sons. One son, namely, Ganda Ram embraced the Religion of Islam and he was known as Abdul Haq. His father having annoyed over such conversion, mutated his entire holding by mutation No. 1383 on 05.06.1946 in favour of his remaining three sons to the complete exclusion of Ganda Ram, who became Abdul Haq.

2. Said Abdul Haq by challenging the above mutation, preferred an appeal before the Revenue Assistant, Jhang/Collector, on the plea that, he being the eldest son of his family and coparcener in joint family, could not have been deprived from his share and, thus, his father was not competent to alienate whole of the property, which Malik Devi Dial also got as ancestral one. His plea was accepted, and the matter was remanded for fresh decision vide order dated 09.12.1946.

3. This time, Malik Devi Dial challenged such findings, in appeal, before the Commissioner Multan Division, which was dismissed in default on 17.11.1947. Malik Devi Dial was reported to have died in India, after migration in the year, 1949.

4. Abdul Haq, despite the mutation in favour of his three brothers, managed to get possession of an area of 218-kanals, 2-marlas, in different villages of District Jhang, Chak Janubi and Lak Badhar.

5. According to the petitioners, Abdul Haq remained in possession of land, in question, through his tenants, who had been cultivating the land and after once the property attained the status of an urban property, the property tax was being paid by said Abdul Haq.

6. The property, which was being claimed by Abdul Haq and after his death, by his son Mohammad Latif/predecessor-in-interest of present petitioners, by treating the same as evacuee property and were part of the pool, was transferred to different persons against their verified claims. One of them was respondent No. 4-Fazal-ur-Rehman, from whom subsequently, respondent No. 3-Mohammad Hanif purchased the land, in question.

7. On the move of Mohammad Latif son of Abdul Haq, the District Collector, Jhang, vide order dated 27.01.1980, nullified the allotment in favour of respondent No. 4.

8. Respondent No. 3-Mohammad Hanif, this time, challenged the cancellation of allotment before this Court through Writ Petition No. 219-R of 1979, and Writ Petition No. 254-R of 1980. Mohammad Latif son of Abdul Haq was respondent No. 2 in Writ Petition No. 254-R of 1980 and he, by filing his written-statement, contested the same; however, he died during its pendency on 15.06.1998. Both the petitions were allowed by this Court on 06.10.2000, and the matter was remanded to respondent No. 2/Member Board of Revenue for fresh decision, after hearing the parties in the light of observations made by this Court.

9. In post-remand proceedings, the Executive District Officer (Revenue), Jhang, by means of order dated 21.01.2003, allowed the petition of respondent No. 3-Mohammad Hanif, and by setting aside the order of Deputy Commissioner/Additional Settlement Commissioner dated 07.01.1980, the allotment in favour of Mohammad Hanif was restored.

10. The LRs of deceased Mohammad Latif son of Abdul Haq have now challenged such decision of respondent No. 1 by means of present writ petition.

11. Some admitted facts are that, Abdul Haq, who before his conversion as a Muslim was ‘Ganda Ram’ son of Malik Devi Dial, and after his such conversion, Malik Devi Dial transferred his whole of estate infavour of his three remaining Hindu sons and, therefore, at the time of partition and after migration of Hindu owners to India, the property was rightly considered as evacuee property and became a part of the pool and, therefore, against verified

claims, allotted to different persons, including Fazal-ur-Rehman/respondent No. 4 from whom Mohammad Hanif-respondent No. 3 was shown to have purchased the same.

12. On promulgation of Act XIV of 1975 i.e. Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975, there is no denial that, after 30th of June, 1974, the evacuee laws lost their any relevance and by virtue of Section 2(2) of the said Act, only the pending cases before theauthorities, were to be taken in to consideration.

13. In this matter, application dated 30.09.1978 has been shown to have been moved by Mohammad Latif son of Abdul Haq, for the first time, complaining the allotments of the property, in question, in favour of Fazal-ur-Rehman/respondent No. 4 and some others, who according to the applicant, were having no entitlement to get such property. A fact noteworthy is that, in such application, there is no mention as to whether any such request was made prior to such application.

14. The petitioners now claim that, on 23.07.1973, late Abdul Haq moved the Chief Settlement & Rehabilitation Commissioner (Revenue) for necessary corrections in the revenue record in his favour. Such move on the part of said Abdul Haq has been termed as a forgery and an after-thought episode, which has been managed only in order to bring on record the attempts, shown to have been made by Abdul Haq, prior to the target date fixed in the repeal laws i.e. 30.06.1974, and by giving an impression that, when in 1973, Abdul Haq preferred such application, such request was a "pending case" within the meaning of Section 2(2) of the Repeal Law, 1975. Had there been any valid move by the predecessor-in-interest of present petitioners or Mohammad Latif, it would necessarily have been a mention in the application moved on 30.09.1978 before the Deputy Commissioner, Jhang. Even with reference to application dated 30.09.1978, it has never been shown as to what power the Deputy Commissioner, Jhang, was enjoying to deal with such application.

15. This Court, when on 06.10.2000 allowed Writ Petition No. 254-R of 1980, formulated the following four questions, to be answered by the Notified Officer, who was directed to decide the case afresh, after affording an opportunity of hearing to the parties concerned, including the petitioner:---

(i) Whether the application filed by Abdul Latif falls within the purview of Section 2 of Evacuee Property & Displaced Persons (Repeal) Act, 1975 and the same was a pending case?

(ii) Whether the property in dispute was never declared or treated as an Evacuee Property as claimed by legal heirs of respondent No. 2?

(iii) Whether the allotment in favour of the Fazal-ur-Rehman was genuine and was made against verified claim?

(iv) Whether the persons in possession of the property in dispute at the time of cancellation of allotment were entitled to any relief under Section 3 of the Repealed Act?"

The Notified Officer, thus, by means of a detailed and well-reasoned order dated 21.01.2003, has reached to the conclusion that, the application moved by Abdul Haq was not a matter, to be treated as a "pending case" within the meaning of Section 2(2) of the Repealed Act, 1975.

16. The Hon-ble Supreme Court of Pakistan in case of Mst. Badshah Begum and others v. The Additional Commissioner (R.), Lahore Division and others (2003 SCMR 629) has held that, the Notified Officer under the Repeal Law, 1975, was not competent to reopen the matter finalized under the relevant statute before the repeal of evacuee laws. The case, which was not "pending" before any forum in terms of Section 2(2) of the repeal laws, would not be treated as such under the order of any authority or Court arising in consequence to the proceedings initiated subsequent to the repeal of evacuee laws and, thus, a remand order could not extend any power to the Notified Officer to effect any change in the cases, which had attained finality.

17. The learned counsel for respondent No. 3 has rightly pointed out that, in view of the provisions of The Pakistan (Administration of Evacuee Property) Act, 1957 (XII of 1957), it was the exclusive jurisdiction of the Custodian to decide as to whether a person/applicant before him, is entitled to have the property, and the question as to whether a property is evacuee or not can only be settled by the Custodian under settlement authority, having the jurisdiction to inquire into the character of the property.

The Custodian was never approached by the petitioner or their predecessor-in-interest in order to have a declaration as to the status of the property. The decision of the Custodian under the relevant law was appealable in view of Section 43 of the Act, 1957. It is also a fact that, the property was confirmed in favour of the claimants on 14.06.1972, and mutations showing such confirmation, are placed on record at pages 48 and 49 of present writ petition. Such confirmation has never been challenged by the present petitioners.

18. Looking from another angle as to what was the competence of Abdul Haq (previously Ganda Ram) to ask for his estate from his Hindu father, after having embraced the Religion of Islam.

Mulla in Mahomedan Law is of the view that, the effect of conversion to Islam was to bring about a complete change as regards the right of inheritance. It was held in case of Nur Ali v. Mala Sulana (PLD 1958 Lahore 431) that, 'A' convert changes not only his religion, but this personal law also.

Syed Ameer Ali in Mahomedan Law (Seventeenth Edition) page - 83, has opined that, under the Sunni Law, a Moslem does not inherit from a non-Moslem, nor does a non-Moslem inherit from a Moslem.

19. For what has been discussed above, there seems to be no illegality in the order passed by the Executive District Officer (Revenue), Jhang, on 21.01.2013.

The petition, thus, having no force is dismissed.

Petition dismissed.

2016 C L C 111
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD IQBAL----Petitioner
Versus
RASHEEDA BIBI and others----Respondents

Civil Revision No.1078 of 2009, decided on 8th September, 2015.

(a) Punjab Pre-emption Act (IX of 1991)---
----S. 13---Talbs, performance of---Proof---Attesting witnesses of notice of Talb-i-Ishhad, competency of--Attesting witness must be in conscious knowledge of contents of the document, which he was going to attest---Attesting witnesses of notice of Talb-i-Ishhad had deposed that they had signed the notice without knowing as to what was written therein---Statements of plaintiff witnesses, who were attesting witnesses of notice of Talb-i-Ishhad, were, therefore, not to be considered at all---Said attesting witnesses, according to their admission, had only put their signatures on previously prepared document without having any knowledge as to what had been written in the same---Said witnesses were not "attesting witnesses" of notice Talb-i-Ishhad as they were not in a position to testify or to affirm the notice of Talb-i-Ishhad to be true or genuine---Strict test was provided under Pre-emption Act, 1991 to prove three Talbs beyond any doubt---Important link of Talbs was missing from chain, in the present case, as provided under S.13 of Pre-emption Act, 1991, which was fatal to the case of plaintiff---Impugned judgment and decree was result of misreading of evidence and non-appreciation of the legal position in question---Judgments and decrees of courts below were set aside---Revision petition was allowed in circumstances.

Khuda Yar through Legal Heirs and 10 others v. Ghulam Muhammad and another 1999 SCMR1808 rel.

(b) Words and Phrases---
----`Attest'---Definition.

Black's Law Dictionary Ninth Edition ref.
Shaigan Ijaz Chadhar for Petitioner.
Najaf Muzammal Khan for Respondents.

ORDER

IBAD-UR-REHMAN LODHI, J.--- Although the suit for pre-emption filed by the present respondents was decreed vide judgment and decree dated 28.03.2006 and appeal filed there against by the present petitioner was dismissed on 28.05.2009, yet the learned counsel for the petitioner has a ground for attack to such decree on stated nonperformance of Talb-i-Ishhad strictly in accordance with the provisions of section 13(3) of Punjab Pre-emption Act, 1991.

2. In elaborating his such contention, learned counsel for the petitioner has referred statements of PW-2 Ghulam Rasool and PW-3 Muhammad Mansha, who were produced in evidence as attesting witnesses of notice of Talb-i-Ishhad. The particular reference has been made to the statement of PW-2 Ghulam Rasool, which statement is to the following effect:-

Similarly, PW-3 Muhammad Mansha who is shown to be the other witness of notice of Talb-i-Ishhad has deposed in the following manner:-
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3. Section 13(3) of Punjab Pre-emption Act, 1991 requires that the notice of Talb-i-Ishhad must be in writing and attested by two truthful witnesses.

4. The term "attest" is defined in Black's Law Dictionary, Ninth Edition in the following manner:-

> "to testify, to affirm to be true or genuine, to authenticate in writing by signing as a witness."

It is thus abundantly clear that an attesting witness must be in conscious knowledge of the contents of the document, which he is going to attest and as such, both the witnesses i.e. PW-2 Ghulam Rasool and PW-3 Muhammad Mansha, who have been introduced as attesting witnesses of the notice of Talb-i-Ishhad are not to be considered, at all, in their such capacity. According to their admission, they only put their signatures over already prepared document without having any knowledge as to what has been written in the said document, as such, they were not attesting witnesses of the notice of Talb-i-Ishhad and thus were not in a position to testify or to affirm the document to be true or genuine.

5. Strict test is provided in the Pre-emption Laws to prove three Talbs beyond any doubt. In the above highlighted background, an important link of Talbs is missing from the chain as provided in section 13 of the Act. In view of section 13(4) of the Act, ("a pre-emptor is only competent to file suit for pre-emption by making Talb-i-Khusumat if the first two Talbs i.e. Talb-i-Muwathibat under subsection (2) and Talb-i-Ishhad under subsection (3) have successfully been performed.") missing of any one link would be fatal to the case of pre-emptor.

6. In the present case, as noted earlier, the plaintiff/pre-emptor has failed to establish the performance of Talb-i-Muwathibat strictly in accordance with provisions of Section 13 of Punjab Pre-emption Act, 1991.

7. The courts below while passing a decree in favour of the plaintiffs have completely overlooked this fatal lapse.

8. The learned counsel for the respondents with the help of case law reported as Khuda Yar through Legal Heirs and 10 others versus Ghulam Muhammad and another (1999 SCMR 1808) has argued that minor discrepancies in the statements of witnesses after efflux of considerable time are to be ignored. The deficiency, as noted in the case in hand, is not a

minor discrepancy, rather it is fatal to the case of the plaintiffs. The decree granted by the courts below is, thus, result of misreading of evidence and non-appreciation of the legal position on the point. It is not sustainable.

9. While accepting this civil revision petition, both the judgments and decrees passed by the courts below are, therefore, set aside and suit of the respondents/plaintiffs is dismissed. However, there will no order as to costs.

SL/M-331/L Revision accepted.

2016 C L C 1125
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
SHAHIDA SHAHEEN and others----Petitioners
Versus
Mst. ASIF SULTANA----Respondent

C.M. No.1-C of 2014 in C.R. No.1461 of 2009, decided on 14th January, 2015.

(a) Civil Procedure Code (V of 1908)---
----O. XLI, R.27, Ss.151 & 115---Production of additional evidence---Powers of Revisional Court---Scope---Applicant filed application to produce additional evidence that was dismissed---Revision against, and Constitutional petition were also dismissed---Applicant again filed revision petition to seek permission to produce additional evidence---Validity---Concept of additional evidence under O.XLI, R 27, C.P.C. was alien to revisional jurisdiction, however, in exceptional circumstances by exercising power under S.151, C.P.C. and that too only to clarify something, such process could be adopted---Additional evidence which was being sought to be produced or brought on record could not be allowed in revisional jurisdiction with intent to fill lacuna---Revisional court, in no circumstances, was competent to allow production of additional evidence of any kind.

(b) Civil Procedure Code (V of 1908)---
----O. XLI, R.27, Ss.107 & 115---Production of additional evidence---Powers of appellate Court and revisional Court---Distinction---Appellate Court shall have same power and perform in accordance with procedure prescribed for courts of original jurisdiction---Appellate Court after resettling issues may finally determine suit but revisional court after calling record of any case will decide illegality, irregularity or jurisdictional defects before the proceedings below---Power to permit additional evidence was confined only either to Trial Court or Appellate Court---Revisional court has no power to finally determine or take additional evidence unlike appellate court---Appellate court has vast and wide powers to reopen and cause addition in record already maintained by Trial Court whereas revisional court would restrict itself to examine illegality or irregularity in proceedings of courts below.
(c) Civil Procedure Code (V of 1908)---
----O. XLI, R.27 & S.115---Production of additional evidence in revision---Case-law surveyed.

Mohabbat v. Asadullah Khan and others PLD 1989 SC 112 and Muhammad Khan v. Mukhtiarkar Revenue, Kot Ghulam Muhammad, District Mirpurkhas and others PLD 2009 Kar. 352 rel.

Ghulam Muhammad v. Mian Muhammad and another 2007 SCMR 231; Km. Rakhi and another v. Ist Additional District Judge, Firozabad and others AIR 2000 Allahabad 166 and Mohd. Sabir v. Mohd. Husain 1979 All LJ 1065 distinguished.

(d) Civil Procedure Code (V of 1908)---

----O. XVIII, Rr.2, 5, 12 & 13---Procedure of taking evidence and examination of witness discussed.

(e) Civil Procedure Code (V of 1908)---

----O. XLI, Rr.27, 28 & 29---Appeal from original decree and powers of court to permit additional evidence---Scope.

(f) Words and Phrases---

----"Record"---Definition---Written account of some act, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates; term 'records' means accounts, correspondence, memorandums, tapes, discs, papers, books and other documents or transcribed information of any type whether expressed in ordinary or machine language; complete record, encompasses clerk's record, record of proceedings and all evidence; Court record proceedings means official collection of all the trial pleadings, exhibits, orders and word-for-word testimony that took place during the trial and Judicial record, means precise history of civil or criminal proceedings from commencement to termination.

Black's Law Dictionary Sixth Edition quoted.

Ahmed Waheed Khan for Petitioners.

Muhammad Anzak Raja for Respondent.

ORDER

C.M. NO.1-C/2014

IBAD-UR-REHMAN LODHI, J.--- Through the present civil miscellaneous, moved under the provisions of Order XLI, Rule 27, C.P.C. read with Section 151, C.P.C., the revision petitioners seek permission to adduce additional evidence.

2. The same has been contested by the respondent by maintaining that the present one is 3rd application in series seeking same relief. The earlier one was moved before the learned trial Court under the provisions of Order XVIII, Rule 2 (Proviso), which was dismissed on 19.07.1999 and a revision petition filed against such dismissal was dismissed by the learned Addl. District Judge, Lahore on 01.06.2000. The revisional order was challenged through Constitutional petition i.e. W.P.No.20745/2000 and the same was dismissed by this Court on 30.09.2002. Second attempt was made on behalf of the petitioners to lead additional evidence was again unsuccessful, when another application moved on 25.10.2003 in this regard was dismissed by the learned trial Court on 04.12.2003. This time the findings of the learned trial Court were never further challenged.

3. In our system, this has become a tendency, which is being increased day by day that the parties in revisional jurisdiction make the prayer for production of additional evidence. The competence of the parties to ask for such relief and the jurisdiction of revisional Court in this respect has not so far been satisfactorily answered.

4. The learned counsel for petitioners, although in support of his contentions for production of additional evidence at revisional stage has placed reliance on Mohabbat v. Asadullah Khan and others (PLD 1989 Supreme Court 112) and Ghulam Muhammad v. Mian Muhammad and another (2007 SCMR 231), which would be discussed, in detail, in the latter part of the order, however, even after going through the same, the controversy on the point in issue does not seem to have been finally resolved.

In Mohabbat's case, it was a pre-emption matter and a learned Single Judge of erstwhile Peshawar High Court on the point as to whether the pre-emptor had a superior right gave his findings, but the vendees in the said case by placing reliance on an unpublished judgment of a learned Division Bench of High Court argued that according to the relevant Jamabandi all the Khasra numbers situate in one Khata and as the pre-emptor did not establish his superior right with respect to some of the Khasras, the vendees remained as owners in the Khata and no superior right could be claimed as against the petitioners-vendees on the basis of contiguity and for this proposition reliance was placed on an unpublished judgment of the learned Division Bench of High Court rendered on 05.05.1970 in C.R.No.02/1963 (Muhammad Sharif etc. versus Pir Bakhsh Khan).

On the other hand, on behalf of the pre-emptor reliance was placed on an unpublished judgment of a learned Division Bench of the same High Court rendered on 17.06.1971 in RSA No.183/1971 (Hafiz Ghulam Khawaja versus Qazi Abdul Latif, etc.) to support the assertion that the vendees could not claim superior right under such circumstances. As the learned Single Judge was of the opinion that the latter authority did not correctly lay down the law, he referred on 21.05.1975 a question after formulation to a Larger Bench, which was heard by a Bench of three Judges and Mr. Justice Qaiser Khan added his separate note. While hearing the revision, the learned Judge recorded the statement of Patwari as additional evidence and the learned counsel for the appellant before the Hon'ble Supreme Court of Pakistan objected to such process' adopted by the learned Revisional Judge in recording additional evidence particularly, when there was no request by the counsel for the respondent nor was any such request made at the appellate stage and by contending that the learned Single Judge misdirected himself as if he was exercising the power of an appellate Court and it was stressed that the revision was not a continuation of the suit like an appeal and, therefore, no additional evidence could be recorded on the merits of the case. Such contentions although noted by the Hon'ble Supreme Court of Pakistan in the reported judgment, but except the second last paragraph of the judgment (side line F), it was not answered in an authoritative manner. The second last paragraph however is reproduced herein below for ready reference:--

> "Even if technically Order XLI, Rule 27, C.P.C. did not apply to the revision as it was not a continuation of the suit, I have no hesitation in holding that the High Court

could in the exercise of its inherent jurisdiction under section 151, C.P.C. admit such evidence for clarification in the ends of justice."

The careful reading of the above findings leads one to conclude that the concept of additional evidence under Order XLI, Rule 27, C.P.C. is alien to the revisional jurisdiction, however in exceptional circumstances by exercising power under Section 151, C.P.C. and that too for a limited purpose only in order to clarify something such process can be adopted.

5. In Ghulam Muhammad's case (Supra), the question as. was argued by the learned counsel for appellant in the reported case, as reproduced in para 4 of the reported judgment was to the effect that the additional evidence which was permitted at revisional stage was violative to the provisions of Order XLI, rule 27, C.P.C.. Such contention was answered in para 8 of the reported judgment by holding that the documents received in additional evidence were public documents and their authenticity and genuineness could not be doubted and the same were admitted to be brought on record in view of the provisions contained in rule 27(1)(b) of Order XLI, C.P.C., which empowered the "Court" to allow production of additional evidence by giving an impression that the word "Court" includes the revisional Court, also but the reading of such rule would clearly indicate that such power to allow production of additional evidence is only restricted to the "appellate Court" only and not the revisional Court.

6. To examine as to what are the powers of appellate courts and revisional courts, one has to compare the provisions of section 107, read with Order XLI rule 24, C.P.C. and Section 115 of the same Code to identify the distinctive powers of appellate and revisional courts and the allied power to be exercised by courts exercising such separate jurisdictions while dispensing justice.

In view of section 107, C.P.C., the Appellate Court has the powers:---

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

and the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by Code of Civil Procedure on Court of Original Jurisdictions in respect of suits instituted therein.

Whereas, in view of Order XLI, rule 24, C.P.C., where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding the fact

that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

7. To the contrary, a revisional Court under Section 115, C.P.C. is competent after calling the record of any case, which has been decided by any Subordinate Court to exercise the revisional jurisdiction in cases, where it appears that the Subordinate Court has not exercised a jurisdiction vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity and the revisional Court in such eventuality, may make such order in the case, as it thinks fit.

8. No power to determine the suit finally or to take additional evidence etc. has been provided to the revisional Court like the Appellate Court.

9. It would be beneficial to examine the manner of taking evidence and examination of the witnesses as provided in C.P.C. and for that purpose this Court has to examine the provision of Order XVIII, C.P.C. carefully.

In view of rule 2 thereof, which deals with the production of evidence it has been added by means of explanation by this Court that the Court of its own accord or on the application of any party, for reasons to be recorded in writing, may direct any party to examine any witness at any stage.

Rule 5 of the said Order has specifically been framed to provide the manner of taking evidence in appealable cases.

Rule 12 thereof provides a power to the Court recording evidence and examining witnesses to record such remarks as it thinks material respecting the demeanour of any witness while under examination.

By virtue of rule 13 thereof, no much importance has been given to the evidence in un-appealable cases and it is not necessary to take down any evidence of the witnesses in writing at length by the trial Judge himself in such cases, but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Order XLI, C.P.C. deals specifically with appeals from original decrees and rule 27 thereof provides a power to the "Appellate Court" to grant permission for additional evidence.

Rule 28 thereof provides a mode of taking such additional evidence, which may either be taken by the Appellate Court itself or a direction be issued to the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the "Appellate Court".

Whereas by virtue of rule 29, it is the duty of the "Appellate Court" where additional evidence is directed or allowed to be taken to specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

10. The brief resume of different rules of Order XVIII and Order XLI, C.P.C. do reveal that the power to allow additional evidence is confined only either to the trial Court or the Appellate Court.

11. Had the intention of the Legislature been to give the power to the revisional Court to permit the recording of additional evidence, it would not be difficult for such Legislature to add suitable provision in Section 115, C.P.C. providing such powers to the revisional Court, which has not been done.

The plain reading of Section 115, C.P.C. would clearly give a picture that a revisional Court after calling the "record" of any case would decide the illegality, irregularity or jurisdictional defect in the proceedings carried out before the subordinate courts. The word "record" used in Section 115, C.P.C. is of much significance, which although has not been defined in Civil Procedure Code, 1908; however, in order to better understanding the meaning of such term, we have to consult the legal dictionary. In Black's Law Dictionary Sixth Edition, the term "record" has been defined in the following manner:-

i. **Record:** A written account of some act, court proceeding, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates.

ii The term "records" means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type whether expressed in ordinary or machine language.

iii. **Complete record.** Such encompasses clerk's record, record of proceedings and all evidence.

iv. **Court record of proceedings.** The official collection of all the trial pleadings, exhibits, orders and word-for-word testimony that took place during the trial.

v. **Judicial record.** A precise history of civil or criminal proceeding from commencement to termination.

The record of a case decided by the subordinate Court necessarily includes the evidence produced by the parties and examination of the witnesses. Similarly, when a person makes an application under Section 115, C.P.C. to the revisional Court, he is bound to furnish, in support of such application, the copies of pleadings, documents and order of the subordinate Court and the revisional Court in such eventuality would not ordinarily call for the record of the subordinate Court. The joint reading of the above provision of C.P.C., clearly indicates that the Appellate Court would have a vast and wide power, where in fact the suit is reopened and the Appellate Court is competent to cause addition in the record already maintained by the learned trial Court, whereas, in comparison thereof, the revisional Court would restrict itself to examine the legality or irregularity in the proceedings carried out by the learned trial Court by examining the record maintained by the learned trial Court. The revisional Court would have no power to cause any addition in already maintained record of the case.

12. In the case of Muhammad Khan v. Mukhtiarkar Revenue, Kot Ghulam Muhammad, District Mirpurkhas and others (PLD 2009 Karachi 352), it has been held that additional evidence of the nature, which is being sought to be produced and/or brought on record cannot be allowed in revisional Court with the intent to fill in the lacuna. Scope of Order XLI, rule 27, C.P.C. is limited to the extent of appeal and it could not allow to be extended while exercising the revisional jurisdiction.

From Indian jurisdiction, this Court can refer the view taken by D.K.Seth, J. in Allahabad High Court in the case of Km. Rakhi and another v. Ist Additional District Judge, Firozabad and others (AIR 2000 Allahabad 166) which held that a revisional Court is concerned with records and confined within the same and it could not look into the material besides the record.

In the case of Mohd. Sabir v. Mohd. Husain (1979 All LJ 1065), although it has been held that additional evidence can be accepted even in revision, but the background in which such observation was made does not permit to conclude that it will be in the power of the revisional Court to allow additional evidence, for, in the reported matter, a compromise arrived at in between the parties at revisional stage was allowed to be brought on record in written shape in order to avoid the delay in final conclusion of the settled issue in between the parties. The compromise deed brought on record with the consent of the parties can in no way be treated as a piece of "evidence" or "additional evidence".

13. The net result of the above discussion is none else but a conclusion that additional evidence can only be allowed by an appellate Court and revisional Court, in no circumstances, is competent to allow the production of additional evidence of any kind.
14. With these observations, this C.M. is dismissed.

15. The office is directed to fix the main case on 21.01.2015.

MM/S-47/L Application dismissed.

2016 C L C 1164
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
GHULAM SAKINA and another----Petitioners
Versus
Mst. MUMTAZ BEGUM----Respondent

Civil Revision No.651 of 2005, heard on 6th November, 2015.

(a) Civil Procedure Code (V of 1908)---
----Ss. 21 & 99---Suits Valuation Act (VII of 1887), S.11---Punjab Civil Courts Ordinance (II of 1962), S. 9---Decree passed by a court having no jurisdiction---Objection to jurisdiction---"Prejudice"---Scope---Civil Judge Class-II passed a decree in a suit having value for the purpose of jurisdiction as Rs.12,00,000/---Validity---When a suit had been

tried by a court on merits and judgment was delivered, it should not be reversed on technical ground unless it had caused failure of justice---Objections to jurisdiction both territorial and pecuniary should be treated as technical unless it had resulted in prejudice on the merits---Civil Judges of Class-II were competent to exercise jurisdiction in original civil suit or proceedings wherein the subject-matter in amount or value did not exceed Rs.50,000/---Civil Judge Class-II on 23-10-1994 had no jurisdiction to pass a decree in the suit, the value of which was determined at the rate of Rs.12,00,000/---Court should consider whether any disadvantage was caused on account of any bias---Appellate Court had not given any findings with regard to value of suit for the purpose of jurisdiction---Defendants had been prejudiced both at trial stage as well as at first appellate stage---Judgments and decrees passed by both the courts below were not sustainable which were set aside---Case was remanded to the Civil Judge Class-I for proceedings in accordance with law---Revision was allowed in circumstances.

Muhammad Hussain and another v. Muhammad Shafi and others 2004 SCMR 1947; Malik Fida Mohammad and another v. Haji Ahmad and another 2001 YLR 1859 and Rehmat Khan v. Muhammad Shafi PLD 1981 Lah. 759 rel.

(b) Punjab Civil Courts Ordinance (II of 1962)---
----S. 9---Civil Judges, classification of---Object---Object for classification of Civil Judges was that the suit having more pecuniary jurisdiction should be attended by the Civil Judge having rich experience.

(c) Words and phrases---
----Prejudice'---Meaning.

Chambers 21st Century Dictionary and Black's Law Dictionary Tenth Edition rel.

Syed Asghar Hussain Sabzwari for Petitioners.

Sardar Abdul Raziq Khan for Respondent.

Date of hearing: 6th November, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- With the concurrence of learned counsel for the parties, the hearing of this civil revision petition is being treated as pacca hearing.

2. The only grievance, as has been canvassed by the learned counsel for the petitioners is that, the learned Civil Judge, who has decided the suit finally, was having no pecuniary jurisdiction at the time, when such suit was decided on 23.10.1994.

3. The relevant facts on such aspect are that, in a suit for declaration and possession, the issue regarding valuation of the suit for purposes of court-fee and jurisdiction was specifically framed as Issue No.1, and the learned Civil Judge Class-II, Talagang, by means of judgment and decree dated 23.10.1994, proceeded to pass a decree in favour of the plaintiff, (respondent herein), and against the defendants with costs notwithstanding his own findings on Issue No.1, to the effect that the value of the suit for purposes of court-fee and

jurisdiction was Rs.12,00,000/-, and after holding such findings on Issue No.1, the plaintiff was bound down to affix maximum court-fee of Rs.15,000/- on the plaint up to 15.11.1994, failing which, the plaint of the suit was deemed to be rejected under the provisions of Order VII, rule 11, C.P.C.

4. The defendants, present petitioners, feeling aggrieved of such decree, inter-alia, on the ground of lack of jurisdiction with learned Civil Judge Class-II, challenged such findings in appeal and in the memo. of appeal before the learned first appellate court, by virtue of Ground-2, it was specifically urged that the learned Civil Judge Class-II was having no pecuniary jurisdiction to decide the case valuing Rs.12,00,000/- for purposes of court-fee and jurisdiction.

5. The learned Addpitional District Judge, while dismissing such appeal, has failed to give any findings on Issue No.1 or the ground taken by means of para-2 of the memo of appeal.

6. Responding to such arguments raised on behalf of the petitioners, the learned counsel for the respondent-plaintiff has submitted that, although the learned Civil Judge Class-II was having no pecuniary jurisdiction to try and pass a final decree in a suit valuing Rs.12,00,000/- for purposes of court-fee and jurisdiction, nevertheless since no prejudice has been alleged to have been caused to the petitioner; therefore, the judgment and decree passed by such learned Civil Judge, having no jurisdiction at the relevant time, was not liable to be set-aside on this score alone.

7 In view of Section 9 of The Civil Courts Ordinance, 1962, it is the High Court, which has the power to determine the jurisdiction to be exercised in original civil suits as regards the value by any person appointed to be a Civil Judge. Vide Notification No.2110Gaz, (1)/XXI, C,35, dated Lahore, 20th November, 1978, the High Court in exercise of such powers in supersession of previous orders issued in this behalf, determined the pecuniary limits of the jurisdiction exercisable by the Civil Judges in original civil suits and proceedings by classifying three different classes of the Civil Judges in the following manner:-

"Civil Judge 1st Class	To exercise jurisdiction in original civil suits or proceedings without limit as regards value.
Civil Judge IInd Class	To exercise jurisdiction in original civil suit or proceedings wherein the subject-matter in amount or value does not exceed Rs.50,000/-
Civil Judge 3rd Class	To exercise jurisdiction in original civil suits or proceedings wherein the subject-matter in amount or value does not exceed Rs.20.000."

8. In 1994, when the Civil Judge Class-II, in the case in hand, passed a decree, in Punjab, the Civil Judges of Class-II were competent to exercise jurisdiction in original civil suit or proceedings, wherein the subject-matter in amount or value does not exceed Rs.50,000/- and this position prevailed even till 1994, as a change after 1978, only occasioned in the year, 2000, when by means of Notification No.114/RULES/XXI.C.35, Dated Lahore, the 21st

March, 2000, such jurisdiction of Civil Judges on original side was enhanced in the following manner:-

"Civil Judge 1st Class	To exercise jurisdiction in original civil suit or proceedings without limit as regards value.
Civil Judge IInd Class	To exercise jurisdiction in original civil suit or proceedings wherein the subject matter in amount or value does not exceed Rs.5,00,000/- (Rupees five lacs).
Civil Judge 3rd Class	To exercise jurisdiction in original civil suit or proceedings wherein the subject matter in amount or value does not exceed Rs.1,00,000/- (Rupees one lac)."

It is, thus, clear that on 23.10.1994, Civil Judge Class-II was having no jurisdiction to pass a decree in the suit, the value of which was already determined by the same learned Civil Judge at the rate of Rs.12,00,000/-.

9. So far as the question as to what "prejudice" has been caused to the present petitioners in the event of passing a decree by the learned Judge Class-II, in a suit, which was valued at Rs.12,00,000/- for purposes of court-fee and jurisdiction, this Court has to see as to whether the term "prejudice" has been defined in any law and, if not, what would be the apparatus with the Court to measure the level of "prejudice", if caused to any party on account of exercise of jurisdiction by an unauthorized Judicial Officer. When the term "prejudice" has not been defined in any law, we have to borrow the definition of such term, as has been provided in the Dictionary.

In Chambers 21st Century Dictionary, published in June, 1996, the term "prejudice" has been defined as:-

"bias, injury, hurt, disadvantage",

and in Black's Law Dictionary Tenth Edition, the term "prejudice" has been defined as:-

"damage or detriment to one's legal rights or claims".

10. The learned counsel for the respondent-plaintiff while relying on Muhammad Hussain and another v. Muhammad Shafi and others (2004 SCMR 1947) and, with reference to Section 11 of The Suits Valuation Act, 1887 (Act No.VII of 1887) has submitted that, the principle underlying Section 11 of Suits Valuation Act, 1887, is that a decree passed by a Court which would have no jurisdiction to hear a suit or appeal, but for over-valuation or under valuation, is not to be treated as what it would be but for section 11, null and void, and that an objection to jurisdiction as regards under valuation or over-valuation should be dealt with under this provision of law and not otherwise. Spirit of law behind Sections 21 and 99, C.P.C. appears to be the same as under Section 11 of Suits Valuation Act, 1887, namely, that when a suit had been tried by a Court on merits and judgment delivered, it should not be liable to be reversed purely on technical grounds unless it had caused failure of justice. The policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an Appellate Court unless it has resulted in grave prejudice on the merits.

Almost on similar lines, this Court in Malik Fida Mohammad and another v. Haji Ahmad and another (2001 YLR 1850) has held that, Section 11 of Suits Valuation Act, 1887, places embargo upon entertainment of objection to pecuniary jurisdiction of Courts below in circumstances stated in the Section, unless and until appellate Court is satisfied for reasons to be recorded by it that suit was over-valued or under-valued and such a mistake has prejudicially affected disposal of suit on its merits.

11. The learned counsel for the petitioners has with him judgment in case of Rehmat Khan v. Muhammad Shafi (PLD 1981 Lahore 759) wherein this Court was of the view that, the jurisdictional value of the suit, as determined by the Civil Judge having been found to exceed his pecuniary limits, and the Civil Judge, was thus possessed no jurisdiction to decide the suit.

12. The judgments relied upon by the learned counsel for the respondent-plaintiff do speaks about a prejudice, which, if proved to have been caused to the affected party, only then the jurisdiction of a learned Civil Judge regarding under-valuation or over-valuation can be adjudged.

13. As already noted that the term "prejudice" has not been defined in any law and such term has been defined in the Dictionaries, noted above therefore, it would be seen as to if, any disadvantage was caused to the petitioners or their case was hurt on account of any bias.

14. When the Courts of Civil Judges are classified in three different categories giving different jurisdiction, the basic intention behind such classification seems to be that the suits valuing more pecuniary jurisdiction, are to be attended to by the Civil Judges having rich experience in their curriculum vitae, and if a case, which has already been determined of a value more than the value fixed by the High Court, to be adjudged by a Civil Judge 1st Class, has been adjudicated upon by Civil Judge Class-II or 3rd Class, the parties to such litigation must have been treated as sufferers on account of the fact that, their case, which deserved to be heard and decided by a Civil Judge having less experience and, thus, even in view of the case-law relied upon by the learned counsel for the respondent, if prejudice has been established to have been caused to the petitioners, the matter deserved to be remanded back to the learned Civil Court, being presided over by a Civil Judge 1st Class for decision of the case afresh on merits.

15. In the present case, the learned first appellate court has failed to give any findings on Issue No.1 as also Ground-2 taken specifically in the memo. of appeal filed against decree dated 23.10.1994 and, thus, it is held that the case of present petitioners has been prejudiced, both, at trial stage, as well as, the first appeal stage. Both the judgments and decrees passed by the courts below on 23 10.1994 and 26.11.2004, respectively, are thus not sustainable and are set-aside. Civil Suit No.339 of 1993 titled as "Mumtaz Begum v. Ghulam Sakeena etc." shall be deemed to have been pending before the Civil Court.

16. The parties, who are being represented through their learned counsel today, would appear before the learned Civil Judge-I at Tehsil Talagang, District Chakwal, on 23.11.2015,

who after requisitioning the record of trial court, would proceed with the matter and try to conclude the trial within nine months, next to 23.11.2015.

17. With these observations, this civil revision petition is allowed.

ZC/G-47/L Revision allowed.

2016 C L C 1672
[Lahore]
Before lbad ur Rehman Lodhi, J
SHAHIDA SHAHEEN and 3 others----Petitioners
Versus
Mst. ASIF SULTANA through Special Attorney----Respondent

Civil Revision No.1461 of 2009, decided on 19th February, 2015.

(a) Limitation Act (IX of 1908)---
----S. 5---Condonation of delay---Principles---Courts should not be reluctant in condoning delay depending upon merits of case under consideration and can exercise suo motu powers to enlarge time and condone delay.

Hyderabad Development Authority through M.D. Civic Centre, Hyderabad v. Abdul Majeed and others PLD 2002 SC 84 and Board of Governors, Area Study Centre for Africa America, Quaid-e-Azam, University, Islamabad and another v. Ms. Farah Zahra PLD 2002 SC 153 rel.

(b) Partition Act (IV of 1893)---
---S. 4---Suit for partition/administration-Estoppel, doctrine of--Applicability---Examination of witness---Principle---Plaintiff, daughter 'of deceased from his earlier marriage claimed her share in suit property---Plaintiff placed her birth certificate and gift deed executed by predecessor of parties in her favour---Defendant had assailed birth certificate of plaintiff before relevant forum but later withdrew the same---Defendant was estopped to raise that plea again challenge to which had been withdrawn by him-Gift deed by predecessor of parties in favour of plaintiff had never been independently challenged even the witness producing the document was not cross-examined---Effect--- When a fact deposed during cross-examination had not been properly checked, it was deemed to be accepted---Mother of defendant was alive and was not produced at the time of recording evidence---Best evidence had been withheld by defendant---Suit of plaintiff stood decreed.

(c) Islamic Law---
----Parentage---Legitimacy---Principles---Islam leans in favor of legitimization and in case of doubt child follows status of father when affirmation of parentage is acknowledged by father.

(d) Constitution of Pakistan---
----Art. 2-A---Objectives Resolution---Mandate---Article 2-A of the Constitution of Pakistan provides' that Objectives Resolution will be a substantive part of Constitution---Social justice as enunciated by Islam is to be fully observed and Muslims are expected to be able to order their lives in individual and collective spheres with teachings and requirements of Islam as settled in Holy Quran and Sunnah.

Ahmad Waheed Khan for Petitioners.
Mohammad Anzak Raja for Respondent.
Date of hearing: 4th February, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- Before arguing the revision petition on merits, the learned counsel for the petitioners objected to the maintainability of the first appeal before the learned District Judge, filed by the present respondent, as being barred by time, which at the time of its original filing, was not accompanied with an application under Section 5 of the Limitation Act, 1908, and when subsequently during pendency of. appeal, such application was moved, the same was supported with a defective and unauthorized affidavit and no plausible explanation was extended for condonation of delay in filing of appeal.

2. The application and reply filed thereto available on the file of present revision petition, have been gone through, which reveals that the appeal before the learned first appellate court. was barred by one day, which point of limitation has elaborately been discussed by the learned first appellate court in paragraphs Nos.21 and 22 in the impugned judgment and, therefore, keeping in view the valuable rights of present respondent, the learned first appellate court has proceeded to decide the appeal on merits.

3. The Hon'ble Supreme Court of Pakistan in Hyderabad 'Development Authority through M.D. Civic Centre, Hyderabad v. Abdul Majeed and others (PLD 2002 Supreme Court 84) and Board of Governors, Area Study Centre for Africa and others America, Quaid-e-Azam, University, Islamabad and another v. Ms. Farah Zahra (PLD 2002 Supreme Court 153), on the subject of condonation of delay, has held that in suitable cases, the Court can exercise suo motu powers to 'enlarge the time and condone the delay and that the Court should not be reluctant in condoning the delay depending upon the merits of the case, under consideration.

4. I find that the learned first appellate courts, in view of the peculiar circumstances of the case, had rightly proceeded to adjudicate the matter on merits by ignoring the delay of one day in filing of the first .appeal. The objection, as has been raised by the petitioners on the maintainability of first appeal before the learned District Judge is, thus, overruled.

5. As far as merits of the present revision petition are concerned, it was the respondent Mst. Asif Sultana, who filed a suit for partition/ administration by claiming her 7/40 shares in the leftover estate of late Mohammad Ayyub Khan, with a claim that she is daughter of said Mohammad Ayyub Khan, from his earlier marriage. Said Mohammad Ayyub Khan breathed his last on 29.09.1989.

6. The learned trial court, after full-fledged trial, dismissed the suit vide judgment and decree dated 22.11.2004. In appeal; however, the suit was decreed, when the appeal was allowed by the learned first appellate court on 08.05.2009.

7. The main thrust of the challenge to the findings of the learned first appellate court by the petitioners is that, the plaintiff has failed to provide the details of the stated marriage of late Mohammad Ayyub Khan with Mst. Fatima Bibi (mother of the plaintiff-Mst. Asif Sultana), as also her own date of birth, and the date of divorce in between Mohammad Ayyub Khan and Mst. Fatima Bibi; therefore, according to the petitioners, the plaintiff/respondent herein, has failed to justify her claim to be the daughter of Mohammad Ayyub Khan from his marriage with Mst. Fatima Bibi and, thus, was rightly deprived by the learned trial court from her stated shares of 7/40 in the leftover estate of Mohammad Ayyub Khan.

8. The learned first appellate court, while passing a decree in favour of the plaintiff-Mst. Asif Sultana, mainly placed reliance on two documents viz. Ex.P.2-birth certificate of the plaintiff and Ex.P.3-a gift deed, stated to have been entered into by late Mohammad Ayyub Khan along with his brother Mohammad Sadiq.

9. The learned, counsel for the petitioners has objected to the validity of Ex.P.2, on the assertion that the same was ordered to be deleted, after an inquiry conducted by the District Health Officer.

10. The learned counsel for the respondent has pointed out that the said birth entry was ordered to be deleted by the District Health Officer, but the effect of such order was not 'being reflected by the relevant' quarters in the Birth Register, which constrained the petitioners to file 'Writ Petition No.8550 of 2010, before this Court, which ultimately was dismissed as withdrawn by the petitioners on 24.01.2001 and, thus, the, challenge, if any to such birth entry, was left nowhere and now at this belated stage, the petitioners are estopped to raise again such plea, challenge to which has already been withdrawn by them.

11. Ex.P.3 is a document i.e. a gift deed registered against No.6357 on 07.09.1960, in the office of Sub-Registrar, Lahore, showing a gift by 'Mohammad Ayyub Khan in favour of his real daughter Mst. Asif Sultana and by Mohammad Sadiq, in favour of her niece-Mst. Asif Sultana, a property noted in the said deed. The said document was made part of the record on 22.07.1997 during proceedings of recording of evidence in the (trial and, if not earlier, at least on 22.07.1997, the defendants in the suit (present petitioners) became aware of the execution and registration of said gift deed, accepting Mst. Asif Sultana, as his .real daughter by Mohammad Ayyub Khan, but to-date, the said document has never been challenged independently. Even the witness, who produced such document in. evidence, was not even cross-examined as to the genuineness or otherwise of such document.

It is a settled rule of law that, a fact deposed during examination-in-chief, if not properly checked by the cross-examiner, is deemed to have been accepted by the side, which was afforded an opportunity to cross-examine the witness.

12. The findings of the learned first appellate court on Issues No.1 and 7-A are result of correct appreciation of evidence, available on record, which findings are made basis for the decree passed in favour of the plaintiff.

13. The learned first appellate Court has rightly noted in the impugned judgment that, Mst. Asghari Begum widow of late Mohammad Ayyub Khan, was alive at the time of recording of evidence in this case, but was not produced, who being an old lady, was supposed to know all the facts of the case, as according to the plaintiff, Mst. Asghari Begum was the second wife of late Mohammad Ayyub Khan. Had such lady been in the witness-box, truth was expected to come out of her mouth and, therefore, it can easily be held that, the best evidence in the shape of Mst. Asghari Begum was withheld by the defendants.

14. The people of Pakistan are conscience of their responsibility before Allah. Almighty and men, through their representative in the National Assembly adopt, enact and give to themselves the Constitution. Article 2-A of the said Constitution provides that the. Objectives Resolution will be a part .of substantive provision, which provides that sovereignty over the entire universe belongs to Allah Almighty alone and the authority which he has delegated to the State of Pakistan, through its people for being exercised with the limits prescribed by Him is a sacred trust. The Objectives Resolution, inter-alia, ensures the social justice as enunciated by Islam to be fully observed and Muslims are expected to be enable to order their lives in individual and collective spheres in accordance with the teachings and requirements of Islam as settled in the Holy Quran and Sunnah. We are the followers of Hazrat Mohammad (Peace Be Upon Him) through whom the command of Allah transferred to Muslims till the Day of Judgment. In order to provide legitimacy to a child, Islam leans in favour of legitimization rather than stigmization and if in case of any doubt, there is any acknowledgement of affirmation of parentage on the part of the father, then such child follows the status of father.

As a civilized system of law, we, the Muslims, must see towards legitimization, particularly, when a stigma of illegitimacy seems to be attempted to have been casted upon a female child only in order to achieve some worldly benefits in shape of some land, etc.

Present case seems to be a classic example of taking such worldly benefit by stigmizing the legitimacy of the respondent. In presence of a clear acknowledgment of paternity by late Mohammad Ayyub Khan in favour of the respondent Mst. Asif Sultana by means of gift deed (Ex.P.3), the effect of which has been discussed herein-above, there should be no question left to doubt the parentage of the respondent Mst. Asif Sultana.

15. In the sermon delivered by our Holy Prophet (SAW) on Ninth Day of Zil-Hajj 10 A.H. in the valley of Mount Arafat in Mecca City, which is commonly known as "Khutbah of Hajja-tul-Wida", and is considered always a pattern of life to be observed by the Muslims, all times to come. Following texts from the said sermon, which are very important and relevant for the present purposes, are highlighted as

It is, thus, clear that it would be binding for us not to usurp the right of others and also to pay all respect to our womenfolk, who was being dealt with during the period of ignorance as

non-entity and were even being in having foot in the grave without waiting their death only in order to deprive them from their share in the relevant estates.

In our present claimed modern age, it cannot be allowed to repeat the nefarious customs of period of ignorance. If this is allowed, the ladies even in this 21st Century, would remain to be allowed to be treated as non-entity again and by doing so, we would be inviting wrath of Allah Almighty, and for such like attitude and behaviour, sanction cannot be given by the Court.

16. No evidence has been produced by the defendants to show as to who was the real father of Mst. Asif Sultana-plaintiff. Her birth is not denied and Ex.P.2 and Ex.P.3, have never been rebutted, in any manner, by the defendants and, therefore, in my view, the findings of the learned first appellate court are justified, whereas, the findings of the dismissal of the suit, as were arrived at by the learned trial court are not sustainable.

17. Resultantly, this revision petition is dismissed. The judgment and decree dated 08.05.2009, passed by the learned first appellate court is upheld and that of passed by the learned Civil Judge 1s Class, Lahore, on 22.11.2004 is set-aside. The suit filed by the plaintiff-Mst. Asif Sultana, present respondent, stands decreed. There will be no order as to costs.

MM/S-36/L Suit decreed.

2016 C L D 1
[Lahore]
Before Ibad-ur-Rehman Lodhi and Mushtaq Ahmad Tarar, JJ
MERCK SHARP & DOHME CORPORATION through Authorized Signatory---Appellant
Versus
FEROZSONS LABORATORIES LIMITED through Chief Executive/Director/Secretary/Manager/Principal Officer---Respondent

Regular First Appeal No.70 of 2015, heard on 25th August, 2015.

(a) Patents Ordinance (LXI of 2000)---
----Ss. 60 & 61---Civil Procedure Code (V of 1908), S. 96 & O. VII, R. 11---Suit for infringement of patent---Rejection of plaint, remedy against---Appeal from original decree---Maintainability---Plaint of suit filed under S. 60 of Patents Ordinance, 2000 was rejected---Contention of plaintiff was that since no other remedy was available against order passed by Trial Court in suit, so remedy of appeal under general law was available---Validity---Under S. 96, C.P.C., appeal was available against decree passed by courts subordinate to such appellate court performing its function under C.P.C.---Under Ss. 60 & 61 of Patents Ordinance, 2000, Trial Court was competent to pass any order, but no decree was required to be passed by Trial Court while trying a suit under special law---Under Patents Ordinance, 2000, no procedure had been made applicable including the C.P.C. to regulate proceedings of trial---Remedy of appeal was provided in Chapter XVIII of Patents Ordinance, 2000, but

same was restricted to appeals from decision, order or direction of Controller or Federal Government made under any provision of the Patents Ordinance, 2000---No appeal was provided under said Chapter from any order passed by District Judge in its capacity of Trial Court before any forum---Right of appeal was creation of statute---Person aggrieved of order passed by District Judge in suit under S. 60 of Patents Ordinance, 2000 was not competent to avail remedy of appeal under S. 96, C.P.C.---Appeal was dismissed in circumstances.

Pakistan through Military Estate Officer, Kharian Cantt., and another v. Abdul Hayee Khan through Legal Heirs and 5 others PLD 1995 SC 418; ICI Pakistan Limited v. Salahuddin and others 1991 SCMR 50; Chairman, Central Board of Revenue, Islamabad and 3 others v. Messrs Pak-Saudi Fertilizer Ltd. and another 2001 SCMR 777 and Government of Pakistan through Secretary Ministry of Interior, Islamabad v. Dr. Abdul Qadeer Khan 2010 MLD 533 rel.

(b) Patents Ordinance (LXI of 2000)---

----S. 69--- Appeal, scope of--- Remedy of appeal is provided in Chapter XVIII of Patents Ordinance, 2000, but same is restricted to appeals from decision, order or direction of Controller or Federal Government made under any provision of the Patents Ordinance, 2000.

(c) Patents Ordinance (LXI of 2000)---

----S. 60---Trade Marks Ordinance (XIX of 2001), S. 114(3)---Suit for infringement of patent---Civil Procedure Code, applicability of---Under S. 114(3) of Trade Marks Ordinance, 2001, provisions of C.P.C. are made applicable to appeal before High Court or District Court under the Ordinance---Unlike Trade Marks Ordinance, 20001, no provision was made in Patents Ordinance, 2000, whereby provision of any law including C.P.C. had been made applicable for purpose of regulating proceedings of suit or appeal under Patents Ordinance, 2000.

(d) Administration of justice---

----Courts are not empowered to legislate, and their function is to interpret legislation---Right which has not been provided in statute by legislature cannot be incorporated by courts by adopting role of legislature.

Mueen Qamar for Appellant.
Barrister Haroon Duggal and Malik Omar Saleem for Respondent.
Date of hearing: 25th August, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The appellant preferred the present appeal under section 96, C.P.C. challenging the order dated 29.04.2015, passed by the learned Additional District Judge, Rawalpindi, whereby the plaint of the suit of the present appellant filed under section 60 of Patents Ordinance, 2000 (LXI of 2000) was rejected.

2. At the very outset of the hearing, learned counsel for the appellant was asked to show the maintainability of present appeal under section 96 of C.P.C. from an order made by the learned trial court in a suit for infringement of patent filed under Section 60 of Patents Ordinance, 2000 (LXI of 2000) (hereinafter to be referred as the Ordinance), the learned counsel in response by referring different provisions of C.P.C. and Civil Courts Ordinance, 1962, attempted to argue that since no other remedies are provided from an order passed by the learned trial court in a suit filed under section 60 of the Ordinance, as such, remedy of appeal provided in general law of C.P.C. would be available to the appellant.

3. Responding to such contentions of learned counsel for the appellant, the respondent took a plea that since no appeal from the order passed by the learned trial court in a suit for infringement of patent filed under section 60 of the Ordinance is provided in the Special Law i.e. Ordinance, therefore, by inference, no remedy is to be made available to any aggrieved person from such order.

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

5. For convenience section 96, C.P.C. is reproduced herein below:-

> **"Appeal from original decree---**(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.
>
> (2) An appeal may lie from an original decree passed ex parte.
>
> (3) No appeal shall lie from a decree passed by the Court with consent of parties."

From the perusal of above provision of law, it is crystal clear that appeal under said provision of law is available against a decree passed by the Courts subordinate to such Appellate Court performing its function under C.P.C.

6. In view of the provisions of sections 60 and 61 of the Ordinance, the learned trial court is competent to pass an order but no decree is required to be passed by the trial court trying a suit under the Special Law i.e. Ordinance 2000. It is noted that in the Ordinance to regulate the proceedings of trial no procedural law has been made applicable including the Code of Civil Procedure, 1908. The remedy of appeals, no doubt, has been provided in Chapter XVIII of the Ordinance, but such appeal is restricted only from any decision, order or direction of the "Controller" or, as the case may be, the Federal Government under any of the provisions of the Ordinance. No appeal is provided by means of said Chapter from any order passed by the learned District Judge in its capacity of trial court before any forum.

7. Trade Marks Ordinance, 2001 (XIX of 2001) can be referred as a example, wherein by virtue of Section 114 (3), the provisions of the Code of Civil Procedure, 1908 (Act V of 1908) are made applicable to appeal before the High Court or a District Court under the said Ordinance,

whereas, unlike such Trade Marks Ordinance, no such provision has been made in the Patents Ordinance, 2000, whereby the provision of any law including C.P.C. has been made applicable for the purpose of regulating the proceedings of suit or appeal under the Ordinance.

8. In case of Pakistan through Military Estate Officer, Kharian Cantt. and another v. Abdul Hayee Khan through Legal Heirs and 5 others (PLD 1995 Supreme Court 418), while placing reliance on the case of ICI Pakistan Limited v. Salahuddin and others (1991 SCMR 50), it is held that it is trite law that right of appeal is a creation of Statute. If it does not confer, none has it. Invasive provisions over the rights of citizens have to be construed strictly. This is axiomatic. Similarly, Apex Court in case of Chairman, Central Board of Revenue, Islamabad and 3 others v. Messrs Pak Saudi Fertilizer Ltd. and another (2001 SCMR 777) has held that right of appeal is a creation of Statute and there can be no right of appeal unless it is conferred by the Statute. A Division Bench of this Court in case of Government of Pakistan through Secretary Ministry of Interior, Islamabad v. Dr. Abdul Qadeer Khan (2010 MLD 533) has given a view that the right of appeal is a right, which is always the creation of a particular Statute dealing with the matter, and it can only be availed of where it is expressly granted by the law, and there is no concept of an inherent right of appeal exercisable by a party consequent upon the judgment or order or decree.

9. The Courts are not empowered to legislate, but their function is to interpret the legislation made by the legislature. A right, which has not been provided in a Statute by the legislature, cannot be incorporated by the Courts while adopting the role of legislatures. After going through the provisions of Ordinance, we are of the considered view that no remedy of appeal has been made available to a person aggrieved from any order passed by the learned trial court exercising jurisdiction under section 60 of the Ordinance and as such, any person feeling himself aggrieved of an order passed by District Judge in a suit under section 60 of the Ordinance is not competent to avail the remedy of an appeal under section 96, C.P.C.

10. The result of above discussion is that the appeal filed by the appellant is not competent and the same is therefore dismissed.

SL/M-283/L Appeal dismissed.

2016 M L D 91
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
ABDUL HAI through L.Rs. and others---Petitioners
Versus
SETTLEMENT AUTHORITIES and 16 others---Respondents

Writ Petition No.99-R of 2003, heard on 19th May, 2015.

Evacuee Property and Displaced Persons Laws (Repeal) Act (XIV of 1975)---

----S.2(2)---Constitution of Pakistan, Art.199---Constitutional petition---'Big mansion'---Declaration---Earlier, matter was remanded to Notified Officer on the ground that Chief Settlement Commissioner did not declare the building in question as 'big mansion'---In post remand proceedings Notified Officer while relying upon parawise reply filed in earlier petition, found that Chief Settlement Commissioner had already declared the building as `big mansion'---Validity---Requirement was that a prior declaration by Chief Settlement Commissioner or an officer authorized by Central Government in such behalf to the effect that a building or premises whether residential or commercial, had been declared as a big mansion or Hotel to dispose of the same by unrestricted public auction---Such pre-requisite was not fulfilled and Notified Officer had acted only on presumptions and an annexure to earlier petition, which had been equated with a declaration specifically required under para 16 of the Schedule, which act had no legal sanction---Annexure in question could in no manner be termed as a declaration by Chief Settlement Commissioner or any Notified Officer by Central Government in such regard---Act of authorities in putting property in unrestricted public auction, in absence of any required declaration was unauthorized and illegal, the same had no legal sanction and was liable to be set aside---High Court declared auction proceedings irregular, unauthorized having no legal effect or bearing upon entitlement of persons in possession of the property to be considered as entitled to get the property, as the same were conducted without there being any required declaration---High Court declared that order passed by Notified Officer was passed without lawful authority and of no legal effect and the same was set aside---High Court directed that if occupants of the property, including the petitioners, would so apply, be considered for transfer of the properties in their possession in any capacity, which law permitted on the applicable terms and conditions---Petition was allowed in circumstances.

S.M. Tayyab for Petitioner (in W.P. No.99-R of 2003).
Sajjad Hussain for Petitioner (in W.P. No.138-R of 2003).
Mohammad Shahzad Shaukat for Petitioner (in W.P. No.154-R of 2003).
Syed Naghman Haider Zaidi for Respondents.
Sameer Ejaz for Settlement Department.
Date of hearing: 19th May, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI J.:- This judgment shall dispose of the following petitions:--

(1) Writ Petition No. 99-R of 2003 (Abdul Hai (deceased through LRs., etc. v. Settlement Authorities and 16 others)

(2) Writ Petition No. 138-R of 2003 (Arshad Naseem and 12 others vs. Khurshid Ali Khan and others)

(3) Writ Petition No. 154-R of 2003 (Mst. Kaneez Yasmeen and 11 others vs. Member Board of Revenue and 17 others).

as in all these petitions, order dated 26.07.2003, passed by the Notified Officer/Settlement Commissioner, Punjab, has been called-in question, by the petitioners.

2. In all these matters, the question as to whether the property, in question, was declared by the Chief Settlement Commissioner as a "big mansion" before the same was put to auction.

3. Briefly the facts relevant for the purposes of disposal of all these petitions are that, property No.S-31-R-128, known as Surjit Building, Mcleod Road, Lahore, was put to auction on 04.12.1959 and being highest bidder, one Rehmat Ullah was declared as auction purchaser against consideration of Rs.6,13,000/- (rupees six lac and thirteen thousand only). However, subsequently at the request of said auction purchaser, the sale in his favour was cancelled and the property was again put to auction on 08.08.1960 and was purchased by M/S F.R. Sharif, and Mustafa Haider, for the auction price of Rs.5,30,000/- (rupees five lac and thirty thousand only). The auction, this time, was approved by the Settlement Commissioner on 15.08.1960 and confirmed by the Chief Settlement Commissioner on 21.09.1962.

4. The property was in occupation of certain persons, who filed Writ Petition No.1548-R of 1965 before this Court mainly on the plea that, the property, which was auctioned as a "big mansion" was, in fact, never declared as such, as required vide Para-16 of the Schedule to The Displaced Persons (Compensation and Rehabilitation) Act, 1958 (Act No.XXVIII of 1958). The writ petition was allowed on 14.09.1971, and it was declared that before auction, there was no declaration by the Chief Settlement Commissioner declaring the property as "big mansion".

5. The findings so arrived at by the learned Single Judge were challenged by means of two separate appeals viz. L.P.A.No.220 and 236 of 1971, which were disposed of by means of a common judgment dated 13.03.2001, in the following manner:-

> "We are further of the view that as the case stands remanded to the Chief Settlement Commissioner, he will be under an obligation to go into the question whether in fact there was a declaration declaring the property in dispute as big mansion by the Chief Settlement Commissioner. The fate of the case shall depend upon the answer to the afore-mentioned question".

6. In post-remand proceedings, the Notified Officer in Board of Revenue, vide order dated 26.07.2003, has come to the conclusion that, the property auctioned was earlier declared by the Chief Settlement Commissioner as a "big mansion".

7. The basis for reaching at such conclusion by the Notified Officer were nothing, but a document introduced as `Annexure-J' in the file of Writ Petition No.1548-R of 1965, which, in fact, was a copy of some application, stated to have been moved by the writ petitioners, shown to have been submitted to the Settlement Commissioner (Policy) with the powers of Chief Settlement Commissioner, Lahore, on 15.05.1965 through their counsel Mr. A.R. Shaukat, Advocate. The Subject, and Para No. 1, as well as, Para No.10 of which were reproduced in the impugned order and for ready reference, same are given below:--

"Subject: Application regarding the Disposal of the Application moved by the petitioners for the transfer of property No.S-31-R-128 (9-Sirjeet Building) Mcleod Road, Lahore in the joint name of the petitioners.

Para-1 That the property cited above was declared to be big mansion by the learned Chief Settlement Commissioner.

Taking the property as big mansion it is further stated in Para 10 of the petition reproduced as under:-

Para-10 That there is a clear notification to this effect that the big mansion, if possible be transferred to the occupants of the property to avoid the dislocation of the Displaced persons".

The Notified Officer, however, has requisitioned the report from the concerned Department, and the Settlement Department in response, has specifically reported that the general file containing the declarations of "big mansions" was not traceable in the said office. The Notified Officer has further pointed out in Para-4(iii) of the impugned order, that property files of "big mansions", which find mention in the auction notices were examined thoroughly, but no declaration as required in view of Para-16 of the Schedule, found available in the said files and as noted earlier, the general file maintained by the Settlement Department meant for the declaration regarding "big mansion" was not available in the Department, and even otherwise, no copy of any such declaration (if made) was placed on the relevant property's file.

8. The requirement of Para-16, as noted herein-above, is clear, which requires a prior declaration by the Chief Settlement Commissioner or an officer authorized by the Central Government in this behalf to the effect that, a building or premises whether residential or commercial, has been declared as a big mansion or Hotel to dispose of the same by unrestricted public auction.

9. Such pre-requisite has not been fulfilled in the present cases, and the Notified Officer has acted only on presumptions and 'Annexure-J' to Writ Petition No.1548-R of 1965 has been equated with a declaration specifically required under Para-16 of the Schedule, which act has no legal sanction. 'Annexure-J' to the mentioned writ petition can, in no manner, be termed or treated as a declaration by the Chief Settlement Commissioner or any Notified Officer by the Central Government in this regard, thus, the act of putting the property in unrestricted public auction, in absence of any required declaration, was unauthorized and illegal. The same had no legal sanction and is liable to be set-aside and, as such, all these writ petitions are allowed, and the auction proceedings, conducted without there being any required declaration, are held as irregular and unauthorized and have no effect or bearing upon the entitlement of the persons in possession of the property, in question, to be considered as entitled to get the property. The order passed by the Notification Officer/Settlement Commissioner, Punjab, on 26-7-2003, is also declared as having been passed without lawful authority and of no legal effect. The same is, therefore, set aside. The

occupants of the property, including the present petitioners, may, if so applied, be considered for transfer of the properties in their possession in any capacity, which law permits on the applicable terms and conditions.

MH/A-77/L Petition allowed.

2016 M L D 158
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
BISE, GUJRANWALA and 2 others---Petitioner
Versus
AJMAL SAEED KHAN---Respondent

Civil Revision No.2658 of 2009, decided on 9th February, 2015.

Punjab Boards of Intermediate and Secondary Education Act (XIII of 1976)---
----Ss. 29 & 30---Proceedings taken by the Education Board, assailing of---Bar of jurisdiction---Scope---Charge-sheet was issued to the plaintiff/candidate against the allegation of impersonation in the examination and he was provided opportunity to defend himself---Plaintiff' instead of surrendering before the Education Board in pursuance of charge-sheet filed a suit calling in question the issuance of charge-sheet---Validity---Civil court had no jurisdiction to entertain the suit filed against any order made or proceedings taken by the Education Board---Persons aggrieved of any order made or proceedings taken by the Education Board could take protection of S.31 of Punjab Boards of Intermediate and Secondary Education Act, 1976 to institute a suit or to initiate any legal proceedings against the Education Board---Condition to take resort for such protection was that the act done or proceeding taken by the Education Board or any official or employee was not in good faith---Plaintiff had not extended any allegation in the plaint with regard to mala fide or lack of good faith on the part of Education Board in issuance of charge-sheet---Only charge-sheet was issued and had the plaintiff joined the proceedings then there was possibility that he would have been exonerated from the charges levelled against him if he succeeded in producing any plausible defence---Statutory proceedings were avoided and a suit which was barred under the law was filed---Civil court had no jurisdiction to entertain and adjudicate upon the suit filed by the plaintiff---Impugned judgments and decrees passed by the courts below were set aside and suit was dismissed---Revision was accepted in circumstances.

Board of Intermediate and Secondary Education through Chairman and 3 others v. Javed Iqbal Bajwa 2005 YLR 2114; Board of Intermediate and Secondary Education Lahore through Chairman v. Ishrat Sultana 2001 YLR 66; Board of Intermediate and Secondary Education Lahore through Secretary v. Mst. Sobia Chand 1999 CLC 116; Education, Lahore through Secretary v. Mst. Ghazala Roohi 2002 MLD 1966 and Board of Intermediate and Secondary Education through Chairman v. Atif Riaz 2006 MLD 1378 rel.

Ali Masood Hayat for Petitioners.

Nemo for Respondent.

ORDER

The respondent was personally served, but he has opted not to appear in this case; therefore, he was ordered to be proceeded against ex-parte vide order dated 20.01.2015, and thereafter, intentionally a considerable gap was provided for hearing of ex-parte arguments of the petitioner, but when today, the case was called, none entered appearance for the respondent to join the proceedings.

2. According to the facts of the case, the respondent appeared in matriculation examination for Spring 1989, under Roll No.6700 in Science Group; however, when the result of the examination was notified on 22.07.1989, the respondent's result was not declared, and the reason was shown that photo on the admission form has, perhaps, been changed and the admission form of the respondent did not carry photograph of the respondent. As a result of facts finding inquiry, the Inquiry Officer vide his report dated 14.12.2005 found it a case of impersonation and also that the respondent himself did not take the papers of exam, rather some person, whose photograph was affixed on the admission form, appeared impersonating the respondent.

3. On receipt of such preliminary inquiry report, a proper charge-sheet was issued to the respondent and he was provided opportunity to defend himself. Instead of surrender before the Board of Intermediate and Secondary Education, Gujranwala, in pursuance of charge-sheet, the respondent filed a suit before the learned Civil Judge at Gujranwala, calling in question the issuance of charge-sheet.

4. On appearance, the Board of Intermediate & Secondary Education, by filing a written statement, has taken a specific objection as to the jurisdiction of the Civil Court in view of Section 29 of The Punjab Boards of Intermediate and Secondary Education Act, 1976 (Pb Act XIII of 1976).

5. Issue No.2 was specifically framed relating to the jurisdiction of Civil Court. The learned trial court, however, vide judgment dated 30.07.2009, has answered Issue No.2 against the petitioner-Board by holding that, the Civil Court being a court of plenary jurisdiction can take all the matters into cognizance even in the presence of an ouster clause. In similar manner, the learned first appellate court in judgment dated 07.10.2009, was also of the view that jurisdiction of Civil Court, in such cases, was not barred.

6. Section 29 of The Punjab Boards of Intermediate and Secondary Education Act, 1976 (Pb Act XIII of 1976), reads as under:-

> "No act done, order made or proceeding taken by a Board in pursuance of the provisions of this Act shall be called in question in any court."

and while such provision of law has been interpreted in cases of Board of Intermediate and Secondary Education through Chairman and 3 others v. Javed Iqbal Bajwa (2005 YLR

2114), Board of Intermediate and Secondary Education Lahore through Chairman v. Ishrat Sultana (2001 YLR 66), Board of Intermediate and Secondary Education Lahore through Secretary v. Mst. Sobia Chand (1999 CLC 116), Education, Lahore through Secretary v. Mst. Ghazala Roohi (2002 MLD 1966), and Board of Intermediate and Secondary Education through Chairman v. Atif Riaz (2006 MLD 1378), it has consistently been held that, Civil Courts have no jurisdiction to entertain the suits relating to any order made or proceeding taken by a Board in pursuance of the provisions of Act XIII of 1976.

7. At the most, persons aggrieved of any order made or proceeding taken by the Board, can take protection of Section 31 of the Act, in order to institute a suit or to initiate any legal proceedings against the Board, but to take resort under Section 31 of the Act, it would be a condition precedent that the act done or proceeding taken by the Board or any official or employee of the Board was not in good faith.

8. In the present case, the plaintiff/respondent has not extended any allegation in the plaint as to any mala fide or lack of good faith on the part of the Board in issuance of charge-sheet. Only charge-sheet was issued and had the plaintiff joined the proceedings in pursuance of such charge-sheet, there was every possibility that he would have been exonerated from the charges levelled against him, if he succeeded in producing any plausible defence, but such statutory proceedings were avoided and a suit, which was barred under the law, was filed. The courts below have erred in law, while giving findings on Issue No.2 completely ignoring the effect of Section 29 of the Act.

9. In view of the clear wording of Section 29 of the Act and the interpretation, which so far has been made as to such provision of law, the Civil Court has no jurisdiction to entertain a suit filed against the proceedings taken and order made by the Board in pursuance of the provisions of the Punjab Act XIII of 1976. The findings on Issue No.2 arrived at by the courts below are, therefore, reversed and it is held that the Civil Court had no jurisdiction to entertain and adjudicate upon the suit, filed by the respondent.

10. Since it has been held that the Civil Court had no jurisdiction to entertain and adjudicate upon the suit; therefore, there is no need to dilate upon the merits of the case.

11. As a result of above discussion, this petition is allowed; the impugned judgments dated 30.07.2009 and 07.10.2009, passed by the courts below respectively are set-aside, and consequently the suit of the respondent/plaintiff stands dismissed.

ZC/B-11/L Revision allowed.

2016 M L D 1651
[Lahore (Multan Bench)]
Before Ibad-ur-Rehman Lodhi and Shahid Mubeen, JJ
NAZAKAT HUSSAIN SHAH and 5 others---Applicants
Versus
MUHAMMAD ALI and 3 others---Respondents

Review Application No. 28-C of 2011 in C. R. No. 723-D of 2004, heard on 9th March, 2016.

(a) Civil Procedure Code (V of 1908)---

----O. XLVII, R. 1---Review---Scope---Scope of review was limited and applicant could not be allowed to exceed the limit as provided in O.XLVII, Rule 1, C.P.C.---Case could not be allowed to be reopened on merits in review jurisdiction---Applicant, in the present case, intended to introduce a new case which was neither taken in the pleadings nor during arguments---Plea of raising legal question at any time of the proceedings was not available to a review applicant---Review was dismissed in circumstances. [pp. 1652, 1653] A, B, D & E

(b) Civil Procedure Code (V of 1908)---

----O. XLVII, R. 1---'Review'---Meaning.

Black's Law Dictionary Sixth Edition rel.

Abdul Rasheed Sheikh for Applicants.

Malik Muhammad Latif Khokhar for Respondents.

Date of hearing: 9th March, 2016.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This is a review application arising out of judgment passed by a learned Single Judge in Chambers on 25.05.2011, in Civil Revision No.723-D of 2004, when the same was allowed.

2. The learned counsel for the applicants has formulated the following points in support of his review application:--

(i) the suit was not maintainable;
(ii) the suit was barred under the provisions of Order II, Rule 2, C.P.C.;
(iii) the suit was hit by the principle of res judicata, particularly, explanation-IV to Section 11, C.P.C.;
(iv) in view of the provisions of Section 22 of The Specific Relief Act, 1877, the suit was not liable to be decreed; and that
(v) plea of law can be raised at any point of time.

According to the learned counsel for the applicants, all above submissions were argued before the learned Judge in Chambers of this Court on 25.05.2011, but the same have not

been taken into consideration; thus, the judgment, under review, is defective and by recalling it, the civil revision petition be heard on merits again.

3. We have gone through the judgment, under review. The learned Judge in Chambers has reproduced the arguments raised by the learned counsel for the revision petitioners in Para-4 of the judgment, under review, which contained no such points, as have been argued by the learned counsel for the applicant today, in support of his review application. We have further inquired from the learned counsel as to whether any of the point agitated today, in support of the review application, was pleaded in the memo of civil revision petition, but the answer again is in negative.

4. In review, the applicant has a limited scope and he cannot be allowed to exceed the limits, as have been provided in Order XLVII, Rule 1, C.P.C. Further, it is by now a settled position of law that, in the garb of review, the applicant cannot be allowed to re-open his case on merits.

5. The review applicants, in fact, want to introduce a new case, which has neither been taken in the pleadings of memo of civil revision petition, nor during arguments before the learned Judge in Chambers on 25.05.2011, and in fact, re-hearing of the case on merits is the intention of the applicants, which cannot be allowed.

6. The main emphasis of the learned counsel for the applicants remains to the effect that, a 'plea of law' can be raised at any stage of the proceedings.

By arguing in such manner; firstly, the learned counsel for the applicants in an indirect way, has admitted that such pleas, which are being taken today, in support of review application, were neither made part of the pleadings in memo of civil revision petition nor were argued on 25.05.2011 before the learned Judge in Chambers of this Court and; for that reason the present pleas are being named by learned counsel for the review applicants as "pleas of law" with a competence to applicants to raise the same even for the first time in review jurisdiction. Secondly, again the learned counsel for the applicants is on wrong side on the question of interpretation.

7. "Review" as is defined in Black's Law Dictionary Sixth Edition is:-
"to re-examine judicially or administratively
consideration for purposes of correction
a reconsideration
second view or examination".

Keeping in view each and every definition of the term "Review" denotes to the position that, while exercising a review jurisdiction, a Court or Tribunal would not allow the applicant to introduce any new point, which was not taken in the original proceedings by the side seeking review of earlier judgment or order and presence of a verdict of the Court on original side must be available on record, which would require to be re-examined or reconsidered, while exercising a review jurisdiction. When in view of the position on record, the points, which now have been formulated in support of the contentions of the learned

counsel for the review applicants, were neither pleaded in the memo of civil revision petition nor argued before the learned Judge in Chambers at the time of final hearing of civil revision petition; hence, nothing is available before this Review Bench to re-consider or to re-examine. The plea of raising legal question, at any time of the proceedings is, therefore, not available to a review applicant.

8. The result of above discussion is that, we find no ground for review, hence, the review application, which merits dismissal is hereby dismissed.

ZC/N-22/L Petition dismissed.

2016 P Cr. L J 1475
[Lahore (Multan Bench)]
Before Ibad-ur-Rehman Lodhi, J
KAUSAR PARVEEN and another---Petitioners
Versus
SHO POLICE STATION CITY JALALPUR, PIR WALA, DISTRICT MULTAN and 2 others---Respondents

W. P. No. 13585 of 2014, decided on 16th February, 2015.

Penal Code (XLV of 1860)---
----Ss. 375, 376, 380, 457, 493-A & 496-B---Criminal Procedure Code (V of 1898), S.561-A---Rape, theft in dwelling house, lurking house-trespass or house-breaking by night, cohabitation caused by a man deceitfully inducing a belief of lawful marriage, enticing or taking away or detaining with criminal intent a woman---Quashing of FIR---Respondent got registered a criminal case, with the allegation that petitioner being his legally wedded wife entered into a marriage with another person (also petitioner) which was a criminal offence---Theft of gold ornaments and some cash amount was also alleged in the FIR---Suit for dissolution of marriage, filed by petitioner on 9-7-2013 against the respondent, was decreed in ex parte proceedings on 6-9-2013; and on the very next day i.e. on 7-9-2013, petitioner entered into marriage with the said person (petitioner)---Earlier to the filing of suit for dissolution of marriage on 9-7-2013, petitioner preferred a suit for jactitation of marriage on 23-5-2013, which was withdrawn on 4-7-2013---Since 23-5-2013, the date of filing of the first suit for jactitation, she had no matrimonial contact with respondent---When on 7-9-2013, the petitioners entered into a marriage, period of "Iddat", if any, to be observed, stood already expired in favour of petitioner, in absence of any matrimonial link of petitioner with respondent---Marriage of the petitioners, even if was considered as "irregular marriage" on 7-9-2013, same had attained the status of "regular marriage" by efflux of time from the point, where 'Iddat' period was supposed to have expired---Criminal case registered through impugned FIR, had entirely been registered on wrong premises; and no criminality was established even prima facie; connecting the petitioners with alleged crime---High Court observed that if said FIR, was permitted to remain in the field, it would not only a wastage of precious time of the courts, but also the wastage of the precious time of Investigating Agency; and result in causing unjustified interference in the matrimonial life of the

petitioners on the strength of a valid marriage---No further proceedings on the basis of such FIR, were allowed to be carried out by any forum or agency---FIR was quashed, in circumstances.

Muhammad Riaz and another v. The State 2011 SD 581; Shaukat Ali and another v. The State 2004 YLR 619; Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf PLD 1963 SC 51; Muhammad Sarwar and another v. The State PLD 1988 FSC 42 and Mst. Kundan Mai v. The State PLD 1988 FSC 89 ref.

Muhammad Ali Siddiqui for Petitioners.

M.R. Fakhar Baloch for Respondent No.2.

Muhammad Abdul Wadood, Deputy Prosecutor-General with Ghulam Sub-Inspector for the State.

Date of hearing: 11th December, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---With the background that Kausar Parveen (petitioner No.1) was in his wedlock, Mohammad Iqbal (respondent No.2) got registered a criminal case by means of FIR No.400, dated 20.09.2014, under sections, 375-iv, 376, 380, 457, 493-A and 496-B, P.P.C., at Police Station, City Jalalpur Pir Wala, District Multan, with the allegation that petitioner No.1, being his legally wedded wife, entered into a marriage with one Samar Khan (petitioner No.2), which is a criminal offence. Theft of gold ornaments and some cash amount was also alleged in the FIR.

2. The petitioners, through the present Constitutional petition, seek quashment of said FIR.

3. According to the facts relevant for the purposes of the present petition, Kausar Parveen (petitioner No.1) filed a suit for dissolution of her marriage before a learned Judge Family Court on 09.07.2013, which was decreed in ex parte proceedings on 06.09.2013. On very next day i.e. 07.09.2013, the petitioners entered into marriage. Earlier to the suit filed on 09.07.2013, petitioner No.1 preferred a suit for jactitation of her marriage on 23.05.2013, which was withdrawn on 04.07.2013.

4. Respondent No.2 has placed on record some additional documents and with the help of the same attempted to create impression that in the said suit for dissolution of marriage, petitioner No.1 subsequently appeared before the learned Judge Family Court and consented to recall the order dated 04.07.2013, by accepting the application moved by respondent No.2, for recalling the said order. In order to properly appreciate the contention for respondent No.2, the additional documents have been examined carefully. The same includes an undated application carrying non-judicial stamp, showing the same as purchased on 21.10.2013, stated to have been moved before the learned Judge Family Court, who passed a decree for dissolution of marriage. Not only that the said application was undated, but the statement of petitioner No.1, showing to have been recorded in pursuance to such application is again an undated document, which follows with no formal order of the learned

Judge, showing final disposal of such application. The statement stated to have been made by petitioner No.1, again creates no sense, which is reproduced herein below:-

As such the proceedings, shown to have been carried out on the basis of such application and the recording of the statement of Kausar Parveen (petitioner No.1), are not of any significance and liable to be ignored from consideration.

5. As discussed hereinabove, the record does not show as to on which date such statement was recorded and also the fact, which has been noted earlier is to be reiterated here that the said statement never followed with any formal order of the learned Judge before whom petitioner No.1, stated to have made such statement.

6. The crucial question for consideration in this matter is as to whether second marriage of the petitioners would be termed as "valid", "void" or "irregular".

7. Although Mahomedan Law by D.F. Mullah is not a codified law, but to understand different problems, being faced by the Muslims in their personal life, the same is being followed by the Courts of our Country. Para-257 of such calculation viz. Mahomedan Law provides that a marriage with a woman before completion of her Iddat is irregular and not void. Iddat is described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. In case the marriage is dissolved by death, the wife is bound to observe the Iddat whether the marriage was consummated or not, and in case of dissolution of marriage by divorce, the wife is bound to observe the Iddat only if the marriage was consummated. If there was no consummation, there is no Iddat, and she is free to marry immediately.

8. Before going further, it would be pertinent to mention here that, in the present case, at least since 23.05.2013, the date of filing of the first suit for dissolution of marriage by petitioner No.1, she at least had no matrimonial contact with respondent No.2 and, as such, when on 07.09.2013, the petitioners entered into a marriage, the period of Iddat, if any, to be

observed stood already expired in favour of petitioner No.1 in obvious absence of any matrimonial link of petitioner No.1 with respondent No.2.

Such question has been considered by our superior courts, which is being discussed, as follows:-

(a) In 'Muhammad Riaz and another v. The State' (2011 SD 581), our Federal Shariat Court, has held:-

"that period of Iddat is only a temporary impediment to remarriage by husband. It is a specific period oriented. It is a relative or temporary disability. Under Sunni Law, an unlawful conjunction by way of marriage during Iddat period renders the marriage irregular and not void. An irregular marriage automatically becomes regular the moment the bottleneck is removed i.e. Iddat period expires";

(b) In 'Shoukat Ali and another v. The State' (2004 YLR 619), the view taken in Para-257 of Mahomedan Law has been confirmed declaring the marriage of a woman before completion of her Iddat as irregular and not void by holding as under:-

"that marriage entered into by divorced wife before completion of Iddat period would be irregular marriage and not void and that an irregular marriage cannot be treated as void marriage. Union of husband and wife in irregular marriage cannot be regarded as un-Islamic and against Shariah".

The learned counsel for the petitioners, with reference to the above-noted judgments, has prayed for the quashment of FIR.

9. The petition has been opposed vehemently and the learned couse1 for respondent No.2 with the help of case-law reported as Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf (PLD 1963 Supreme Court 51), Muhammad Sarwar and another v. The State (PLD 1988 Federal Shariat Court 42) and Mst. Kundan Mai v. The State (PLD 1988 Federal Shariat Court 89) has emphasized the requirement of notice of divorce within the meaning of section 7 of Muslim Family Laws Ordinance, 1961, in absence of which in view of the learned counsel for respondent No.2, Talaq would not be considered as effective.

10. The point of issuance of notice and effect thereof under section 7 of Muslim Family Laws Ordinance, 1961, has already been dealt with by the Courts of our Country, and by now, it is a settled position in this regard that on the validity of divorce, the absence of such notice would have no bearing.

11. The learned Deputy Prosecutor-General, for the State, on his turn, has supported the petition on the basis of the contention that, presently offence under section 10(2) of the Offence of Zina (Enforcement of Hudood), Ordinance, 1979, is no more an effective law, whereas, by elaborating the eventualities necessarily to be in existence in order to prove the commission of the offence of rape within the meaning of section 375, P.P.C., which provides five eventualities i.e.,

(i) the commission of rape against the will of the woman,

(ii) without her consent,

(iii) with her consent, when her consent has been obtained by putting her in fear of death or of hurt,

(iv) with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or

(v) with or without her consent, when she is under sixteen years of age.

As such, in view of the learned Deputy Prosecutor-General, when the rape, as has been defined in the Pakistan Penal Code, 1860, is not made out, that cannot be punished under section 376, P.P.C. Similarly, the learned Deputy Prosecutor-General has further argued that, no offence under section 493-A, P.P.C. again is not made out, which deals with the situation, where every man who deceitfully caused any woman, who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief.

12. As to the criminality alleged regarding fornication under section 496-B, P.P.C., the learned Deputy Prosecutor-General is of the view that; firstly, the offence of fornication also is not made out and; secondly, the procedure provided in section 203-C, Cr.P.C., has not been followed, which provides that no court shall take cognizance of offence under section 496-B, P.P.C., except on a complaint lodged in a Court of competent jurisdiction. According to the learned Deputy Prosecutor-General and rightly so, the offence under section 496-B, P.P.C. can only be brought into the notice of a Court by means of a complaint.

13. What has been emerged from the above discussion is that the marriage of the petitioners, even if was considered as "irregular marriage" on 07.09.2013, the same has attained the status of "regular marriage" by efflux of time from the point, when Iddat period was supposed to have been expired with reference to the earlier marriage of petitioner No.1 with respondent No.2 and, as such, in complete agreement of the contentions raised by the learned Deputy Prosecutor-General, who has rendered valuable assistance to the Court, without adopting the role of a traditional Prosecutor, I am of the view that the criminal case registered through FIR No.400 of 2014 has entirely been registered on wrong premises and no criminality is established even prima facie connecting the petitioners with the alleged crime. If the FIR is permitted to remain in the field, it would not only a wastage of precious public time of the courts, but also the wastage of the precious time of the investigating agency by overburdening the same, as also would result in causing unjustified interference in the matrimonial life of the petitioners on the strength of a valid marriage. It will be not beneficial either for respondent No.2 or the prosecuting agency to allow further prosecution of said registered criminal case. No further proceedings on the basis of such FIR are allowed to be carried out by any forum or agency.

14. Resultantly, this Constitutional petition is allowed and FIR No.400), dated 20.09.2014, under sections, 375-iv, 376, 380, 457, 493-A, P.P.C., registered at Police Station, City Jalalpur Pir Wala, District Multan, is hereby quashed.

HBT/K-11/L Petition allowed.

2016 P Cr. L J 1773
[Lahore (Rawalpindi Bench)]
Before Ibad-ur-Rehman Lodhi and Raja Shahid Mehmood Abbasi, JJ
Raja WAHEED MEHFOOZ---Petitioner
Versus
SPECIAL JUDGE, ANTI-TERRORISM COURT-II, RAWALPINDI and 2 others---Respondents

W. P. No. 3625 of 2015, decided on 21st December, 2015.

Criminal Procedure Code (V of 1898)---

----S. 167---Anti-Terrorism Act (XXVII of 1997), S.21-E---Physical remand of accused---Scope---Local Police, on event of refusal of pre-arrest bail to accused persons, by the Trial Court, arrested accused persons and after completion of twenty four hours with the Police; produced accused before the Trial Court with request of their physical remand---Trial Court in two lines order, granted 15-days physical remand of accused persons to the Police---Principles provided in S.167, Cr.P.C., were the guidelines for the court before whom, accused were produced for physical remand; it was mandatory requirement within the view of S.167(3), Cr.P.C., that, the court authorizing under said section detention in the custody of the Police, would record its reasons for so doing---Remand was not to be granted mechanically without application of mind, rather it was to be granted only in case of real necessity; and also that the period of such remand was to be fixed with due regard to reasonable requirements---Remand order, passed by the court, did not reflect the fact that before handing over accused persons on physical remand to the Police, neither the Police record was consulted by the court, nor even the submission made on behalf of accused persons, were taken into consideration---Trial Court, was mistaken in understanding that while exercising its powers under S.21-E of Anti-Terrorism Act, 1997 was not required to give reasons for the order granting physical remand of accused persons, court's such interpretation, was completely in violation of the provision of S.21-E(3) of Anti-Terrorism Act, 1997---Impugned order was set aside, accused persons were granted post-arrest interim protective bail, in order to enable them to approach the competent forum for their bail by moving application.

Khairati Ram's case AIR 1931 Lah. 476; Rashid v. The State and 2 others PLD 1970 Lah. 389; Hafeezur Rehman v. The State PLD 1993 Pesh. 252 and Senator Asif Ali Zardari v. The State 2000 MLD 921 ref.

Mohammad Ilyas Siddiqui for Petitioner.

Syed Raza Abbas Naqvi, Assistant Advocate-General Punjab with Allah Yar, Inspector-SHO and Abdul Majeed, S.I.

ORDER

The petitioners along with others, after having been implicated in criminal case registered through FIR No.1038, dated 10.11.2015, under sections, 186, 224, 225, 324, 341, 353, 148, 149, P.P.C., read with section 7 of Anti-Terrorism Act, 1997, at Police Station, Sadiq Abad, District Rawalpindi; were arrested by the local police on the event of refusal of their pre-arrest bail by the learned Judge, ATC-II, Rawalpindi, on 14.12.2015, and after completion of twenty-four hours with the police, the accused persons, namely, Raja Waheed Mehfooz, Raja Nasir Mehfooz and Raja Yasir Khan, were produced before the learned Judge, ATC-II, Rawalpindi, with a request of having their physical remand. The learned Judge by means of following two lines order dated 15.12.2015, granted 15-days physical remand of the accused persons to the police:-

> "Court is of the view that 15 days physical remand is justified. Application is, therefore, allowed. The accused are ordered to be produced on 30.12.2015."

2. The petitioner, through the present Constitutional petition, has called in question the legality of the above-referred order of the learned Judge, ATC-II, Rawalpindi, by maintaining that the same is in complete negation of the settled principles provided for the Courts granting physical remand of the accused persons involved in a criminal case. Further contended that, Ghulam Khan, the alleged injured person in the offence reported through the present criminal case, got recorded his statement under section 164, Cr.P.C., whereby none of the accused persons, who were handed over to the police on physical remand by the learned Judge, were implicated by the said injured person. Also submitted that, Mst. Abida, the other person, who allegedly received injuries as a result of alleged firing by the accused persons, also disowned the allegations against the petitioner and other accused persons. The said lady also appeared before this Court in confirmation of her such stated stance.

3. The principles provided in section 167, Cr.P.C. are, in fact, the guidelines for the Court before whom accused persons in criminal cases, are produced for physical remand. In addition to other requirements, it is a mandatory requirement within the view of section 167(3), Cr.P.C. that, the court authorizing under this section detention in the custody of the police shall record his reasons for so doing.

4. The effect of section 167, Cr.P.C. has been dealt with earlier by the Courts in Sub-Continent. The pre-partition view, as was taken by the Lahore High Court, in case of Khairati Ram reported as (AIR 1931 Lahore 476) was to the following effect:

> "When the accused is produced before a Magistrate, the latter is empowered under S. 167 to direct the detention of the former "for a term not exceeding fifteen days in the whole." It will be observed that this section comes into operation only if the investigation cannot be completed within the period of twenty-four hours fixed by S.61, and that, if the Magistrate authorized detention in the custody of the police, he is enjoined to record his reasons for so doing."

After partition, again this Court in case of Rashid v. The State and 2 others (PLD 1970 Lahore 389), while dealing with the issue of remand of accused has held that, the remand is not to be granted mechanically without application of mind, rather it is to be granted only in case of real necessity and also that the period of such remand is to be fixed with due regard to reasonable requirements.

From Peshawar jurisdiction, such question has been dealt with in case of Hafeezur Rehman v. The State (PLD 1993 Peshawar 252) by holding that, accused's detention for want of competent remand order would, no doubt, amount to illegal confinement and the same can be a valid ground to release him on bail and one need not go to the extent to hold that there shall not be left any option with the Court to release the accused on bail even if held in detention under an invalid remand order.

A Division Bench in Karachi High Court in case Senator Asif Ali Zardari v. The State (2000 MLD 921) even in ATA matter has set-aside a remand order in criminal revisional jurisdiction of the High Court by holding the remand order as illegal and violative to the mandatory requirements of section 167(3), Cr.P.C. and section 19(4) of Anti-Terrorism Act, 1997.

5. The supreme law i.e. The Constitution of the Islamic Republic of Pakistan, 1973, which jealously guarded the respect of a citizen provides through Article 4 thereof that, to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen and no action detrimental to the life, liberty, body, reputation or property of any person shall be taken, except in accordance with law. Part-II of the Constitution, which provides fundamental rights of the citizens, protects every person in view of Article 9 thereof as against any deprivation of life or liberty save in accordance with law.

6. When the petition was placed before the Bench and the factual background was disclosed by the learned counsel for the petitioner, the police was directed to produce the persons on remand along with record.

On appearance, Inspector-SHO and the Investigating Officer, both, have admitted that the fact of a statement of Ghulam Khan, the alleged injured, got recorded under section 164, Cr.P.C. by a competent Magistrate, was in the notice of police even, when the accused persons were produced before the learned Judge, ATC-II, Rawalpindi, for the purposes of obtaining the physical remand.

7. We have noted with concern that, the order passed by the learned Judge, ATC-II, Rawalpindi, on 15.12.2015, does not reflect the fact that before handing over the accused persons on physical remand to the police, either the police record was consulted by the learned Judge or even the submissions made on behalf of the accused persons, who were shown to have been represented through their learned counsel at the relevant time, were taken into consideration. The learned Judge, ATC-II, Rawalpindi (Mr. Asif Majeed Awan), who granted physical remand of the accused persons to the police, was also required to see us in the Chambers, who, on appearance, when asked as to how without giving any reasons in the impugned order, such important facts, as indicated above, were ignored by him, while curtailing the liberty of the citizens of Pakistan, he simply responded that he was not exercising his powers within the meaning of section 167, Cr.P.C., rather section 21-E of

Anti-Terrorism Act, 1997, provides him powers to allow physical remand of the persons, accused of special offences.

The learned Judge, ATC-II, Rawalpindi, is badly mistaken in understanding that, while exercising his powers under section 21-E of Anti-Terrorism Act, 1997, he is not required to give reasons for the order granting physical remand of the accused persons and his such interpretation is completely in violation of the provisions of subsection (3) of section 21-E of the Act, which provides that, the Special Court under Anti-Terrorism Act, 1997, shall be deemed to be a Magistrate for purposes of subsection (3) of section 21-E of the Act. As such, the learned Special Court under Anti-Terrorism Act, while dealing with the matters of remand of the accused persons, is equally responsible to observe the provisions of section 167(3), Cr.P.C., and the remand order, if passed without assigning any reasons, would be a nullity in the eye of law, and would be termed nothing, but as an invalid remand order.

8. In such like situation, when the fundamental rights guaranteed under the Constitution, are shown to have been violated, this Court would not hesitate to exercise its Constitutional jurisdiction and technicalities of availability of any other remedy available under the law, would not stand in the way of its inherent jurisdiction.

9. The writ petition was allowed by this Court on 21.12.2015 by means of short order, when the accused persons in custody of police on physical remand on the strength of an invalid remand order dated 15.12.2015, which was challenged and subsequently was set aside, the accused persons, namely, Raja Waheed Mehfooz, Raja Nasir Mehfooz and Raja Yasir Khan, were granted post-arrest interim protective bail in case FIR No.1038 of 2015, in order to enable them to approach the competent forum for their bail by moving proper application.

The above are the reasons of said short order.

HBT/W-2/L Petition allowed.

2016 P L C 261
[Lahore High Court]
Before Ibad-ur-Rehman Lodhi, J
Messrs NESTLE MILKPAK LIMITED
Versus
JUDGE, SOCIAL SECURITY COURT, LAHORE and 2 others

F.A.O. No.230 of 2002, decided on 30th October, 2015.
(a) Provincial Employees' Social Security Ordinance (X of 1965)--------Ss. 2(8)(f), 20 & 57---'Employee'---Meaning and scope---Amount and payment of contribution---Punjab Social Security Institution, issued demand notice to company, directing it to pay less paid Social Security contribution for a certain period along with fifty percent statutory Increase---Company filed complaint against the notice under S.57 of Provincial Employees' Social Security Ordinance, 1965 which was dismissed by Vice Commissioner, while disagreeing

with interpretation of 'wages' as given by the company, whereunder the company had included all expenses incurred by it for providing facilities to its workers connected with their job performance during working hours---Appellate court upheld finding of Vice Commissioner---Counsel of department contended that under S.20 of Provincial Employees' Social Security Ordinance, 1965, employer was under duty to pay, in respect of every employee, to the Institution a contribution at such times, at such rate and subject of such condition as might be prescribed, provided that no contribution would be payable on so much of an employee's wages, which was in excess of three thousand rupees---Validity---Section 2(8)(f) of Provincial Employees' Social Security Ordinance, 1965 remained effective during the whole period in question, and the employees of the establishment could not to be said to have ceased to be employee of the establishment, even if they were getting wages exceeding three thousand rupees---Demand in question raised by the Punjab Employees Social Security Institution was, therefore, valid and legal act on part of the Institution, and refusal on part of the petitioner-establishment was without any justification.

Province of Sindh through Chief Secretary and others v. M.Q.M. through Deputy Convener and others PLD 2014 SC 531; Dr. Muhammad Anwar Kurd and 2 others v. The State through Regional Accountability Bureau, Quetta 2011 SCMR 1560 and Reckitt and Colman of Pakistan Limited, Karachi and others v. The Commissioner, Sindh Employees' Social Security Institution, Awan-e-Mehnatkash Gulshan-e-Iqbal, Karachi and others 2001 PLC 245 ref.

(b) Provincial Employees' Social Security Ordinance (X of 1965)---

----Ss. 64, 59, 58 & 57---Appeal to Social Security Court---Review on account of new facts---Decision on complaints, questions and disputes---Under S.59 of Provincial Social Security Ordinance, 1965, first appeal lies before Social Security Court against decision of the Institution under S.57 or on review under S.58 of the Ordinance---Appeal to High Court, within the meaning of S.64 of the Ordinance, is always to be considered as 'second appeal'---High Court directed its office to entertain and register such appeals as second appeal against order (SAO).

Umer Abdullah for Appellant.

Anwar Hussain, Asstt. A.-G., Punjab and Mohammad Nauman Aslam Raza for Respondents.

Date of hearing: 13th October, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- Although this appeal was not only filed, but entertained and registered as FAO; however, keeping in view the fact that, in the scheme of law, as has been promulgated by means of Provincial Social Security Ordinance, 1965 (hereinafter to be referred as "the Ordinance"), first appeal lies before the Social Security Court in view of Section 59 of the Ordinance against a decision of the Institution under Section 57 or on a review under Section 58, as such, the appeal to the High Court within the meaning of Section 64 of the Ordinance is always to be considered as 'Second Appeal' in the relevant scheme of law and, thus, office is directed to entertain and register such appeals as SAO in future.

2. Earlier, this Court on 20.11.2002 allowed the present appeal; however, the same was called-in-question by The Vice-Commissioner, Punjab Employees Social Security Institution (PESSI) before the Hon'ble Supreme Court of Pakistan, where Civil Petition, after grant of leave, was converted into Civil Appeal No.2217 of 2008, which finally was decided on 12.02.2015 by the apex Court, in the manner that, the judgment passed by this Court on 20.11.2002 was set-aside and case was remanded to this Court for rehearing of the appeal and passing a fresh order inter-alia taking into account the Notification dated 29.06.1994.

3. In compliance of such directions, this appeal was again heard and is being decided by means of present judgment.

4. The controversy started, when the local office of Punjab Employees Social Security Institution, Shahdara, Lahore, issued a demand notice on 13.01.1999 to Nestle Milkpak Limited, present appellant, directing to pay less paid Social Security contribution for the period from January, 1995 to December, 1998 along with 50% increase and total recoverable amount was calculated as Rs.2,99,664/- (rupees two lac, ninety nine thousand, six hundred and sixty four only).

5. The appellant having its own reservations filed a Complaint under section 57 of the Ordinance before the Commissioner, Punjab Employees Social Security Institution. The Vice Commissioner in the Institution was entrusted the hearing of the complaint, who by means of order, announced on 02.03.2001, did not agree with the appellant by not accepting the interpretation of wages as was attempted to be given effect by the present appellant by including therein all expenses incurred by the Establishment for providing the facilities to the workers connected with their job performance during the working hours, as such, encashment of Festival Holidays, meal subsidy, Uniform and its washing allowance, leave fare assistance and transportation expenses, were not included in the wages of the workers and, therefore, the Director of Social Security was allowed to effect the recovery of demand.

6. Such findings of the Vice Commissioner were challenged by the Institution-appellant before the learned Judge, Social Security Court Punjab, Lahore, by means of Appeal No.9/S/2001, under Section 59 of the Ordinance. The first appellate court, vide order dated 11.05.2002, proceeded to dismiss the appeal upholding the findings of the Vice Commissioner; hence, this appeal before this Court.

7. The pivotal question, to be interpreted, is the effect of proviso added in Section 2(8)(f) of the Ordinance, by virtue of Labour Laws (Amendment) Act, 1994 (Act XI of 1994), which reads as under:-

> "Provided that an employee shall not cease to be an employee for the reason that his monthly wages exceed three thousand rupees".

8. In order to better understand the provision of Section 2(8)(f) of the Ordinance, it would be beneficial to trace out its history. The relevant provision of Section 2(8)(f) of the Ordinance has been underwent with certain amendments and changes, after the enactment of the original Ordinance. The original position of Section 2(8)(f) of the Ordinance, as was

promulgated by means of Ordinance X of 1965, West Pakistan Employees' Social Security Ordinance, 1965, was to the following effect:-

> "8. "employee" means any person working, normally for at least twenty-four hours per week, for wages, in or in connection with the work of any industry, business, undertaking or establishment, under any contract of service or apprenticeship, whether written or oral; express or implied; but does not include--
>
> (a) ……
> (b) ……
> (c) ……
> (d) ……
> (e) ……
> (f) any person employed on wages exceeding five hundred rupees per mensem "

Through Act No.XI of 1976 i.e. Labour Laws (Amendment) Act, 1976, the said provision was further amended and words "five hundred" were substituted with the words "one thousand".

In 1985, Act No.XVI of 1985 i.e. Labour Laws (Amendment) Act, 1985, in Section 2(8)(f), for the words "one thousand", the words "one thousand five hundred" were substituted.

By means of Ordinance XXIII of 1993 i.e. Labour Laws (Amendment) Ordinance, 1993, the provision, under consideration, was further amended and for the words "one thousand five hundred", the words "three thousand" were substituted.

In 1994, by virtue of Act XI of 1994 i.e. Labour Laws (Amendment) Act, 1994, this clause was further amended and this time, the above noted proviso was also added in Section 2(8)(f) of the Ordinance.

In 2001, again there was some Legislative change and by means of Ordinance No.LIII of 2001 i.e. Labour Laws (Amendment) Ordinance, 2001, whereby, in Section 2(8)(f), for the words "three thousand", the words "five thousand" were substituted.

In 2008, by virtue of Act No.1 of 2008 i.e. The Finance Act, 2008, Section 2(8)(f) of the Ordinance was further amended and for the word "five" occurring twice earlier, the word "ten" was substituted; and

lastly by virtue of Act, XXIV of 2013 i.e. Provincial Employees' Social Security (Amendment) Act, 2013, after amendment, Section 2(8)(f) of the Ordinance was substituted in the following position:-

"(a) in clause (8), for sub-clause (f), the following shall be substituted:--

"(f) any person employed on wages exceeding the wages determined by the Government under Section 71,".

9. The learned counsel for the appellant has mainly placed much emphasis on his point that, if there is a direct conflict in between the main provision and the proviso attached therewith, then the proviso is to be ignored and in support of his such contention, has placed reliance on Province of Sindh through Chief Secretary and others v. M.Q.M. through Deputy Convener and others (PLD 2014 Supreme Court 531), which provides that a proviso could not be construed to nullify the enacted clause. He has further placed his reliance on Dr. Muhammad Anwar Kurd and 2 others v. The State through Regional Accountability Bureau, Quetta (2011 SCMR 1560) to contend that, natural presumption of providing such proviso is to exclude general application of relevant section/subsection in the matter notified under the proviso. Proper function of proviso is that it qualifies generality of main enactment by providing an exception and taking out as it were, from main enactment. To say, proviso should normally be construed nor merely to limit or control but nullify the enactment and taking away completely a right conferred by enactment is incorrect.

10. While responding to such contentions raised by the learned counsel for the appellant, the learned Assistant Advocate-General Punjab assisted by the learned counsel for the respondents has contended that Section 2(8) of the Ordinance defines the term "employee" whereas, while a proviso was added to such provision; it simply extended such definition, but never nullified the basic statutory, provision. The learned Assistant Advocate-General Punjab has further referred Section 20 of the Ordinance, which is a charging Section and contended that, it is the duty of the employer to pay in respect of every employee, whether employed by him directly or through any other person, to the Institution a contribution at such times, at such rate and subject to such conditions as may be prescribed, provided that no contribution shall be payable on so much of an employee's wages, which is in excess of three thousand rupees. Although this amount of rupees three thousand was subsequently enhanced, but keeping in view the relevant period in this particular case, which is from January, 1995 to December, 1998, such amount is being referred, which remains applicable during whole of such referred period. The learned Assistant Advocate-General Punjab, in support of his arguments, has referred an elaborated judgment passed by the erstwhile Karachi High Court in case of 'Reckitt and Colman of Pakistan Limited, Karachi and others v. The Commissioner, Sindh Employees' Social Security Institution, Awan-e-Mehnatkash Gulshan-e-Iqbal, Karachi and others (2001 PLC 245). Relevant portion of said findings, which have a direct bearing upon the issue involved in the present appeal, is re-produced herein-below:-

"Consequent to the above discussion it is held that although amendment has been made in section 2(8)(f) of the Ordinance, in the form of proviso but a bare perusal of the provision leaves no scintilla of doubt, that in effect and in substance it is not in the nature of proviso. In substance it is a leading provision. The reason being that the provision is generally an exception to the section preceding the proviso and being in the nature of an exception it is interpreted very narrowly and strictly. A bar perusal of the proviso under consideration shows that 'it has enlarging effect. It is further held that the provision under consideration is part of section containing definition

and therefore, it is declaratory in nature as held by Hon'ble Supreme Court of Pakistan, in the judgment reported as (PLD 1964 SC 616).

As already held by the Hon'ble Supreme Court of Pakistan in the judgments cited above, the entire law contained in the Ordinance is beneficial in nature, therefore, the provision under consideration is also a beneficial and welfare legislation and thus, is required to be interpreted liberally and in a way which has the effect of advancing the relief and suppressing the mischief. It is further held that the provisions contained in proviso are explanatory in nature and explanation added by the legislature is deemed to be a note of caution indicating the real intention of the legislature and purpose of the enactment as well as removal of any doubt. Thus, the provision is clarificatory as well. The presumption is that the legislature while enacting any law or making any amendment is conscious of the circumstances prevailing at the time of enactment/ amendment/ substitution, and therefore, it is held that the legislature was aware that questions were being raised about the exclusion of a worker from the purview of the terms employee used in the Ordinance as defined in Section 2(8)(f) and a view was prevailing which was prejudicial to the interest of worker and was not in consonance with the avowed object and purpose of legislation, therefore, an amendment was inserted whereby it was clearly provided without any ambiguity that once a person/worker is included within the definition of employee under the Ordinance, he shall continue to be so, notwithstanding crossing the ceiling of wages. Thus, the law curative in nature as well. Thus, the proviso to section 2(8)(f) of the Ordinance being a part of definition section is declaratory and at the same time it is beneficial, curative, remedial and welfare legislation and has to be given retroactive effect.

As a result of above findings, it is held that the proviso to section 2(8)(f) of the Ordinance, being retroactive in effect, the respondents have rightly' held that the employees who have crossed the ceiling continue to be employees and therefore, the respondents are justified in demanding contribution in respect of such employees from the appellant in accordance with the provisions contained in the Ordinance".

11. A fact, which is to be kept in mind is that the period relevant in this case is from January, 1995 to December, 1998 and during whole of this period, the proviso added by virtue of Act XI of 1994 i.e. Labour Laws (Amendment) Act, 1994, remained effective and by no stretch of imagination, it can be argued that, the employees of the establishment even if, were getting wages exceeding three thousand rupees, were ceased to be the employees of the establishment and, therefore, when such proviso was effective with full force, it has to be given effect in the same force.

12. The conclusion on the basis of above discussion is that, the demand raised by the Institution vide notice dated 13.01.1999, directing the appellant to pay less paid Social Security contribution for the period from January, 1995 to December, 1998 along with 50% statutory increase, was a valid and legal act on the part of the Institution and the refusal on the part of the establishment-appellant was having no justification.

The result is that this appeal fails and is dismissed.

SL/N-50/L Appeal dismissed.

P L D 2016 Lahore 293
Before Ibad-ur-Rehman Lodhi, J
CHINIOT CO-OPERATIVE HOUSING SOCIETY LTD. through President---Petitioner
Versus
GOVERNMENT OF PUNJAB through Secretary Cooperative Department and 2 others---Respondents

Writ Petitions Nos.11292, 8872, 11224 of 2003; 14543 of 2010 and 2692 of 2014, decided on 9th September, 2015.

(a) Land Acquisition Act (I of 1894)----
----Ss. 4, 5, 5-A, 6, & 17(4), 40----Lahore Development Authority Act (XXX of 1975), Ss. 13 (5) & 33---Constitution of Pakistan, Arts. 199, 24, 23 & 10---Constitutional petition---Acquisition of land---Principles---Public purpose---Scope---Publication of preliminary notification and powers of officers---Declaration that land was required for public purpose---Special powers in case of urgency---Right to fair trial---Protection of property rights---Petitioners' Societies, through present petitions, challenged notifications issued under Ss. 4, 6 & 17 of Land Acquisition Act, 1894 by respondent-Lahore Development Authority for its residential housing scheme---Contention raised by petitioners was that they, being registered Co-operative Societies, had already acquired subject land and entered into agreement of acquisition for accommodating their members---Validity---For determining 'public purpose', which was basic and necessary ingredient for acquiring any land, it would be seen as to whether members of petitioners Societies would fall within definition of 'public' or only contributors to LDA scheme would be considered as members of public---In view of categories of members of petitioners Societies, such members could not have been ousted from consideration to be members of a class of public---Land, already having been arranged for residential purposes, could not be taken back to the disadvantage of such needy people to accommodate members of LDA scheme, who were better placed than members of petitioners Societies---Term 'purpose' would be applicable to both classes: members of petitioners Societies and contributor to LDA scheme---High Court observed that when suit land had already been held by petitioners Societies for paramount public purpose, then issuance of notice under S. 6 of Land Acquisition Act, 1894 was not warranted---Once petitioners' Societies had accommodated their members for purpose of extending residential accommodation to them, they could not be deprived from such benefit simply in order to accommodate members of LDA scheme, which was not intention of law of acquisition---In schemes under petitioners Societies, development process was completed, allotments had been made, and even some members had also constructed theirs houses---Members of petitioners Societies were protected and to be dealt with under Co-operative Societies Act, 1925---Acquiring agency or Collector would have no competence to acquire shares of members of Co-operative Societies---Members of Co-operative Societies were purchasers of shares of Societies and their shares could not, in any way, be subject matter of land acquisition proceedings---High Court setting aside impugned notifications issued by respondent-LDA for acquiring suit properties, quashed acquisition proceedings---Constitutional petition was allowed in circumstances.

Federation of Pakistan through G.M. Telegraph and Telephone Department, Lahore Telephone Region, Lahore v. Province of Punjab through Land Acquisition Collector/Assistant Commissioner, Headquarters, Lahore and 2 others 1993 SCMR 1673; Ch. Mehraj Din and others v. Lahore Improvement Trust, Lahore through the Chairman PLD 1986 SC 673; Mian Fazal Din v. Lahore Improvement Trust PLD 1969 SC 225; Federal Government Employees' Housing Foundation through Director-General Islamabad and another v. Muhammad Akram Alizai, Deputy Controller, PBC, Islamabad 2002 PLC (C.S.) 1655; Nazir Ahmad and 7 others v. Commissioner, Lahore Division, Lahore and 3 others 2000 MLD 322; Muhammad Ahmad Siddiqui and 11 others v. Collector, Lahore District, Lahore and 4 others 2000 MLD 820; Darshan Lal Nagpal (dead) by L.Rs. v. Government of NCT of Delhi and others AIR 2012 SC 412 and Sulemna(sic) Daud v. Lahore Development Authority Writ Petition No.7160 of 2007 rel.

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

----Ss. 5, 5-A & 17(4)---Constitution of Pakistan, Art.199---Constitutional petition---Acquisition of land---Notification that particular land was needed for public purpose or for company---Hearing of objections, requirement of---Special powers in case of urgency---Direct issuance of notification under S.17(4) of Land Acquisition Act, 1894 by dispensing with requirements as provided under Ss.5 & 5-A of the Act, was nullity in eye of law---Collector and acquiring agency had failed to demonstrate as to emergent nature of the affair, whereunder entertainment of objections, hearing the same and disposal thereof could have been dispensed with---Constitutional petition was allowed.

(c) Lahore Development Authority Act (XXX of 1975)----

----Ss. 13 (5) & 33--- Constitution of Pakistan, Art.199---Constitutional petition---Preparation of Housing scheme---Approval or sanction of Authority, requirement as to---Principles---Objection of Authority was that petitioners Societies had been introduced without legal sanction or approval of the Authority and was nullity---Validity---Under S.13(5) of Lahore Development Authority Act, 1975, no planning or development scheme would be prepared by any person or local body or government agency within the areas except with concurrence of LDA---Neither sanction nor approval of Authority was required for any development scheme; rather, 'concurrence' of Authority was maximum requirement of law---Silence on part of LDA for long time, after scheme by petitioners Societies had been publically launched, would amount to concurrence, particularly, when violation of such non-concurrence would have no consequential effect---Under S.33 of Lahore Development Authority Act, 1975, in case of any contravention of any provision of the Act or rules or regulations made thereunder, LDA could impose penalty of imprisonment up to six months with or without fine---Absence of such concurrence would not create any adverse effect upon future proceedings of Co-operative Society.

(d) Land Acquisition Act (XXX of 1894)----

----Ss. 4, 6(4) & 17(4)--- Constitution of Pakistan, Art.199---Constitutional petition---Publication of preliminary notification and powers of officers---Declaration that land was required for "public purpose"---Special powers in case of urgency---Principles---Term 'land' used either in S.6 or S.17(4) of Land Acquisition Act, 1894, was necessarily referable to term 'land' used in S.4(1) of the Act---Section 6(4) of Land Acquisition Act, 1894 only

catered that situation where area in respect of which notification under S.6 or 17(4) of Land Acquisition Act, 1894 is less than area previously notified under S.4(1) of the Act, which is deemed to have been superseded by said notification so far that related to excess area---Such provision did not cater with situation, where land notified under S. 6 read with S.17(4) of Land Acquisition Act, 1894 was exceeded the land already notified under S.4 of Land Acquisition Act, 1894---Land, which was to be notified either under S.6 or 17(4) of Land Acquisition Act, 1894, must not be in excess of land notified under S.4 of the Act---Notification issued under S.17(4) of Land Acquisition Act, 1894 acquiring land in excess than land already notified under S.4(1) of the Act, was, therefore, defective and invalid.

(e) Constitution of Pakistan----

----Art. 10-A---Right to fair trial---'Fair trial', scope of---Under S.10-A of the Constitution, fair trial has been taken as fundamental and basic right of citizens of Pakistan---Depriving any interested person from raising any objection as to his intended deprivation from his right, would be an act, which can conveniently be termed as violative to concept of "fair trial".

Nazir Ahmad and 7 others v. Commissioner, Lahore Division, Lahore and 3 others 2000 MLD 322 and Sulemna(sic) Daud v. Lahore Development Authority Writ Petition No.7160 of 2007 rel.

Mian Bilal Bashir and Ch. Bashir Hussain Khalid (in W.P.No.11292 of 2003), Mian Israr-ul-Haq, (in W.P.11224 of 2003), Syed Najaf Hussain Shah (in W.P.No.8872 of 2003), Ch. Zafarullah (in W.P. No.14543 of 2010) and Tallat Farooq Sheikh (in W.P.No.2692 of 2014) for Petitioners.

Khawar Ikram Bhatti, Addl. A.-G. Punjab for Respondents Nos.1 and 3.
Kh. Muhammad Haris for Respondent No.2-LDA.
Date of hearing: 1st June, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.- With the concurrence of learned counsel for the parties, this case is being treated as pacca hearing.

2. Through this common judgment, following Constitutional petitions are to be disposed of together:-

1. **Writ Petition No. 11292 of 2003.** (Chiniot Co operative Housing Society v. Government of Punjab and 2 others)

2. **Writ Petition No. 11224 of 2003.** (Islamic Research Scholars Cooperative Housing Society Limited v. Lahore Development Authority and 5 others).

3. **Writ Petition No. 8872 of 2003.** (Electrical and Mechanical Engineers (EME) Cooperative Housing Society Limited v. Lahore Development Authority and 3 others).

4. **Writ Petition No. 14543 of 2010.** (The Punjab Board of Revenue Employees Co-operative Housing Society Limited v. Lahore Development Authority and 6 others).

5. **Writ Petition No. 2692 of 2014.** (Punjab Civil Secretariat Employees Cooperative Housing Society v. Muhammad Arshad Bhatti and 8 others).

as common questions of law and facts are involved in all these petitions.

3. When Lahore Development Authority launched its scheme, known as LDA Avenue-I, on 03.12.2002, and proceeded to set up a residential scheme and shown its intention to acquire certain land for the said purpose, it offended and put the petitioners at guard, for the reason that, landed property, intended to be acquired for this purpose, was mostly included the landed property already purchased, owned and possessed by the petitioners' Societies, mainly for the purposes of setting up their residential schemes for the benefit of the respective members of the registered co-operative societies/petitioners.

4. In Writ Petition No. 11292 of 2003, firstly, a notification under Section 4 of The Land Acquisition Act, 1894 (hereinafter to be referred as "Act"), was issued on 18.12.2002 with regard to the land measuring 1500 acres, i.e. equal to 12000 kanals. However, no further process was carried out in consequence of such notification. Another notification under Section 4 of the Act again was issued on 28.04.2003 with regard to the land measuring 850 acres, i.e. equal to 6800 kanals in village Bhopatian, Tehsil and District, Lahore, and inconsequence of such second notification under Section 4 of the Act, a subsequent notification under Section 17(4) read with Section 6 of the Act was issued on 04.07.2003 with regard to the land measuring 14458 kanals and 9-marlas.

In Writ Petition No.11224 of 2003, 328 kanals of land, which was allotted to most of the members of petitioner's Society was shown in the intended land, to be acquired for the proposed scheme of LDA Avenue-I.

In Writ Petition No. 8872 of 2003, the petitioner's Society was originally known as "Electrical and Mechanical Engineers (EME)"; however, subsequently it was merged with Defence Housing Authority (DHA), and its 320 kanals of land in Mauza Musalla, Tehsil Lahore, which was contiguous to Block-A of petitioner's Society, was the subject-matter of the intention of LDA and notification under Section 4 of the Act was issued on 24.12.2002.

In Writ Petition No 14543 of 2010, the petitioner's Society purchased through private negotiations, land measuring 391 kanals, 12 marlas, in village Dhana Singh Wala and Phase-II in village Bhopatian, a land measuring 1000 kanals and additional land measuring 182 kanals, 12 marlas was purchased, whereas, the LDA for its proposed residential scheme, shown its intention to include the land measuring 182 kanals, 10 marlas of petitioner's Society for its residential scheme.

In Writ Petition No. 2692 of 2014, the petitioner's Society purchased 25 kanals of land, whereas, with regard to the land measuring 300 kanals, it entered into agreement to sell on

payment of earnest money, the possession was also taken over by the petitioner's Society for accommodation of its 700 members. The notification under Section 17(4) read with Section 6 of the Act, was also issued by the LDA showing the intention to include petitioner's property into their proposed launched scheme on 04.07.2003, published in Gazette on 08.07.2003.

5. Mian Bilal Bashir, Advocate for the petitioner in Writ Petition No.11292 of 2003 has addressed the Court by means of his lead arguments

The learned counsel, representing the other petitioners, have adopted the arguments of Mian Bilal Bashir, Advocate, with certain additions respecting to their separate writ petitions.

6. The main thrust of the petitioners remained to the effect that the Petitioners. who, all are Registered Co-operative Societies, have acquired or entered into agreement to acquire the landed property, mainly for the purposes of accommodating their respective members in order to cater their residential problems by providing residential plots in developed housing schemes under the petitioners' Societies and, therefore, the same land, which was already earmarked for a specific purpose i.e. provision of shelter to homeless persons, would not again be subject-matter of acquisitioning the same in the garb of "public purpose" by providing the same facility of residential plots to the contributors for LDA Avenue-I Scheme. Further, it was added that the notification issued under Section 17(4) read with Section 6 of the Act, was defective in nature and it does not qualify to be a valid notification under the land acquisitioning laws.

7. The learned counsel for the petitioners went on arguing that, even while showing the intention to acquire certain land belonging to petitioners' Societies in a complete defective manner, a member of housing societies holding the landed property in the same area were specifically exempted from the process of acquisitioning the land. The intention to take over the land of the petitioners' Societies by the LDA was also termed as violative even to the provisions of The Lahore Development Authority Act, l975 (hereinafter to be referred as "LDAA"), and that continuation of proceedings by petitioners' Societies for proposed residential schemes cannot be made subject to the sanction or approval of LDA, and at the most, even if any violation of LDA laws is alleged, that can be compounded only by means of imposition of penalty and not otherwise.

8. The contentions of the petitioners were refuted by the learned counsel representing the Lahore Development Authority, by maintaining that the schemes prepared, announced and undertaken by the petitioners, were not validly sanctioned schemes by the LDA and unless there is a sanction or approval by the LDA, no such scheme can be continued in the area fall within the control of LDA. It was further argued on behalf of the LDA that the public purpose for which LDA has shown its intention to acquire the land, including one owned or Possessed by the petitioners, would be a valid and legal process of acquisition and the LDA would have a preferential right to be considered on a better footing than that of the petitioners Societies to acquire the land for the purposes of establishing a housing scheme thereon.

9. The initial notification issued under Section 4 of the Act on 18.12.2002, disclosing the intention of the Collector was made with regard to the land measuring 1500 acres, i.e. equal

to 12000 kanals. However, when in consequence of such notification, a subsequent notification under Section 17(4) read with Section 6 of the Act, was issued, it was with regard to the land measuring 14458, kanals, 9 marlas, thus, in clear terms, the land mentioned in Section 4's notification was exceeded in the subsequent notification.

The situation has been visualized in Section 6(4) of the Act, which only caters the situation, where the area in respect of which notification under Section 6 or 17(4) of the Act is issued, is less than the area previously notified under Section 4(1), which is to be deemed to have been superseded by the said notification so far it relates to the excess area, but such provision does not cater with the situation, where the land notified under Section 6 read with Section 17(4) of the Act is exceeded to the one already notified under Section 4 of the Act.

10. The term "land" used either in Section 6 or Section 17(4) of the Act is necessarily referable to the term "land", used in Section 4(1) of the Act, as such, the land, to be notified either under Section 6 or 17(4) of the Act must not be in excess of the land notified under Section 4 of the Act. The notification, thus, issued under Section 17(4) read with Section 6 of the Act acquiring the land excess than the land already notified under Section 4(1) is defective and not a valid notification.

11. So far as "public purpose" is concerned, which is the basic and necessary ingredient for acquisitioning of any land, it would be seen that as to whether the members of the petitioners' Societies would fall within the definition of "public" or only contributors to LDA Avenue-I would be considered the members of public. Keeping in view the categories of members of the petitioners' Societies, who are mainly low paid salaried persons of different organizations or the educationists, who would have no shelter in their career life on account of their meager financial sources and are provided by the Co-operative Societies the chance to invest as members of Co-operative Societies, to have at least one shelter either at the fag end of their career or at their retirement, could not have been ousted from consideration to be a member of a class of public, as such, the landed property already arranged for their residential purposes, cannot be taken back to the disadvantage to such needy people in order to accommodate the members of the LDA scheme, who are better placed than that of the members of the petitioners' Societies, if not similarly placed in the social set up.

12. The term "purpose" would be applicable to both of the classes i.e. members of the petitioners'. Societies and also the contributor to LDA Avenue-I, and once the petitioners have accommodated their members for the purpose of extending residential accommodation to them, they cannot be deprived from such benefit simply in order to accommodate the members of LDA Avenue-I, which is not the intention of even the acquisitioning law. The members of the petitioners' Societies are protected to be dealt with under Co-operative Societies Act, 1925.

13. Another aspect, which is to be taken into consideration is that a "land" is to be acquired under the Land Acquisition Act, 1894, or even The Lahore Development Authority Act, 1975, but acquiring agency or the Collector would have no competence to acquire the shares of members of the Co-operative Societies. In the cases, in hand, the members of the

petitioners' Societies are purchasers of the shares of the society and their such shares can, in no way, be subject-matter of land acquisitioning proceedings.

14. The direct issuance of notification under Section 17(4) of the Act, by dispensing with the requirements as provided in Sections 5 and 5-A of the Act is again a nullity in the eye of law, for, the Collector and the acquiring agency have failed to demonstrate as to the emergent nature of the affair, whereunder the entertainment of objections, hearing the same and disposal thereof could have been dispensed with.

15. Now by insertion of Article 10-A in the Constitution by means of Constitutional (Eighteenth Amendment) Act, 2010, fair trial has been taken as a fundamental and basic right of the citizens of Pakistan and depriving any interested person from raising any objection as to his intended deprivation from his any right, would be an act, which can conveniently be termed as violative to the concept of fair trial.

16. The arguments advanced by the learned counsel representing the Lahore Development Authority, to the effect that, the schemes introduced by the petitioners' Societies were having no legal sanction or approval of the LDA and, thus, were not worthy to be continued, would be nullified by the bare reading of Section 13(5) of The Lahore Development Authority Act, 1975, which provides that, no planning or development scheme shall be prepared by any person or local body or Government agency within the area except with the concurrence of the Authority. It is neither sanction nor approval of the authority, which is required for any development scheme, rather its "concurrence" is the maximum requirement of law and the silence on the part of LDA for a long time, after the schemes by the petitioners' Societies were publically launched, would amount to concurrence, particularly, when violation of such non-concurrence would have been given no consequential effect, rather in view of Section 33 of the LDAA in case of any contravention of any provision of the LDAA or any rules or regulations made thereunder, imposition of penalty or a punishment, which may extend maximum to a term of six months or with fine or with both are the steps, which can be enforced by LDA. Even absence of such concurrence would not create any adverse effect upon the future proceedings of a Co-operative Society.

17. I have been informed that in almost all the schemes of the petitioners' Societies, development process has been completed, allotments have been made and in some schemes, some houses by the members have already been constructed thereon.

18. Such questions involved in the present petitions and discussed herein-above, the Courts in our country as well as in the neighbouring country, in the past have dealt with in the following manner:-

The Hon'ble Supreme Court of Pakistan in case of Federation of Pakistan through G.M. Telegraph and Telephone Department, Lahore Telephone Region, Lahore v. Province of Punjab through Land Acquisition Collector/Assistant Commissioner, Headquarters, Lahore and 2 others (1993 SCMR 1673) has dealt with the object of "public purpose", which is the basic and a necessary component of the land acquisition process and it was held that enquiry under Section 40 of Land Acquisition Act, 1894 is factual in nature in which hearing is

given to the objectors. It is a channel to place information before the Commissioner for his satisfaction to enable him to have a correct perception of the situation before making a declaration that the land is needed for a public purpose and consequently its acquisition is warrantable, but the satisfaction of the Commissioner should be deliberate and arrived at after due care and proper application of the mind, to the facts appearing on the record. It was further taken note of by the apex Court in the reported matter that when the land with reference to which the declaration under Section 6 was made by the Commissioner was already held by the writ petitioners for paramount public purpose, the issuance of notification under Section 6 was held as not warranted.

Dealing with the case of Lahore Improvement Trust (the predecessor of the respondents-LDA), the Hon'ble Supreme Court of Pakistan in Ch. Mehraj Din and others v. Lahore Improvement Trust, Lahore through the Chairman (PLD 1986 Supreme Court 673), while discussing the different provisions of law relating to the Improvement Trust or as the case may be, the Development Authorities has emphasized the requirements of raising objections by the land owners as against indented acquisition of their land either by the Improvement Trust or any Development Authority and dispensation of the requirement of raising objection by the land owners and hearing the same by the Commissioner has been held as not valid. In the reported matter, by placing reliance on an earlier view reported as Mian Fazal Din v. Lahore Improvement Trust (PLD 1969 Supreme Court 225), again the importance of notice to public, notice to the owners affected, raising of objections by the said owners and hearing the objections, have been termed the steps towards the provision of fair opportunity of representing the case of land owners.

The Hon'ble Supreme Court of Pakistan in case reported as Federal Government Employees' Housing Foundation through Director-General, Islamabad and another v. Muhammad Akram Alizai, Deputy Controller, PBC, Islamabad (2002 PLC (C.S) 1655) has emphasized the requirement of the hearing of objections and also dealt with the comparison of the personal benefit of one or some individuals with that of the benefit of a particular class of employees. Even benefit to be extended to a particular class of employees has not been considered as "public purpose" with reference to land acquisition law.

A Division Bench of this Court in case of Nazir Ahmad and 7 others v. Commissioner, Lahore Division, Lahore and 3 others (2000 MLD 322), on the subject, has held that dispensing with the requirement of raising objection by the land owners as against the intended process of land acquisition is in fact a classic example of misuse of State machinery for the benefit of individuals, which was against the basic purpose of Land Acquisition Act, 1894. It was also considered as violative to the fundamental rights guaranteed in the Constitution of Islamic Republic of Pakistan, particularly, Articles 23 and 24 of the Constitution, according to which, no person shall be deprived of the property, except in due course of law and there shall be no compulsory acquisition save for the public purposes. It was also held that the Land Acquisition Act is based on the rule to rob Peter to pay Paul. However, it was held that there was no scope for such type of action in the Islamic State as the same offended the Inunctions of Islam. The rule to enrich privileged one at the cost of poor is legacy of imperialism and had no place in an ideological State like Pakistan. In the reported matter like present one, the real purpose for land acquisition was to establish

a Housing Scheme for the benefit of few individuals and it was clear from the record that same was not a need of the society, but in fact purpose behind such acquisition was to establish a residential colony and that too, after committing the dacoity on the valuable rights of the land owners guaranteed under Articles 23 and 24 of the Constitution.

A Full Bench of this Court constituted to examine different provisions of Land Acquisition Act, in case of Muhammad Ahmad Siddiqui and 11 others v. Collector, Lahore District, Lahore and 4 others (2000 MLD 820), after holding that the application of independent mind by the land acquisitioning authorities is a condition precedent and the Courts will always be duty bound to see that during course of said procedures, the authorities concerned have applied their mind or not, has further held that the Land Acquisition Authorities moved in the matter in a mechanical manner and the only urgency, as apparent on record, was for pushing through the process of acquisition without complying with the duties imposed upon them by law. It was held that it was a matter of concern that the Collector and the Commissioner faithfully followed the report placed by them by the authorities under their control and gave a declaration that the land is required for the public purpose, without taking into consideration that the land intended to be acquired was in fact already held by the petitioners' societies for the same purpose and benefit of their number of members to cater with the requirements of their residential problems and finally by observing that exhibiting lack of transparency in the process of decision-making, the power of judicial review under Article 199 of the Constitution, was available with the Courts to see whether or not such had been arrived at by the public functionaries concerned in manner which did not contravene the fundamental rights or the Constitutional guarantees.

The Indian Supreme Court on the same issue in case of Darshan Lal Nagpal (dead) by L.Rs. v. Government of NCT of Delhi and others (AIR 2012 Supreme Court 412) mainly on the urgency in the acquisition process and the import of the objections by the land owners of the intended land to be acquired and hearing, as well as, disposal of the same in a transparent manner, has held as follows:-

> "21. It is also apposite to mention that no tangible evidence was produced by the respondents before the Court to show that the task of establishing the sub-station at Mandoli was required to be accomplished within a fixed schedule and the urgency was such that even few months time, which may have been consumed in the filing of objections by the land owners and other interested persons under Section 5A(1) and holding of inquiry by the Collector under Section 5A(2), would have frustrated the project. It seems that the Bench of the High Court was unduly influenced by the fact that consumption of power in Delhi was increasing everyday and the DTL was making an effort to ensure supply of power to different areas and for that purpose establishment of sub-station at village Mandoli was absolutely imperative. In our view, the High Court was not justified in rejecting the appellants' challenge to the invoking of urgency provisions on the premise that the land was required for implementation of a project which would benefit large section of the society. It needs no emphasis that majority of the projects undertaken by the State and its agencies/instrumentalities, the implementation of which requires public money, are meant to benefit the people at large or substantially large segment of the society. If

what the High Court has observed is treated as a correct statement of law, then in all such cases the acquiring authority will be justified in invoking Section 17 of the Act and dispense with the inquiry contemplated under Section 5A, which would necessarily result in depriving the owner of his property without any opportunity to raise legitimate objection. However, as has been repeatedly held by this Court, the invoking of the urgency provisions can be justified only if there exists real emergency which cannot brook delay of even few weeks or months. In other words, the urgency provisions can be invoked only if even small delay of few weeks or months may frustrate the public purpose for which the land is sought to be acquired. Nobody can contest that the purpose for which the appellants' land and land belonging to others was sought to be acquired was a public purpose but it is one thing to say that the State and its instrumentality wants to execute a project of public importance without loss of time and it is an altogether different thing to say that for execution of such project private individuals should be deprived of their property without even being heard. It appears that attention of the High Court was not drawn to the following observations made in State of Punjab v. Gurdial Singh (AIR 1980 SC 318) (supra):

"It is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power."

Applying the above rule to the present cases, it can safely be held that urgency, even if existed in the year 2003 in acquiring the land by dispensing with the provisions of Sections 5 and 5-A of the Act, whereafter more than a decade has gone, it has in fact vanished by efflux of time and presently, the respondents are not in a position to still claim that the land is immediately required by dispensing with the fundamental rights of the land owners to raise objections and disposal of the same in a fair and transparent manner.

In an unreported matter, when Writ Petition No.7160 of 2007 (Sulemna(sic) Daud v. Lahore Development Authority), was decided on 21.05.2008, by the then Hon'ble Chief Justice of this Court, vide para-6 of the same judgment, it was held as under:-

"6. Another aspect of equally importance, which cannot be lost sight of is that the properties of number of persons, companies, societies have been excluded from the purview of the Scheme. The petitioner can thus have a legitimate grievance to urge that he is not being dealt with like others similarly placed and situated. One may at this juncture revert to the provisions of Constitution of the Islamic Republic of Pakistan, 1973. According to Article 23, every citizen has the right to acquire, hold and dispose of property in any part of Pakistan subject to the constitution and any

reasonable restriction imposed by law in the public interest. Article 24 further guarantees that "No person shall be deprived of his property save in accordance with law".

19. The result of above discussion is that, all the writ petitions are allowed. The notifications issued earlier under Section 4 and then under Section 17(4) read with Section 6 of the Land Acquisition Act, 1984, are set-aside and the process initiated by the respondents authorities for the acquisition of the land of the petitioners is quashed.

SL/C-26/L Petitions allowed.

P L D 2016 Lahore 425
Before Ibad-ur-Rehman Lodhi, J
Messrs DAWLANCE UNITED REFRIGERATION INDUSTRIES PRIVATE LTD. through Branch Coordinator---Appellant
Versus
MUHAMMAD ASIM CHAUDHRY---Respondent

F.A.O. No.120 of 2009, heard on 14th September, 2015.

(a) Punjab Consumer Protection Act (II of 2005)----
----Ss. 28(4) & 2(c)(1)----Dowry and Bridal Gifts (Restriction) Act (XLIII of 1976), S.5---Settlement of claims---Limitation, determination of---Term 'consumer', meaning of---Product forming part of wife's dowry---Husband debarred from filing claim---Respondent contended that Consumer court had wrongly granted claim, as same was beyond prescribed limitation---Validity---Under S.28(4) Punjab Consumer Protection Act, 2005, claim by consumer or Authority would be filed within thirty days of arising of cause of action---Consumer Court, however, had jurisdiction to allow claim to be filed after thirty days within such time as might be allowed if court was satisfied that there was sufficient cause for not filing claim within specified period---In the present case, neither the Consumer Court was asked to exercise such jurisdiction nor Consumer Court had permitted claimant to file delayed claim-Section 28(4) of Punjab Consumer Protection Act, 2005 provided that such extension would not be allowed beyond period of sixty days from date of expiry of warranty specified, and if no period was specified, then one year from date of purchase of product or providing of services would be considered as period of limitation for filing claim---Warranty card issued to complainant did not contain any date as to expiry of warranty-In absence of warranty period, maximum time. which could be granted to claimant by Consumer Court, even after giving an extension in filing complaint, must not exceed one year from date of purchase of product---Claimant had filed present claim after about one and half year from date of purchase---Claim was, therefore, barred by time---Wife of claimant, as matter of admitted fact, had originally purchased product (washing machine) for her dowry and she herself had used the same after her marriage---Husband of wife could not be treated as 'consumer' as defined under S.2(c)(1) of Punjab Consumer Protection Act, 2005---Under S.5 of Dowry and Bridal Gifts (Restriction) Act, 1976, bride was to be considered as absolute owner of items of dowry and other bridal gifts---Impugned order suffered from illegalities,

and same was, therefore, not sustainable---Consumer Court had misapplied the law---High Court, setting aside impugned order, dismissed the claim---Appeal was allowed in circumstances.

(b) Dowry and Bridal Gifts (Restriction) Act (XLIII of 1976)----
----S. 5---Vesting of dowry etc. in the bride---Under S.5 of Dowry and Bridal Gifts (Restriction) Act, 1976, bride is to be considered as absolute owner of items of dowry and other bridal gifts.

Kashif Ali Chaudhry for Appellant.
Rana Mohammad Anwar for Respondent.
Date of hearing: 14th September, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--The claim, which was granted to the respondent by the learned Presiding Officer/District Consumer Court, Lahore, on 27.03.2009, has been called-in-question by the appellant mainly on the plea that in view of the provisions of Section 28 of The Punjab Consumer Protection Act, 2005 (hereinafter to be referred as 'the Act'), the claim, as was raised by the present respondent was beyond limitation and, as such, did not deserve to be adjudicated upon merits.

2. Elaborating such contentions, learned counsel for the appellant has contended that the date of purchase of the disputed Washing Machine was 26.03.2007 with a one year warranty period, whereas, the legal notice was issued on 16.09.2008. The memo of complaint, as was filed by the respondent, did not contain any particular date as to when, according to the complainant, cause of action in his favour arose.

3. In view of Section 28(4) of the Act, a claim by the consumer or the Authority shall be filed within thirty days of the arising of the cause of action.

The Consumer Court, however, has been provided a jurisdiction to allow a claim to be filed after thirty days within such time as it may allow if it is satisfied that there was sufficient cause for not filing the complaint within the specified period.

In the present case, neither such jurisdiction was asked to be exercised by the learned Consumer Court nor naturally the Consumer Court passed any order permitting the complainant to file a delayed claim by showing sufficient cause for its non-filing within specified period.

4. By virtue of second proviso to Section 28(4) of the Act, it is further provided that such extension shall not be allowed beyond a period of sixty days from the expiry of warranty specified by the manufacturer or provider and if no period is specified, then one year from the date of purchase of the products or providing of services would be considered as a period of limitation provided for filing claim before the Presiding Officer of District Consumer Court.

Since according to the stated consumer, the warranty card, issued by the appellant at the time of purchase of Washing Machine, did not contain any date of expiry of warranty, as such, in absence of any such warranty period, the maximum time, which could have been granted to the claimant by the learned Consumer Court even after giving an extension in filing the complaint, must not be exceeded to one year from the date of purchase of the product or providing of service.

5. Keeping in view the date of purchase i.e. 26.03.2007, the claim, at the most, can be filed by or before 25.03.2008 and, as such, same was filed on 30.10.2008, which is clearly barred by time, and the learned Consumer Court entertaining such claim, has never given any extension to the claimant to file such delayed claim.

6. Another aspect, which is noted by this Court is that as per showing of the respondent-claimant himself, Washing Machine was originally purchased by his wife and it was a part of her dowry and after marriage, it was the wife of the claimant, who started use of said Machine.

7. The term "Consumer" is defined in Section 2(c)(1) of the Act in the following manner:-

> "buys or obtains on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose".

Keeping in view the above definition of 'Consumer', the husband of the wife, who brought her dowry articles, including Washing Machine in question, could not be treated as a 'Consumer'. If, at all, any complaint was to be lodged as to any defect in the Washing Machine, which admittedly purchased by the wife of the claimant, it was the wife, who should have been a complainant or claimant in the matter. The husband, who even never used such Machine, is not a "consumer".

8. Even otherwise, in view of Section 5 of The Dowry and Bridal Gifts (Restriction) Act, 1976, it is the bride, who is to be considered as an absolute owner of the items of dowry and other bridal gifts also.

9. For what has been discussed above, the order passed by the learned Presiding Officer, District Consumer Court, Lahore, on 27.03.2009, suffers from illegalities and law has been misapplied by the learned Presiding Officer. The same is not sustainable, thus, it is set-aside. The claim/complaint, filed by the respondent before the Consumer Court stands dismissed.

This appeal is allowed.

SL/D-9/L Appeal allowed.

P L D 2016 Lahore 509
Before Ibad-ur-Rehman Lodhi and Raja Shahid Mehmood Abbasi, JJ
Ex.-Brigadier ALI KHAN---Petitioner
Versus
SECRETARY, HOME DEPARTMENT, GOVERNMENT OF PUNJAB and another---Respondents

Writ Petition No.2983 of 2015, decided on 26th January, 2016.

(a) Anti-Terrorism Act (XXVII of 1997)---
----Ss. 21-F & 11-F (2)---Penal Code (XLV of 1860), Ss. 302 & 120-B---Pakistan Army Act (XXXIX of 1952), Ss. 59 & 31 (d)---Pakistan Prison Rules, 1978, Rr.199 & 214-A---Grant of remission to prisoner---Scope-- Accused was convicted and sentenced by Field General Court Martial---Representation for seeking remission was moved by the accused but same was declined---Validity---If remissions were refused on account of conviction under Anti-Terrorism Act. 1997 then effect of such refusal must not be taken beyond the period of maximum conviction provided for such offence---Principle of refusal of remission even if applied in the present case then same must not be extended for remaining period of conviction after exclusion of the period of maximum sentence of six months as provided under S.11-F(2) of Anti-Terrorism Act, 1997---Accused was never convicted for espionage or anti-state activities resulting into refusal of remission---To grant remission was an extra judicial power of prison managers to shorten the sentence in a judicial manner to make the criminal minds sane citizen---Such powers should have been in the exclusive domain of prison authorities to deal with the matters in post-conviction period---No unjustified restrictions could be imposed upon the prison authorities either in order to pre-empt their such jurisdiction or to overawe their such statutory right---Only prison authorities had power in view of the conduct of the prisoner in post-conviction period either to grant or refuse remission and no other authority was competent to even comment upon the conduct of the prisoner--Impugned refusal to grant remission to the accused was violative of the Pakistan Prison Rules, 1978---Jail authorities were directed to grant remission to the accused available under Pakistan Prison Rules, 1978 by excluding the period of conviction of six months provided under S.11-F(1) of Anti-Terrorism Act, 1997---Constitutional petition was allowed in circumstances.

Shah Hussain v. The State PLD 2009 SC 460 and Nazar Hussain and another v. The State PLD 2010 SC 1021 distinguished.

(b) Pakistan Prison Rules, 1978---
----Rr. 199 & 214-A---Remission to prisoner---Scope-Remission was an arrangement by which a prisoner sentenced to imprisonment whether by one sentence or by consecutive sentences for a period of four month or more might by good conduct and industry become eligible for release when a portion of his sentence ordinarily not exceeding one-third of the whole sentence had yet to run--Person who was convicted for espionage or anti-State activities was not entitled to ordinary or special remission unless otherwise directed by the Provincial Government.

Tanveer Iqbal Khan for Petitioner.

Malik Feisel Rafique, Deputy Attorney General for Pakistan with Raja Abdul Qayyum, Law Officer and Col. Shamsher Ali for Respondent.

Barrister Qasim Ali Chohan, Assistant Advocate General, Punjab.

Date of hearing: 21st December, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--The petitioner was convicted and sentenced by a Field General Court Martial. When to serve out the sentence, the person of the petitioner was handed over initially to the Superintendent, District Jail, Sialkot, a warrant of commitment was issued to the said jail authority, wherein the details of the conviction and sentence on three charges were provided to the following effect:-

(i) First charge under Section 59 of Pakistan Army Act read with Section-11-F(2) of Anti-Terrorism Act, 1997 for professing to belong a proscribed organization.

(ii) Second charge was laid under Section 31(d) of Pakistan. Army Act, for attempting to seduce a person in the military forces of Pakistan from his allegiance to the Government of Pakistan.

(iii) Third charge was laid again under Section 59 of Pakistan Army Act for being party to a criminal conspiracy to commit an offence punishable with death under Section 120-B read with Section 302 of the Pakistan Penal Code.

and by means of one sentence of all such offences, the petitioner was sentenced to suffer Rigorous Imprisonment for five years and also dismissal from service. The sentence was made effective w.e.f. 20.06.2012 and warrant of commitment so issued carried a date of issuance as 03.08.2012. Subsequently, on 12.08.2012 the petitioner was shifted to Central Jail Adyala, Rawalpindi, where still he is lodged.

2. On behalf of the petitioner, his wife moved the Home Department in Government of the Punjab, by means of a representation seeking remissions and other facilities admissible under Prison Rules. Such representation was declined by the Home Department, Government of the Punjab and such refusal was communicated to the wife of the petitioner through letter dated 31.08.2015 intimating that since the petitioner was sentenced under Section 11-F(2) of the Anti-Terrorism Act, 1997, therefore, he is not entitled to any kind of remission in view of the provisions of Section 21-F of the said Act.

3. Such refusal has been called in question by the petitioner through this Constitutional petition being an aggrieved person of passage of the impugned order by the Home Department, Government of the Punjab.

4. The report and parawise comments from the respondents side did contain the same position as has been pleaded in the impugned refusal mainly on the strength of the

provisions of Section 21-F of the Anti- Terrorism Act, 1997 as well as Rule 214-A of Pakistan Prison Rules, 1978.

Home Department, Government of the Punjab in its report and parawise comments has additionally placed reliance on two judgments of the Hon'ble Supreme Court of Pakistan reported as Shah Hussain v. The State (PLD 2009 SC 460) and Nazar Hussain and another v. The State (PLD 2010 SC 1021) with the contention that no remission to a convict under Anti-Terrorism Act is available.

5. The parties have been arguing mainly on the concept of a relief available under Section 382-B, Cr.P.C. and for that purpose from both the sides, the above referred law laid down by the Hon'ble Supreme Court of Pakistan was referred. In Shah Hussain's case, it was the conclusion that benefit of Section 382-B, Cr.P.C. is available to all the prisoners irrespective of the fact under which penal clauses, they have been convicted, but benefit of said Section was not available to the convicts of offences under the National Accountability Ordinance, 1999, Anti- Terrorism Act, 1997, and the offence of Karo Kari and where the law applicable, prohibits itself to such relief, whereas, in Nazar Hussain's case mainly the powers of the President of Pakistan under Article 45 of the Constitution of the Islamic Republic of Pakistan, 1973, are discussed, which both have no nexus with the point involved in the present petition.

6. Both the sides have never addressed the Court on the real question involved as to whether remissions in view of Pakistan Prison Rules, 1978 can be refused to a person convicted by a Field General Court Martial and sentenced under three charges including the one under Anti- Terrorism Act, 1997.

7. The petitioner was convicted under Sections 31(d) and 59 of Pakistan Army Act read with Section 11-F(2) of the Anti-Terrorism Act, 1997 and in compliance of the requirements of Rule 54 of Pakistan Military Rules one sentence of five years was imposed in addition to dismissal from service. The effect of one sentence for all the offences is to be analysed and also it is to be looked into as to whether if under one offence remissions are not permissible to a prisoner, whether such restraint would equally be applicable for offences under other laws, where such restriction is not imposed in that other law.

8. In the present case, remissions have been denied to the petitioner simply for the reason that he has been convicted for an offence under Section 11-F(2) of Anti Terrorism Act, 1997 and in view of the barring clause .i.e. Section 21-F of the same Act, a convict under any provision of Anti Terrorism Act would not be entitled to get any remission. The important fact to be noted is that maximum sentence for an offence under Section 11-F(2) of Anti Terrorism Act, 1997 is six months. Now it is to be seen as to whether length of the "one sentence" of five years can be presumed for the offence under Section 11-F(2) also despite the fact that for such offence maximum sentence available under the law is six months and further that whether a barring clause refusing remission to a convict under any provisions of Anti-Terrorism Act, 1997 can be made applicable in case of a prisoner convicted and sentenced by Field General Court Martial against whom one accumulative sentence has been imposed under Anti-Terrorism Act, 1997 and also Pakistan Army Act. Even if the

remissions are refused on account of conviction under Anti-Terrorism Act, 1997, the effect of such refusal must not be taken beyond the period of maximum conviction provided for such offence, as such, the principle of refusal of remission even if applied in this case, it must not be extended for remaining period of conviction i.e. 4 1/2 years after exclusion of the period of maximum sentence of six months provided under Section 11-F(2) of Anti-Terrorism Act, 1997. Section 21-F of the said Act, do suggest that the remissions can only be refused to a person convicted and sentenced for any offence under such Act, as such, the petitioner can be refused remissions with regard to the period of conviction of six months, which is maximum period of conviction under Section 11-F(1) of Anti-Terrorism Act, 1997.

9. Chapter 8 of Pakistan Prison Rules, 1978 provides Remission System, which in view of Rule 199 is an arrangement by which a prisoner sentenced to imprisonment, whether by one sentence or by consecutive sentences, for a period of four months or more may by good conduct and industry, become eligible for release when a portion of his sentence ordinarily not exceeding one-third of the whole sentence has yet to run. Such rules contained a prohibition in themselves by means of Rule 214-A, which provides that no person, who is convicted for espionage or anti-state activities shall be entitled to ordinary or special remission, unless otherwise directed by the Provincial Government. The petitioner was never convicted and sentenced for any such offence resulting into refusal of remission under Pakistan Prison Rules, 1978, rather in view of the warrant of commitment on account of his first charge, he was sentenced for alleged professing to belong a proscribed organization, whereas, in view of the second charge, he was sentenced for attempting to seduce a person in the military force of Pakistan from his allegiance to the Government of Pakistan and in view of third charge, he was sentenced for being party to a criminal conspiracy. Even such barring clause provided under Rule 214-A of Pakistan Prison Rules, 1978, would not be applicable in case of the petitioner.

10. To grant remission is an extra judicial power of prison managers to shorten the sentence in a judicial manner to make the criminal minds sane citizen and it should have been in the exclusive domain of prison authorities to deal with such matters in post conviction period. No unjustified restrictions are to be imposed upon the prison authorities either in order to pre-empt their such jurisdiction or to overawe their such statutory right. It is only for the prison authorities in view of the conduct of the prisoner in post conviction period, either to grant or refuse remission and no other authority is competent to even comment upon conduct of the prisoner to which only prison authorities are supposed to be the direct witness.

11. In view of what has been discussed above, we have reached to the conclusion that the impugned refusal to grant remission to the petitioner is violative to the Pakistan Prison Rules, 1978 at least for the period of conviction of the petitioner to the extent of four years and six months after exclusion of the period of maximum six months conviction under Section 11-F(2) Anti-Terrorism Act, 1997. The present writ petition is, therefore, allowed and the jail authorities are directed to grant remissions to the petitioner available under Pakistan Prison Rules, 1978 by excluding the period of conviction of six months provided under Section 11-F(1) of Anti-Terrorism Act, 1997.

ZC/A-29/L Petition allowed.

P L D 2016 Lahore 545
Before Ibad-ur-Rehman Lodhi, J
KHALID ZAHIR AKHTAR---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretary Ministry of Defence---Respondent

Writ Petition No.2663 of 2015, decided on 23rd December, 2015.

(a) Pakistan Army Act (XXXIX of 1952)---
----Ss. 92, 16, 2(2) & 60---Army Regulations Rules, 1998, Rr. 269-A & 269-C---Petitioner, a retired army officer---Dismissal from service---When petitioner was called with reference to S.92 of Pakistan Army Act, 1952 then there was no other option with the authorities except to try him and punish him for such offence allegedly committed by him---Such mode was not adopted by the respondents in the present case---No order by the Chief of Army Staff existed for constitution of Court of Inquiry-No show cause notice was issued to the petitioner---Proceedings could be ordered against an officer who was at the relevant time in active service of Pakistan Army---Army Regulations Rules, 1998 did not empower any authority to proceed against an already retired officer---If retired officer from army was called under S.92 of Pakistan Army Act, 1952 then he should be made subject to Pakistan Army Act, 1952 but only for limited purpose provided in the said provision of law---Petitioner was never charge sheeted for any alleged offence committed by him---Petitioner was never tried by any Court Martial and no conviction had ever been passed against him---Retirement order of petitioner had already been acted upon which had never been recalled, modified, cancelled, rescinded or replaced---Retired army officer could not be dismissed without adopting the required process---Impugned order was based on malice and was without jurisdiction---Impugned order of dismissal of petitioner from service was not sustainable which was set aside---Constitutional petition was allowed in circumstances.

(b) Constitution of Pakistan---
----Art. 199(3)---Constitutional petition against Armed Forces---Bar of jurisdiction---Scope---Bar of jurisdiction contained in Art. 199(3) of the Constitution is not absolute and High Court had jurisdiction to examine whether the order challenged suffered from mala fide or was without jurisdiction or coram non judice.

District Bar Association Rawalpindi and others v. Federation of Pakistan and others PLD 2015 SC 401 and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan through Secretary and others PLD 2010 SC 61 rel.

Mohammad Akram Sheikh, Mohammad Wasif Khan Niazi and Syed Faraz Raza for Petitioner.

Waqar Ahmad Rana, Additional Attorney-General for Pakistan, Raja Faisal, Standing Counsel and Col. Shamsher Ali for Respondent.

Date of hearing: 16th December, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---The petitioner is aggrieved of an order dated 05.08.2015, passed by the Government of Pakistan in Ministry of Defence, whereby, a

decision of the competent authority has been conveyed to the petitioner that the approval for the dismissal from service of the petitioner, was granted under Section 16 of the Pakistan Army Act, 1952 (hereinafter to be referred as 'the Act').

2. The relevant facts of the case, in brief, are that the petitioner had been performing his duties as Major General in Pakistan Army under Personal No.PA-13080, and by means of an Order No.15/2008, issued by the CORO, GHQ, dated 28.02.2008, the petitioner was allowed to proceed on LPR for a period of twelve months, to be started from 27.02.2008 and his date of retirement/relinquishment of appointment was given in the said order as 27.02.2009', and the petitioner was held entitled to special additional pension along with other benefits, to be effective from 27.02.2009 for life. The authority for such order was given as under:-

"Auth: GHQ MS Branch 1tr No.0313/13080/MS-IB dated 05 Jan. 2008.

Auth: PP&A Dte GHO ltr No. 4630/901/PPA-1 dated 30 Jan 2004"

3. The petitioner had been enjoying his such status of a Retired Army Officer, when vide letter No.4821/2582/12616/PS-1(A)/2, dated 13.09.2011, issued by the Adjutant General's Branch Personnel Services Directorate, Rawalpindi, the petitioner was required to report to the Headquarters 10-Corps on 19.09.2011, for disposal of the case pertaining to alleged irregularities in National Logistic Cell (NLC) affairs. It would be relevant to mention here that in the said letter, the petitioner was addressed as Retired Major General of Pakistan Army.

In compliance of said letter, the petitioner reported to the concerned Corps Headquarters, where subsequently neither he was issued any show cause notice nor charge sheeted or tried, but without any such formal proceedings, the impugned order was conveyed vide letter dated 05.08.2015, which has been called in question by the petitioner by filing present Constitutional petition before this Court.

4. The respondents were directed to furnish parawise comments in this petition, which, after a great hesitation, were filed on 24.11.2015, but respondents still avoided to comment upon the merits of the case and instead confined themselves to address only legal aspects of the matter and reserved the right to make submissions, as deemed appropriate to the respondents at the time of hearing. This avoidance to furnish any comments on merits of the case is taken by the Court as an attempt on the part of the respondents to avoid any admission or to provide any catch point.

5. The learned counsel for the petitioner and the learned Additional Attorney-General for Pakistan, who was having assistance of learned Standing Counsel and also representative from JAG Branch, were heard, in detail.

6. The petitioner, who stood retired from Pakistan Army w.e.f. 27.02.2009, was recalled under Section 92 of the Act, which reads as under:-

"92. Liability of offender who ceases to be subject to the Act.-

(1) Where an offence has been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody and tried and punished for such offence as if he had continued to be so subject.

(2) No such person shall be tried for an offence, unless his trial commences within six months after he had ceased to be subject to this Act:

Provided that nothing contained in this sub¬section shall apply to the trial of any such person for an offence of desertion, fraudulent enrolment, or for any of the offences mentioned in section 31 [or section 40] or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court martial".

7. The basic point for determination is as to what authority would be available with the respondents, when an already Retired Army Officer is recalled under Section 92 of the Act. The case, in hand, will be examined in light of the following provisions of Army Laws, which are reproduced herein-below for ready reference:-

"Section 2(2) of the Act.

"Every person subject to this Act under clause (a) or clause (b) [or clause (e) of subsection (1) shall remain so subject until duly retired, released, discharged, removed or dismissed from the service"

Section 16 of the Act.

"Dismissal or removal by Federal Government.- The [Federal Government] may dismiss or remove from the service any person subject to this Act".

Section 40 of the Act.

"Fraudulent offence in respect of property.- Any person subject to this Act who commits any of the following offences, that is to say,-

(a) dishonestly misappropriates or commits theft of, or criminal breach of trust in respect of any property belonging to the Government or any service property or the property of any person subject to this Act, [ ]

[or the Pakistan Air Force Act, 1953 (VI of 1953),] or to the [Pakistan Navy Ordinance, 1961 (XXXV of 1961), or of any person serving with or attached to any of the armed forces of Pakistan; or

(b) dishonestly receives or retains any stolen property of the nature specified in clause (a), knowing or having reason to believe the same to be stolen; or

(c) is guilty of any other act or omission with intent to defraud, or to cause wrongful gain or wrongful loss to any person, shall on conviction by court martial,

be punished with rigorous imprisonment for a term which may extend to five years, or with such less punishment as is in this Act mentioned".

Section 60 of the Act.

Punishments.-Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by courts martial according to the scale following, that is to say,--

(a) ----------

(aa) ----------

(aaa) ----------

(b) ----------

(c) ----------

(cc) ----------

(d) dismissal from the service.

(e) ----------

(f) ----------

(g) ----------

(h) ----------

(i) ----------

(j) ----------

(k) ----------

(l) ----------

Rule 269-A of The Army Regulations (Rules), 1998:-

"Dismissal, Removal, Premature or Voluntary Retirement/ Resignation of Officers for Misconduct etc. Procedure. The following procedure will be observed to deal with cases in which it is not practicable or desirable to convene a court martial for the trial of an officer against whom misconduct or inefficiency etc; is imputed and his retention in service is not considered to be in the interests of the Army:-

a. The Chief of Army Staff may order a Court of Inquiry to investigate the matter and submit its findings together with his recommendations to the Government, for decision, or

b. The Chief of Army Staff may call upon an officer to show cause why action should not be taken against him for his dismissal, removal or premature retirement from the service under the PAA Rules and submit the officer's explanation together with his recommendations to the Government for decision; or

c. When it is not expedient either to hold a court of Inquiry or call for the officer 's explanation, the Chief of Army Staff may submit a report giving all the circumstances of the case and evidence, if any available, together with his recommendations for the decision of the Government".

Rule 269-C of the Rules, 1998.

"If it is necessary to remove an officer immediately from his appointment pending decision on his case, he may be.--

a. suspended from duty; or

b. sent on leave, under orders of the Chief of Army Staff according to leave at his credit."

8. The requirements of Section 92 of the Act, under which the petitioner was recalled are that, if, a person, who has ceased to be subject to Army Act, has committed some offence, he may be taken into and kept in military custody and tried and punished for such offence, as if he had continued to be so subject. As such, when the petitioner was recalled with particular reference of Section 92 of the Act, there was no other option with the respondents, except to try him and punish him for such offence, allegedly committed by the petitioner. Such mode was not adopted.

There is an exception however to such requirement of trial. Rule 269-A of The Army Regulations (Rules), 1998, provides a procedure to be observed to deal with the cases in which it is not practicable or desirable to convene a court martial for the trial of an officer against whom misconduct or inefficiency is imputed and his retention in service is not considered to be in the interest of the Army and in such case, an order of Chief of Army Staff to convene a Court of Inquiry to investigate the matter and submit its findings together with the recommendations to the Government, for decision, is required or in alternate, the Chief of Army Staff may call upon the officer to show cause why action should not be taken against him for his dismissal, removal or premature retirement from the service under the Pakistan Army Act, 1952, and submit the officer's explanation together with his recommendations to the Government for decision or when it is not expedient either to hold a Court of Inquiry or call for the officer's explanation, the Chief of Army Staff may submit a report giving all the circumstances of the case and evidence together with his recommendations for the decision of the Government.

Nothing of the sort happened in the case, in hand.

9. During hearing, time and time again, the learned Additional Attorney-General, was asked to show any order passed by the Chief of Army Staff regarding constitution of Court of Inquiry or to issue a show cause notice to the petitioner, but, firstly; the respondents failed to answer satisfactorily to such query, however, on insistence, the representative from JAG Branch produced original record, which, too, did not contain any order passed by the Chief of Army Staff, which is the designated authority in the Act under the referred Rules but only the letters signed by the Adjutant General of Pakistan Army, have been referred in this regard. Ultimately, the learned Additional Attorney-General has admitted that the relevant file does not contain any order, passed by the Chief of Army Staff in this regard, as such, the respondents have failed to demonstrate as to whether at any point of proceedings, subsequent to recalling the petitions under Section 92 of the Act, the Chief of Army Staff by exercising his jurisdiction as provided under Rule 269-A, passed any order.

Even otherwise, plain language of Rule 269-A read with Rule 269-C of The Army Regulations (Rules), 1998, do suggest that the proceedings can be ordered against an officer, who was, at the relevant time, in active service of Pakistan Army. The said Rules do not empower any authority to proceed against an already retired officer.

10. The learned Additional Attorney-General, with vehemence, has argued that, when once the petitioner was recalled under Section 92 of the Act, he immediately attained the status of a person, subject to Army Act and, therefore, the respondents were competent to deal with him as if he was a person subject to Army Act.

When Section 92 of the Act is to be read with the provisions of Section 2(2) of the Act and all other enabling provisions of Army Laws, it would become clear that, if an already retired officer from Army is recalled under Section 92 of the Act, he would be made subject to Army Act, but only for limited purposes i.e. to be dealt with in accordance with the situations provided in the said provision of law, which included taking into and keeping in military custody, trial and punishment and nothing else.

11. The dismissal from service is nowhere provided as an impediment to be imposed upon a retired army personnel recalled under Section 92 of the Act. Even punishment of dismissal from service as provided in Section 60(d) of the Act, may be inflicted in respect of offences committed by the persons subject to the Act and convicted by the courts martial, whereas, the dismissal from service has been imposed as against the petitioner without adopting the measures provided in such provision of the Pakistan Army Act, 1952. The petitioner was never charge sheeted for any alleged offence, committed by him and naturally, he was never tried by any court martial and no conviction has ever been passed as against the petitioner.

The respondents further have failed to show any enabling provision of the relevant law, where a "retirement" can be converted into a "dismissal from service". In the case, in hand, the retirement order, which was effective w.e.f. 27.02.2009, has already been acted upon and further the same has never been recalled, modified, cancelled, rescinded or replaced and in absence of any enabling provision making competent the respondent authorities to convert

the retirement of Army Officer into a dismissal, the subsequent dismissal order would not stand as having some legal status.

12. By concluding his arguments, the learned Additional Attorney-General has suggested as an alternate prayer to refer back the matter to the respondent authorities for reconsideration of the issue, in question. This, itself, speaks the weakness of the respondents' case, which they have realized and now they are seeking reconsideration of the matter with a possible planning in their mind to proceed again against the petitioner, now by leaving no lapses in the proceedings.

13. As observed herein-above, that the law on the subject, does not provide a situation, where a Retired Army Officer, can be dismissed from service, after a gap of almost six years and that, too, without adopting any required process.

14. The learned Law Officer has objected to the maintainability of this Constitutional petition on the touchstone of Article 199(3) of the Constitution of Islamic Republic of Pakistan, 1973.

In this regard, suffice it to refer a judgment of the Hon'ble Supreme Court of Pakistan reported as District Bar Association Rawalpindi and others v. Federation of Pakistan and others (PLD 2015 SC 401), wherein by referring a chain of judgments already pronounced by the apex Court, it was concluded that the bar of jurisdiction contained in Article 199(3) of the Constitution is not absolute and the Court always has the jurisdiction to examine whether the order challenged suffers from mala fide, including malice in law or is without jurisdiction or is coram non judice. Earlier in the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61), the apex Court concluded as follows:-

> "In view of the above, there can be no manner of doubt that it is a settled law that any Order passed or sentence awarded by a Court Martial or other Forums under the Pakistan Army Act, 1952, included as amended by the Pakistan Army (Amendment) Act, 2015, is subject to the Judicial Review both by the High Courts and this Court, inter alia, on the ground of coram non judice, without jurisdiction or suffering from mala fides including malice in law. This would also hold true for any decision selecting or transferring a case for trial before a Court Martial ".

Therefore, in light of above discussion, when malice in law on the basis of the acts performed by the respondents is proved, it is also the conclusion of the Court that the impugned order is result of a jurisdiction, which was never vested in the respondents and, thus, impugned order/action is also a coram non judice.

15. On account of what has been discussed above, the impugned order of dismissal of petitioner from service is not sustainable in law. The same is set-aside by accepting this petition.

ZC/K-10/L Petition allowed.

P L D 2016 Lahore 865
Before Ibad-ur-Rehman Lodhi, J
KHALIDA SHAMIM AKHTAR---Petitioner
Versus
GHULAM JAFFAR and another---Respondents
Civil Revision No.795-D of 2010, heard on 2nd June, 2016.

(a) Islamic jurisprudence---

----Sources---Main sources of Shariat are the Holy Qur'an, Sunnah, Ijma and Qias.

(b) Islamic law---

----Book "Muhammadan Law by D.F. Mulla"---Significance and relevance---High Court observed that the said book was only a reference book and not statutory law applicable in the country (Pakistan) in the sense that the legislature had not enacted the same; that it was just an option of the Court to consult the same on the basis of equity and refer to the principles mentioned in paragraphs of the said book; that the rules quoted in the said book were not at all applicable, if in the opinion of the Court, they were found opposed to justice, equity and good conscience, and that the Rules mentioned in the said book were not even referred to in situations directly covered by the Holy Qur'an or Sunnah or by binding Ijma and Qias.

Muhammad Nasrullah Khan v. The Federation of Pakistan and another (Shariat Petition No.06/1 of 2013) ref.

(c) Islamic law---

----Shia law of inheritance---"Issueless/childless widow"---Share of 'issueless widow' from her (Shia) husband's estate---Question of competence of a childless widow from Fiqa-e-Jafriya had neither been adjudicated upon by the Judiciary as yet nor codified into a law by the Legislature---However, Ayat No.12 of Sura Al-Nisa (Holy Qur'an), stated that a childless widow was entitled to 1/4th share from the leftover estate of her husband---High Court on such basis declared that even a childless widow from Fiqa-e-Jafariya would be entitled to claim 1/4th share from the leftover estate of her husband---High Court observed that it expected that the Federal Ministry of Law, would take legislative measures to promulgate a codified law in such regard in order to protect the rights of Ahl-e-Tashih childless widows, in getting their due shares from the inheritance of their deceased husbands. [Para 113 of Muhammadan Law by D.F. Mulla, not approved.]

Syed Muhammad Munir (represented by 10 heirs) and another v. Abu Nasar, Member (Judicial) Board of Revenue, Punjab, Lahore and 7 others PLD 1972 SC 346; Muhammad Bashir and others v. Mst. Latifa Bibi through L.Rs. 2010 SCMR 1915; Al-Qur'an Ayat No.12 of Sura Al-Nisa and "Kitab-e-Meeras" Volume 3, Chap. 9 by Allama Syed Iftikhar Hussain Naqvi Jajafi ref.

Tahir Jamil Butt (absent) for Petitioner.
Malik Muhammad Jahanzeb Khan Tamman for Respondents.

Allama Syed Iftikhar Hussain Naqvi, Najafi, Member, Council of Islamic Ideology, Government of Pakistan: Amicus Curiae.

Date of hearing: 2nd June, 2016.

JUDGMENT

IBAD-UR-REHMAN LODHI J.--The question emerged in this civil revision petition was that, as to whether an issueless widow, whose husband was follower of Fiqa-e-Jafariya, can competently claim her share from the inheritance of such deceased husband, in the background that, the present petitioner, whose husband-Mohammad Khan, expired leaving her as "widow", was refused to get her share as inheritance from the leftover estate of her husband, mainly by Ghulam Jaffar and Noor Khan, real brothers of deceased Mohammad Khan with the plea that, under Shia Law of Inheritance, an issueless widow is not entitled to claim her share from the inheritance of her deceased husband.

2. In this case, the learned trial court, vide judgment and decree dated 16.12.2008, proceeded to pass a decree in favour of the petitioner in her suit filed against above-referred Ghulam Jaffar and Noor Khan, whereby, she was held entitled to have a share from the leftover estate of late Mohammad Khan, her husband, in her capacity of "widow".

In appeal, however, such findings were reversed, particularly, by setting aside the findings on Issue No.8, and the petitioner was deprived from any share, to be claimed as inheritance from her deceased husband, being childless widow. The appeal, filed by present respondents was allowed by the learned Additional District Judge, Chakwal, vide judgment and decree dated 08.06.2010; hence, this civil revision petition before this Court.

3. The learned counsel for the respondent has mainly based his contentions by opposing the petition on a pamphlet entitled "Beevi Ki Meeras" by Allama Mufti Syed Tyeb Agha Musavi Jazairi, who at one point of time, when West Pakistan Legislative Assembly, was going to promulgate some law making issueless Shia widows competent to claim their shares from the estate of their deceased husbands, seriously controverted and the Legislative Assembly was not allowed to promulgate any law, touching the Shia Community.

In this respect, the learned counsel for the respondent has placed reliance on Syed Muhammad Munir (represented by 10 heirs) and another v. Abu Nasar, Member (Judicial) Board of Revenue , Punjab, Lahore and 7 others (PLD 1972 Supreme Court 346), wherein, although the issue under discussion was dealt with in some details, but ultimately, it was ruled out that, it was not open to the Supreme Court in 1972 to change a settled rule of succession, having the force of Ijma behind it at such latter stage and it was held that, if a change is desired to be made, this work should be undertaken by the Legislature itself, after consulting the Shia Community. The Legislature, however, as noted herein-above was resisted to promulgate any law on the subject and no amendment was made by the West Pakistan Legislative Assembly simply, for the reason that, it was opposed by the Shia Community. The following from the said judgment would be relevant for the present purposes:-

> "It seems that this question was raised sometime back in the West Pakistan Legislative Assembly but no amendment was made as it was opposed by the Shia

community. In that connection, one Allama Mufti Syed Tyeb Agha Musavi Jazairi seriously controverted the argument that the Shia rule was against the text of the Holy Qur'an by maintaining in a pamphlet entitled "Beevi Ki Meeras" that the proper translation of the Arabic text of the Holy Qur'an quoted earlier, is as follows:-

This translation, it will be noticed, does not tally with the other translation which we have given above; but the learned author has also maintained that the rule excluding a childless widow from inheriting agricultural lands is based on the true traditions of Imam Jafar Sadek, the founder of the Shia School. Indeed, the learned author has cited as his authorities for this rule Muhammad Bin Muslim, Biyah al-Zarti and Zajar Sayeb and also cites Abdul Malek as authority for the following tradition:-

"It is said that Imam Muhammad Baqir also summoned the Book of Hazrat Ali. This was brought by Imam Jafar Sadek and in it was found written that for widows there will not be any share in the lands of their deceased husbands. This was written in the hand of Hazrat Ali himself which was recognized by Imam Muhammad Baqir.

But even according to these traditions it will be noticed that no distinction has been made between "childless" and "childful" widows. The denial is to all widows and the reason given for this rule is that, since the widow does not belong to the family of the deceased husband, she is excluded from inheritance in the lands in order to avoid disputes which are likely to occur if she remarries and thus introduces an outsider in the family.

The Shias claim that the differences between Shias and Sunnis arise as a result of their different interpretations of some of the Quranic texts. The Sunnis, it is said, accept the interpretation given by the four Imams, namely; Imam Abu Hanifa, Imam Malek, Imam Ahmad and Imam Shafi'e whereas the Shias rely on the interpretation of the Holy Qur'an given by only the Ahl-e-Bait (Members of the Household of the Holy Prophet) beginning with Hazrat Ali and ending with the last Imam and, as such, they claim that their interpretation is likely to be more correct. No one, they maintain, could have known the Holy Qur'an better than Hazrat Ali himself who in his Book had recorded these interpretations according to the instructions of the Holy Prophet himself.

In view of this difference in the interpretation of the Quranic text itself we feel that it would not be proper on our part at this stage to attempt to put our own construction in opposition to the express ruling of commentators of such great antiquity and high authority. To depart from a rule of succession which the Shia community has universally been following ever since the days of Imam Jafar Sadek, as evidenced by the unanimous opinions of the Shia Jurists on this point, would be wrong. It is not open to us to change a settled rule of succession, having the force of Ijma' behind it at this late stage. If a change is desired to be made this work should be undertaken by the Legislature itself after consulting the Shia Community. We can only point out that the Urdu translation given by Allama Mufti Syed Tyeb Agha Musavi Jazairi does not tally with the English translation given by S. V. Mir Ahmed Ali, another eminent Shia scholar."

4. Keeping in view the importance of the question, emerged in this petition and the fact that, a particular class is being deprived from a right of inheritance, and the fact that the Legislature, despite the fact that, it was expected from it even in 1972 to take such legislative measures in order to settle the issue, has not taken any such steps, a public notice was ordered to be issued on 05.05.2016, inviting any segment of life to render assistance to the Court in this regard, particularly, Shia Ulema.

In response, Allama Syed Iftikhar Hussain Naqvi Najafi, a sitting Member of Council of Islamic Ideology, Government of Pakistan, appeared and rendered assistance. He has also referred his own collection on this point titled "Kitab-e-Meeras"; Volume-3, Chapter-9 whereof deals with the matter of inheritance of husband or wife.

5. During arguments, from both the sides, case-laws titled Syed Muhammad Munir (represented by 10 heirs) and another v. Abu Nasar, Member (Judicial) Board of Revenue, Punjab, Lahore and 7 others (PLD 1972 Supreme Court 346) and also Muhammad Bashir and others v. Mst. Latifa Bibi through LRs. (2010 SCMR 1915) have been referred and relied upon in order to reach to a just conclusion; therefore, I am going to summarize the above noted case-laws.

In Syed Muhammad Munir's case (supra), some collection of different Authors, including Syed Ameer Ali, Tyabji, K.P. Saxena, Shama Churun Sircar and Allama Mufti Syed Tyeb Agha Musavi Jazairi, the Hon'ble Supreme Court of Pakistan reached to the conclusion that, the rule, which was being acted in Shia Sect for inheritance purpose to the effect that, a "childless widow" would not inherit her husband in immovable property, has been taken as the force behind as of "Ijma" and it was left to be taken-up by the Legislature, after consulting Shia community, if a change is desired to be made in such rule. In the same judgment, it has been noted that, such question was raised some times back in the West Pakistan Legislative Assembly, but no amendment was made in relevant law as it was opposed by Shia community and in such connection, Allama Mufti Syed Tyeb Agha Musavi Jazairi seriously controverted the argument that Shia rule was against the text of Holy Qur'an by maintaining in a pamphlet entitled "Beevi Ki Meeras".

Ayat No.12 of Sura Al-Nisa can be quoted in this respect, which has been translated in Eqglish by S.V. Mir Ahmed Ali:-

> "And for them shall be a fourth of what ye leave if ye have no issue, and if ye have an issue then for them (shall be) the eighth of what ye leave after paying the bequest ye had bequeathed and the debt".

In Muhammad Bashir's case (supra), although the Hon'ble Supreme Court of Pakistan has commented upon the history and background of division of Muslims in different sects by maintaining that, it is not necessary that a "Mussalman" must either be a Sunni or a Shia and it may well be that he is free from all sectarian feelings, sentiments and faith. It was also maintained that, it cannot be overlooked that, in the first 150 years of the history of Islam, sects were unknown. In fact, the four Schools of Law viz. Hanafi, Maliki, Shafi and Hanbali, were founded in the second century Hijra. The position, therefore, is crystallized that the formation or division of the Muslim population in the world among several sects took place

long after the revelation and death of the Prophet (Peace Be Upon Him). After digging out such history, the Hon'ble Supreme Court, thus, found itself unable to hold that, every "Mussalman" must either be a Shia or a Sunni.

However, such question of competence of a "childless widow" to inherit her Shia husband, has not been answered even in Muhammad Bashir's case.

6. The Quranic Command, as reflected here-in-above, in Verse No.12 of Surah Nisa has completely been ignored in the case, in hand, rather a totally contrary view is being preferred.

The main sources of Shariat are; Holy Qur'an, Sunnah, Ijma and Qias and the Hon'ble Federal Shariat Court in case titled "Muhammad Nasrullah Khan v. The Federation of Pakistan and another" (Shariat Petition No.06/I of 2013) has held that, if something in any Book is proved to be different from Quran and Sunnah, that would be invalid.

Muhammadan Law by D.F.Mulla, not only in the present case, but other cases also is oftenly quoted for a reference. The Hon'ble Federal Shariat Court, in the referred judgment, has held that, said law is in fact only a reference book and not a statutory law applicable in Pakistan, in the sense that the legislature has not enacted the same. It is just an option of the Court to consult the same on the basis of equity and refer to the principles mentioned in paragraphs of the said book, at times, and that too casually in some matters only. Moreover, the rules quoted in Muhammadan Law are not at all applicable, if in the opinion of the Court, they are found opposed to justice, equity and good conscience. These rules are not even referred to in situations directly covered by the Holy Quran or Sunnah or by binding Ijma and Qias.

7. According to Para-113 of Muhammadan Law by D.F. Mulla, a childless widow takes no share in her husband's lands, but she is entitled to her one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise.

This Para is in complete negation of Ayat No.12 of Sura Al-Nina, whereby a childless widow is entitled to 1/4th share from the leftover estate of her husband. The legislation has not declared Muhammadan Law as codified one.

8. In "Kitab-e-Meeras" Volume-3, Chapter-9 by Allama Syed Iftikhar Hussain Naqvi Najafi, even a childless widow of Fiqa-e-Jafariya, is held entitled to inherit l/4th share from the leftover estate of her deceased husband and while appearing before this Court, he has reiterated his such version as taken in the referred book and submitted that, Ahl-e-Tashih or Fiqa-e-Jafariya are first Muslims and cannot think of a different thinking, as have been settled by Holy Qur'an. Ayat No.12 of Sura Al-Nisa, has been referred by Allama Syed Iftikhar Hussain Naqvi Najafi, in support of his such version. He has referred the under-mentioned collections from Fiqa-e-Jafariya on this point:-

9. The question of competence of a childless widow from Fiqa-e-Jafariya has not yet been adjudicated upon by the Judiciary and unless the Legislature, by performing its duty, legislate any codified law in this respect, it is declared that even a childless widow from Fiqa-e-Jafariya would be entitled to claim 1/4th share from the leftover estate of her husband.

10. After holding this, the judgment and decree arrived at by the learned Additional District Judge, Chakwal, on 08.06.2010 has no place to be retained as a valid judgment; therefore, same is set-aside, whereas, judgment and decree, passed by the learned trial court on 16.12.2008 is restored and resultantly, suit of present petitioner is decreed.

11. Before parting with this judgment, this Court extends profound gratitude to Allama Syed Iftikhar Hussain Naqvi Najafi, who rendered his valuable assistance to the Court in reaching a just decision on such intricate question, which temained unanswered since decades.

12. It is expected that, the Government of Pakistan in Ministry of Law, would take legislative measures to promulgate a codified law in this regard in order to protect the rights of childless widows from Ahl-e-Tashih, in getting their due shares from the inheritance of their deceased husbands.

13. Office is directed to send a copy of this judgment to the Secretary Law, Government of Pakistan.

With these observations, this civil revision petition stands allowed.

MWA/K-25/L Petition allowed.

2016 Y L R 1078

[Lahore]

Before Ibad-ur-Rehman Lodhi, J

JAVED ASIF---Petitioner

Versus

Rana ALMAS LIAQAT and 2 others---Respondents

Writ Petition No.29791 of 2015, decided on 9th October, 2015.

Punjab Local Government Act (XVIII of 2013)---

----S. 27(1)(b)----Qualifications and disqualifications for candidates and elected members---Age of candidate, determination of---Different dates mentioned on National Identity Card and Matriculation Certificate---Principles as to preference---Date of birth recorded on Matriculation Certificate---Evidentiary value---Both Returning Officer and Appellate Authority accepted the nomination papers of respondent---Petitioner raised objection as to candidature of respondent on ground that , given his date of birth on his matriculation certificate, he was not qualified to contest the election for being less than twenty-five years of age at time of filing his nomination papers---Validity---High Court observed that date of birth noted on record of educational testimonials was to be given preference to that noted on National Identity Card---Date of birth, recorded in record of Education Board, being earlier in time, would be the correct and true date of birth of respondent---High Court further observed that, in preference to oral or other version with regard to age, date of birth recorded on matriculation certificate would be considered as unimpeachable evidence---Appellate

authority, while holding that respondent had fundamental right to contest the election, had ignored that every fundamental right was subject to law, and the law did not favour respondent having less than twenty-five years of age to claim himself being valid candidate as his fundamental right---Appellate Authority also erred in law by holding that technical objections must have been avoided---Law in question was although a technical subject, but if technicalities were not observed, then that would lead to allow foul play everywhere, which was not the intention of law---Respondent was not qualified, and his nomination papers had been illegally allowed---High Court, setting aside orders of Returning Officer and Appellate Authority, rejected nomination papers of the respondent---Constitutional petition was allowed in circumstances.

Malik Muhammad Faisal and another v. State Life Insurance Corporation through Chairman, Karachi and 2 others PLD 2007 Lah. 453 and Sher Baz Khan and others v. Mst. Malkni Sahibzadi Tiwana and others PLD 2003 SC 849 rel.

Ch. Mohammad Amin Javaid for Petitioner.

Rana Intezar for Respondent No.1.

Khawar Ikram Bhatti, Additional Advocate-General Punjab with Mohammad Ilyas ARO.

ORDER

IBAD-UR-REHMAN LODHI, J.---The present petitioner raised objections as to the candidature of respondent No.1-Rana Almas Liaqat for General Member in Ward No.7, Asif Colony, Pattoki, on the ground that in view of his date of birth i.e. 14.09.1994, which has been noted in his matriculation certificate, issued by the Board of Intermediate and Secondary Education, Lahore, he was not qualified to be a valid candidate on account of his being less than 25 years of age on the day of nomination.

2. The said objection although was received by the Returning Officer on 15.09.2015, but when on the next day i.e. 16.09.2015, the process of scrutiny was carried out, the Returning Officer has not commented upon such objection and simply "accepted" the nomination papers of respondent No.1.

3. The appeal, filed by the petitioner, was dismissed by the learned appellate authority on 28.09.2015, by holding that it is the fundamental right of every citizen to contest the election and that nomination papers of any candidate cannot be rejected on technical grounds.

4. The learned counsel for respondent No.1, on appearance, at the very outset, has objected to the locus-standi of the petitioner, as in his view, the petitioner was neither a contesting candidate nor proposer, seconder or voter of the concerned Union Council; therefore, he was not competent to raise objection or to file an appeal against acceptance of nomination papers of respondent No.1.

5. Answering to such query, the learned counsel for the petitioner has referred Rule 14(1) of Punjab Local Government (Conduct of Elections) Rules, 2013, which provides that the scrutiny of nomination papers shall be open to the candidates, their election agents, proposers and seconders, or the persons who made objections against the nomination papers

and any voter of the constituency with the permission of the Returning Officer, before the commencement of the scrutiny and the Returning Officer shall give all those present reasonable opportunity for examining all nomination papers delivered to him under rule 12, and according to the learned counsel for the petitioner, a class of "persons, who made objections against the nomination papers" indicates to an independent and separate class of persons, who were competent to challenge the nomination of any candidate for local bodies. Further contends that, in view of Rule 14(2), the Returning Officer shall, in the presence of the persons attending the scrutiny under sub-rule (1), examine the nomination papers and decide an objection raised by any such person to a nomination. The learned counsel for the petitioner contends that, the word "such" used in Rule 14(2) denotes the persons present at the scrutiny mentioned in sub-rule (1), which includes the person, who made objections.

6. Regarding the right to file an appeal, the learned counsel for the petitioner, with reference to sub-rule (10) of Rule 14, has submitted that an appeal against the decision of the Returning Officer rejecting or accepting the nomination papers of the candidate, may be preferred by any person present at the time of scrutiny under sub-rule (1) to the concerned District Judge.

7. The learned counsel for respondent No.1, after having gone through such provisions of Rules, impliedly withdrew his objection as to the locus-standi of the petitioner in either filing objection against nomination papers of respondent No.1 or filing appeal against the acceptance of nomination papers of said respondent.

8. On merits, it is the position that the date of birth, noted in matriculation certificate of respondent No.1 is '14.09.1994' and, therefore, respondent No.1, at the time of nomination, was not of the age of 25 years, which is the minimum age for a person to qualify to be elected as a Member or to hold an elected office of a local government in view of Section 27(1)(b) of the Punjab Local Government Act, 2013, and such age limit is to be considered on the last day, fixed for filing the nomination papers.

9. Respondent No.1 was aware of his such disqualification and in order to overcome such difficult situation, he, with the help of his date of birth, which he got entered in the record maintained by NADRA as 14.02.1990, moved the Educational Board only one day prior to the process of scrutiny for correction of his date of birth.

10. Although in order to keep a mystery, no date has been noted on such application for correction of date of birth of respondent No.1 moved before the Board, but the fee deposited in the Bank, receipt of which is available at page-19 of the present file, reveals that the same was deposited in the Bank on 10.09.2015 and naturally, after deposit of such fee, respondent No.1 moved the concerned Board his request regarding change of his date of birth.

11. The learned counsel for the petitioner has rightly pointed out that, although some entry in NADRA has been produced by respondent No.1, but Form-B, which is meant for the detailed particulars of whole of the family, has been withheld. The petitioner has placed on record, copies of CNIC of Mohammad Waqas and Gulnaz Liaqat, real brother and sister of respondent No.1, which carries dates of birth of said two persons as 10.01.1990 and

10.12.1990, respectively. Respondent No.1 has not denied the authenticity of such document placed as Annexure-F (pages 27 and 28 of the present file).

12. If the date of birth now attempted to be got entered by respondent No.1 as '14.02.1990', then it would be clear that there was only a gap of one month in the birth of respondent No.1 and his real brother-Mohammad Waqas.

13. Twins may get birth at one time, but this gap cannot be lingered on for one month period and this is not the case of respondent No.1 that he was a twin brother of Mohammad Waqar (his real brother). Even such request made by respondent No.1 before the Educational Board has not been decided, in any manner, whatsoever.

14. This Court in case of Malik Muhammad Faisal and another v. State Life Insurance Corporation through Chairman, Karachi and 2 others (PLD 2007 Lahore 453) has held that the National Identity Card of the person concerned containing a date of birth other than that of noted in the record of Secondary School/Educational Board, then the date of birth, as noted in the educational testimonials, is to be given preference to that of noted in the National Identity Card, by holding further that the correct and true date of birth of the relevant person would be the one as recorded in the Board of Education's record, being earlier in time.

15. The Hon'ble Supreme Court of Pakistan in case Sher Baz Khan and others v. Mst. Malkni Sahibzadi Tiwana and others (PLD 2003 Supreme Court 849) has authoritatively held that in preference to the oral or other version with regard to the age, the one recorded in matriculation certificate would be considered as unimpeachable evidence.

16. The Returning Officer has not, at all, considered the objections, whereas, the learned appellate authority has proceeded on wrong directions by holding that, it is the fundamental right of every citizen to contest the election, but ignored that every fundamental right is subject to law and law does not favour a person having less than the age of 25 years to claim his being valid candidate irrespective of his age limit, as his fundamental right. The appellate authority has further held that, technical objections must be avoided. By holding such, the appellate authority, again erred in law, as the law, no doubt, is a technical subject and if technicalities are not observed, then it would lead to allow a foul play everywhere, which is not the intention of law.

17. The result of above discussion is that, respondent No.1-Rana Almas Liaqat, was not qualified on the date of nomination, to be considered as a valid candidate to contest the elections of a local government and, thus, his nomination papers were illegally allowed and appeal filed against such acceptance was erroneously dismissed. The objections, filed by the petitioner, are allowed and resultantly nomination papers, filed by respondent No.1, for General Member, Ward No.7, Asif Colony, Pattoki, District Kasur, stand rejected by setting aside the order/judgment passed by the authorities below on 16.09.2015 and 28.09.2015, respectively.

18. This Constitutional petition is allowed in the above lines.

SL/J-12/L Petition allowed.

2016 Y L R 1151
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Malik ALLAH DITTA, through L.Rs. and 9 others---Petitioners
Versus
MEMBER BOARD OF REVENUE and another---Respondents

Writ Petition No.23-R of 2010, decided on 26th June, 2014.

Evacuee Property and Displaced Persons Laws (Repeal) Act (XIV of 1975)---
----S. 3---Scheme for Disposal of Un-allotted Rural Agricultural Land---Constitution of Pakistan, Art.199---Constitutional petition---Allotment of land---Market price of land---Petitioners were aggrieved of decision made by Board of Revenue whereby they were asked to pay price of land at current market price plus 50% penalty---Validity---Petitioners might be in possession of land in question since 1972 as pleaded by them but date of possession was not at all relevant to determine market price of land rather it was date of submission of application intimating intention to exercise option for purchase of land---Petitioners were estopped by their conduct to claim fixation of price of land other than the market price, for they themselves had agreed to purchase land in question by making payment at market price before High Court earlier on 26-3-1991, when a compromise deed was filed which was signed and thumb marked by all petitioners and was available on record of High Court---No illegality or irregularity was noticed in order passed by Board of Revenue---Constitutional petition was dismissed in circumstances.

Abdul Majid v. Deputy Settlement Commissioner and others PLD 1978 Lah. 912 ref.
Saif-ul-Haq Ziay for Petitioners.
Ghazanfar Khalid Saeed for Respondents.
Muhammad Nasir Chohan, A.A.-G. for the State.
Date of hearing: 5th June, 2014.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The petitioners herein are aggrieved of the findings arrived at, by a Member Board of Revenue (Judicial-V)/Chief Settlement Commissioner Punjab, on 24.08.2009 while dealing with the option submitted by the petitioners for purchase of land measuring 300-Kanals in village Bhallarian Tehsil Chunian District Kasur, he fixed the value of land at current market price plus 50% penalty and in case of refusal to pay the penalty, the petitioners were held liable to pay "Tawan" since the date of possession.

The back ground of this controversy is that the petitioners submitted an application for the purchase of land noted above to the Member Board of Revenue (Judicial-V)/Chief Settlement Commissioner Punjab on 10.01.2004. After due process, it was reported from the concerned Revenue Department of District Kasur that land measuring 620-Kanals 2-Marlas was allotted to Mst. Noor Bahri, who sold the same to Messrs Burhan Ali etc. Later on the land stood cancelled from the name of original allottee and was resumed in favour of the state. Messrs Burhan Ali, etc. referred above, applied to the then Member Board of Revenue

(Judicial-V)/Chief Settlement Commissioner Punjab for the purchase of land in question which request was allowed on the payment of average market price vide letter dated 27.09.1984. The present petitioners challenged the said order of Member Board of Revenue (Judicial-V)/Chief Settlement Commissioner Punjab before this Court through W.P.No.67-R/1988 which was disposed of on the basis of settlement arrived at in between the parties whereby the present petitioners and M/s Burhan Ali, etc. were agreed to the arrangement that the land measuring 328- Kanals 2-Marlas will be purchased by Messrs Burhan Ali, etc. whereas the remaining land viz 300-Kanals will be purchased by the present petitioners on the market price. By means of order dated 26.03.1991 passed in W.P. No.67-R/1988 on the basis of above settlement, the same was disposed of. It was specifically clarified that the Board of Revenue was not a party to the aforesaid settlement, therefore, obviously the interest of the Board of Revenue, if any, shall not be affected by the said arrangement.

A formal petition was, however, moved by the present petitioners for purchase of the land measuring 300-Kanals on 10.01.2004 and as agreed by the petitioners on 26.03.1991 before this Court in W.P.No.67-R/1988, it was ordered by the Member Board of Revenue (Judicial-V)/Chief Settlement Commissioner Punjab to receive the price of land from the petitioners at current market price.

2. The learned counsel for petitioners, by making particular reference to the case titled Abdul Majid v. Deputy Settlement Commissioner and others (PLD 1978 Lahore 912) and two letters one of dated 20.11.1974 and other one of dated 27.05.1975 issued in pursuance of proviso to Section 3 of the Evacuee Property and Displaced Persons Laws (Repeal) Ordinance, 1974 whereby a decision was conveyed to the effect that all unallotted rural agricultural evacuee land shall be offered for sale to the persons, who have been in actual cultivating possession thereof for a period of at least four harvests immediately preceding Kharif 1973 up to the extent of subsisting holding within the meaning of the Land Reforms Regulation, 1972 i.e. 121/2 acres, in case any other land is held by such occupant on the basis of an independent right, such holding shall be taken into account for determining the maximum limit. It was further decided that the price of the land shall be determined at the rate of Rs.10/- per P.I.U. of the land to be purchased. The matter was further clarified by the authorities through memo dated 27.05.1975 as to the disposal of all unallotted land and on reconsideration it was decided that the land will henceforth be disposed of at the rate of Rs.100/- per P.I.U. instead of Rs.10/- per P.I.U. as decided through memo dated 20.11.1974. Under the first letter the occupants were required to exercise their option by 31.12.1974. The time, however, was extended for exercising the option by such occupants up to 30.11.1976. However, while extending the time limit, it was re-asserted that the price of the land shall be determined at the rate of Rs.100/- per P.I.U. in view of letter of 1975 and therefore, learned counsel has argued that at the most the petitioners can be charged towards price of the land at the rate of Rs.100/- per P.I.U. (Produce Index Unit) and as such, the demand as to the price of the land according to the current market value is neither legal nor authorized.

3. The learned counsel representing the respondents has argued that the petitioners themselves have agreed to purchase the land on the payment of market price on 26.03.1991 when they entered into a settlement in W.P. No.67-R/1988. He clarified the position that the rate of Rs.10/- per P.I.U. were fixed for the persons, who applied by exercising their option

to purchase the state land before 31.12.1974 or before the issuance of second letter dated 27.05.1975. The petitioners, according to learned counsel for respondents have applied for the purchase of land on 10.01.2004, therefore, they are not entitled to claim any benefit of both these letters of 1974 and 1975 whereby the price of land was fixed either Rs.10/- per P.I.U. and Rs.100/- per P.I.U.

The learned counsel for respondents has further referred a letter dated 26.12.2002 which is reproduced herein below:--

"No.1498-1998-2223-RL(A)I, Board of Revenue, Punjab,
Farid Kot House, Lahore.
Dated the 26th Dec. 2002.
From

The Board of Revenue,
Settlement and Rehabilitation Wing.

To
All the Executive District Officer (Revenue) in the Punjab.

All the district Officer (Revenue) in the Punjab

Subject: **SCHEME FOR DISPOSAL OF UNALLOTED RURAL AGRICULTURAL LAND.**

Memorandum:

In continuation of this office Memo. No. 1407-98/3594/RL(A)I, dated 02.12.1998, on the subjected cited above.

2. According to Scheme for Disposal of Un-allotted, Un-occupied, Occupied Evacuee Rural Agricultural Land, the occupants were required to submit their option for purchase of land @ Rs.100/ P.I Us by 31.01.1999.

3. The Jammu and Kashmir temporary allottees of evacuee land were also allowed to get proprietary rights of the temporary allotted land on payment of Rs.100/- per P.I.Unit. The Government have decided to continue it till further orders.

4. It has been decided that the cases of other occupants who had given option by 31.01.1999 for purchase of land at the rate of Rs.100/- per produce index unit be decided accordingly. Such persons who apply for purchase after 31.01.1999 for them Rs.750/- per produce index unit will be the price and they can exercise option by 30.06.2003. The Government has accordingly fixed the date of submitting option by the occupants as 30.06.2003.

5. You are, therefore, requested to please proceed in the matter accordingly and make vide publicity in the press and through other media. The necessary amendment in the scheme is being issued separately.

Sd/
SECRETARY (SETT. & REHB.)
BOARD OF REVENUE, PUNJAB,
FARID KOT HOUSE, LAHORE."

The above letter provides that the occupants, who had given option by 31.01.1999 for the purchase of land were to be charged @ Rs.100/- per produce index unit, but who apply for purchase thereafter they will be charged @ Rs.750/- per P.I.U. and even for that levy, the cut of date was fixed as 30.06.2003.

4. I have heard the arguments of learned counsel for the parties and gone through the record.

5. The date of making application by the present petitioners for purchase of land measuring 300-Kanals has been noted in the impugned order announced on 24.08.2009 as 10.01.2004 and to that extent, the impugned order has never been challenged by the petitioners. In paragraph-4 of this writ petition, the date of submission of application originally typed, has intentionally been erased and from whole of the memo of petition, the date of submission of application for purchase of land has no where been borne out. I take this as an intentional attempt to conceal the fact from this Court and to get benefit of what, to which the petitioners are not entitled, in fact.

6. The reference of the learned counsel for petitioners to case of Abdul Majid supra, is not relevant for the present petitioners as in the said reported matter, the petitioner therein moved an application within target time as was fixed through letters dated 20.11.1974 and 27.05.1975.

Paragraph 4 of the said reported citation is being reproduced herein below for convenience to understand the point raised therein and the issue involved in the present case:--

> "It will, therefore, be seen that the question that will arise for decision in all these cases will be whether the petitioners are entitled to purchase the excess land at the rate of Rs.10 per P.I.U. as decided by the first letter dated 20.11.1974 or that they should be charged at the rate of Rs.100 per P.I.U. on the basis of the decision taken vide letter dated 27.05.1975. The learned counsel appearing for the petitioners has argued that the petitioners had applied exercising their option before 31.12.1974 as provided in the first letter dated 20.11.1974 and through no fault of theirs if the cases are not finalized by the competent authority till such time the second letter dated 27.05.1975 was issued enhancing the price from Rs.10 to Rs.100 per P.I.U. they are entitled to the benefit under the first letter. He has referred to Mian Irshad Ali v. Government of Pakistan through Secretary, Ministry of Rehabilitation, Islamabad and others (1). However the learned counsel appearing for the petitioner has frankly conceded that the persons, who had not exercised their option before the issuance of

the second letter dated 27.05.1975 cannot claim benefit of the first letter. The learned Advocate appearing for the Department has, however, argued that the right to purchase the excess land at a particular rate is not a vested right and, therefore, if for any reason, the cases could not be finalized before the second letter dated 27.05.1975 was issued by which the price was enhanced from Rs.10 to Rs.100 per P.I.U. the occupant shall have to pay the price at the revised rate."

The price fixed through letter dated 26.12.2002 still will not be applicable for the petitioners. In order to get benefit of such letter, the petitioners had to apply for purchase of land before 30.06.2003. The petitioners may be in possession of the land in question since 1972 as pleaded by them but the date of possession is not at all relevant to determine the market price of the land rather it is a date of submission of application intimating the intention to exercise option for the purchase of the land. Even otherwise, the petitioners are estopped by their conduct to claim fixation the price of land other than the market price, for, they themselves have agreed to purchase the land in question by making payment at market price before this Court on 26.03.1991 as referred herein above and compromise deed (Mark-C1) was signed or thumb marked by all the petitioners which is available in the record of W.P.No.67-R/1988.

7. For what has been discussed above, this Court has come to irresistible conclusion that there is no illegality or irregularity in the order impugned herein passed by the Member Board of Revenue (Judicial-V)/Chief Settlement Commissioner in Board of Revenue Government of Punjab announced on 24.08.2009 and finding no force in this petition, the same is therefore, dismissed.

8. A copy of this judgment will be sent to the Member Board of Revenue (Judicial-V)/Chief Settlement Commissioner in Board of Revenue, Government of the Punjab with a direction to work out the current market price of the land which the petitioners intend to purchase and such worked out amount will be deposited by the petitioners. The necessary exercise be completed by the Board of Revenue within 45-days after receipt of a certified copy of this judgment. The imposition of penalty or in case of non-payment of the same, the payment of "Tawan" will be reconsidered by the learned Member Board of Revenue (Judicial-V)/Chief Settlement Commissioner Punjab and the said issue will be decided in accordance with law within same stipulated period as noted herein above.

MH/A-149/L Petition dismissed.

2016 Y L R 1679
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
TASEER KHAN---Petitioner
Versus
ISLAMABAD ELECTRICITY SUPPLY COMPANY (IESCO) through Executive Engineer---Respondent

C.Rs. Nos.212, 213 and 255 of 2013 and 345 of 2014 heard on 19th November, 2015.

Limitation Act (IX of 1908)---
----Arts. 49 & 149---Civil Procedure Code (V of 1908), S. 79---Suit for recovery of amounts---Suits filed by or on behalf of Government--- Scope--- Contention of plaintiff Electricity Distribution Company/ WAPDA was that it had a limitation of 60 years to file a suit in view of provisions of Art. 149 of Limitation Act, 1908---Validity---Per S.79, C.P.C., WAPDA or a Distribution Company could not claim its status to be that of "Government"---Although Distribution Company's/ WAPDA's affairs to some extent were controlled by government but for all practical purposes, it was an independent entity and authorized to carry out business of utilization of water and power resources of country and to generate electricity and that WAPDA or any Distribution Company, like plaintiff was not performing any of sovereign functions of the State, so as to be declared as a body corporate performing functions with affairs of Federation---In the present case, suit was filed in the name of plaintiff company through its Chief Executive but neither any resolution of company had been pleaded in or annexed with plaint authorizing any particular person to represent the company, nor any power was shown to have been extended in favour of Chief Executive of company to file or verify the plaint on its behalf---Lis could not be initiated on behalf of company which was a juristic person, without having due authority either in terms of Articles of Association or by resolution of the Board of Directors which in reported matter, were conspicuously missing, and when litigant had not even appended any document to establish that Chief Executive of company who even in reported matter put his signatures to memo of appeal was not having any authority to do so, hence, appeal would be termed as not maintainable and will be dismissed---Article 149 of Limitation Act, 1908 provided a period of limitation of sixty years for a suit by or on behalf of Federal or Provincial Government, but when such fact was established that plaintiff could, in no way, attain the status of either Federal or Provincial Government, provisions of Article 149 of Limitation Act, 1908 were of no help to plaintiff---Revision was allowed, accordingly.

Maqsood Ahmed Toor and 4 others v. Federation of Pakistan through the Secretary to the Government of Pakistan, Ministry of Housing and Works, Islamabad and others 2000 SCMR 928; Province of the Punjab through Member Board of Revenue, (Residual Properties), Lahore and others v. Muhammad Hussain through Legal Heirs and others PLD 1993 SC 147 and Telecard Limited through Authorized Representative v. Pakistan Telecommuni-cation Authority through Chairman 2014 CLD 415 rel.

Zaheer Ahmed Qadri for Petitioner (in Civil Revisions Nos.212, 213 and 255 of 2013).

Malik Sardar Khan for Petitioner (in Civil Revision No.345 of 2014).
Malik Fazal-ur-Rehman for Respondent.
Date of hearing: 19th November, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This civil revision petition as also Civil Revision No. 213 of 2013 (Taseer Khan v. Islamabad Electricity Supply Company), Civil Revision No. 255 of 2013 (Amjad Rasheed v. Islamabad Electricity Supply Company) and Civil Revision No. 345 of 2014 (Amjad Rasheed v. Islamabad Electricity Supply Company) are to be disposed of together, as similar request was made in all the suits for rejection of the plaints and all such requests were similarly treated, when it were refused by the learned trial court.

2. Precisely, facts relevant for the purposes of disposal of present civil revision petitions are that, the respondent-Islamabad Electricity Supply Company (hereinafter to be referred as "IESCO"), filed suits for recovery of different amounts on account of alleged excess withdrawal of material from the Company's Store and subsequently not using the same in the work assigned to the petitioners and, as such, not only that the same material was wrongfully taken, but subsequently, in the same manner, wrongfully detained the same.

3. The suits in Civil Courts at Attock and Chakwal were filed in the year, 2011, respectively, and at a subsequent stage, by taking certain objections, rejection of the plaints was sought for by the present, petitioners by moving independent applications under the provisions of Order VII, Rule 11, C.P.C.

4. The learned Senior Civil Judge, Attock, refused to reject the plaint on the application of present petitioners, on 22.01.2013, whereas, the learned Civil Judge 1st Class, Chakwal, did the same thing on 22 03 2014.

5. First objection as to the maintainability of the petition on the touchstone of limitation was raised to the effect that, nowhere in the plaint, the plaintiff-respondent has disclosed as to when, the audit of the work assigned to the petitioners by the Company, was conducted and when it was pointed out through the Audit Report as to the withdrawal of excess material from the Company's Store and subsequently wrongfully detaining of the same by the petitioners.

6. Such contentions of the petitioners gain support from bare reading of the plaints, which, at no place, disclosed that as to when the audit was conducted and when the Audit Team reported that some wrongful has been committed, allegedly by the petitioners.

During arguments, the learned counsel for the respondent-Company was asked to explain such position to which he answered that the audit was conducted way-back in 1992. The omission in mentioning the date of conduct of audit inspection and raising some objection by the Audit Team is understood, as, had the same been pleaded, the plaintiff would have to explain the reason for filing of a suit, after almost two decades.

Now, by adopting the status of Government, the respondent-Company, is taking shelter under the plea that, they had a limitation of 60 years to file such suit in view of the provisions of Article 149 of The Limitation Act, 1908.

7. Section 79, C.P.C. deals with the circumstances as to how suits by or against the Government can be filed, which provides that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be:--

(a) in the case of a suit by or against the Federal Government;

(b) in the case of a suit by or against a Provincial Government, the Province.

WAPDA or, a distribution Company, like the plaintiff in the present matter, which is Islamabad Electric Supply Company (IESCO), cannot claim its status to be that of Government.

8. The Hon'ble Supreme Court of Pakistan in case of Maqsood Ahmed Toor and 4 others v. Federation of Pakistan through the Secretary to the Government of Pakistan, Ministry of Housing and Works, Islamabad and others (2000 SCMR 928) and Civil Appeals Nos.1033 to 1037 of 2004, decided on 30.05.2013, has held that although WAPDA's affairs to some extent are controlled by the government, but for all practical purposes, it is an independent entity and authorized to carry out the business of utilization of water and power resources of the country and to generate electricity and that WAPDA or any distribution Company, like IESCO, is not performing any of sovereign functions of the State, so as to be declared as a body corporate performing functions with the affairs of the Federation.

Elaborating Section 79, C.P.C., the Hon'ble Supreme Court of Pakistan in case of Province of the Punjab through Member Board of Revenue, (Residual Properties), Lahore and others vs. Muhammad Hussain through Legal Heirs and others (PLD 1993 Supreme Court 147) has held that, even suing Pakistan or a Province through the Departmental Head of the Federal Government or Provincial Government was not only a mistake but a diversion of the proceedings materially affecting the further proceedings on judicial side.

9. The suits in the present matters were filed in the name of IESCO through its Chief Executive, but neither any Resolution of the Company has been pleaded in or annexed with the plaint authorizing any particular person to represent the Company, nor any power was shown to have been extended in favour of Chief Executive of IESCO to file or verify the plaint on its behalf. Further, it is noted that, even the Chief Executive of IESCO has not signed or verified the plaints, rather it is some SDO, who has performed such job.

In such like situation, the Hon'ble Supreme Court of Pakistan in case of Telecard limited through Authorized representative v. Pakistan Telecommuni-cation Authority through Chairman (2014 CLD 415) has held that, a lis could not be initiated on behalf of the Company, which is a juristic person, without having due authority either in terms of the articles of association or by the Board resolution, which in the reported matter, were conspicuously missing, and when the litigant had not even appended any document to

establish that the Chief Executive of the Company, who even in the reported matter put his signatures to the memo of appeal, was not having any authority to do so, the appeal was termed as not maintainable and was dismissed.

10. Article 149 of The Limitation Act, 1908, provides a period of limitation of sixty years for a suit by or on behalf of the Central or Provincial Government, but when this fact is established that IESCO can, in no way attain the status of either Federal or Provincial Government, the provisions of Article 149 of the Act were of no help to the plaintiff.

11. The suits, like present one, would govern under the provisions of Article 49 of The Limitation Act, 1908, which provides for specific movable property or compensation for wrongfully taking or wrongfully detaining such property and for such suit, a period of three years is provided as limitation and starting point of which is, from when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

12. Although in clear terms, in the suits, the starting point of accruing cause of action in favour of the plaintiff has not been pleaded, but now it is established that the audit report, finalized in the year, 1992, has been made basis of the filing of the suits, filed in the year, 2011, as such, the suits, at the time of their filing, were hopelessly barred by time, if adjudged on the touchstone of Article 49 of The Limitation Act, 1908.

13. On both counts, i.e. limitation and filing and verifying by an incompetent person, plaints in the suits were liable to rejection. The learned trial court has committed illegality, while declining the request of the defendant-petitioner for rejection of the plaints.

14. The plaints in the suits were not proceedable, even at the time of their institution. They were defective and were bound to bury in their inception, but the learned trial court, despite the fact that, inherent defects were pointed out in such plaints, refused to reject the same and in doing so, committed illegality and irregularity. The impugned orders dated 22.01.2013 and 22.03.2014, are not sustainable; the same are therefore, set-aside. The applications, filed by the present petitioners, for rejection of plaint, are allowed and resultantly all the civil revision petitions are allowed and the plaints filed by the respondent-plaintiff are rejected under the provisions of Order VII, Rule 11, C.P.C. There will be no orders as to costs.

RR/T-2/L Petition accepted.

PLJ 2016 Lahore 115

***Present*: IBAD-UR-REHMAN LODHI, J.**

SHOUKAT ALI--Petitioner

versus

ELECTION COMMISSIONER, DISTRICT KASUR and others--Respondents

W.P. Nos. 29531, 29442, 29533, 29534, 29576, 29619, 29638, 29678, 29737 of 2015, decided on 7.10.2015.

Punjab Local Government (Conduct of Elections) Rules, 2013--

----R. 12(2)--Punjab Local Government Act, 2013, S. 27--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Nomination papers for election of local government, rejected--Proposers or seconders were not voters of relevant ward--Qualifications for candidates and elected members, does not contain any embargo or proposal or secondment--Union council and ward--Significance--Validity--Returning officers and then appellate authorities also fell in error while not appreciating real spirit and legislative intent in providing at least two entities in which either of any one can be adopted to adjudge qualification of proposer or seconder to hold such valid position on showing their inclusion as voters in union council or ward and thus rejection of nomination papers of petitioners was an act which was not supported by any law and therefore, was not sustainable--Petitions were allowed. [P. 118] A

Punjab Local Government (Conduct of Elections) Rules, 2015--

----R. 12(2)--Principle of interpretation--Union Council and Ward--Validity--Word "Union Council" and "Ward" are used separately providing two different bodies or entities for proposers and seconders of any duly qualified person as to his candidature for his election to office of member or as case may be, chairman and vice-chairman of a union council.

[P. 118] B

Ch. Muhammad Yousaf, Advocate for Petitioner.

Mr. Muhammad Shafique Malik, Advocate for Petitioner (in W.P. No. 29442 of 2015).

Mr. Muhammad Shahzad Ijaz, Advocate for Petitioner (in W.P. No. 29533 of 2015).

M/s. Ch. Muhammad Yousaf and Shahid Rafiq Mayo, Advocates for Petitioner (in W.P. No. 29534 of 2015).

Mr. Abid Hussain Khichi, Advocate for Petitioner (in W.P. No. 29576 of 2015).

Mr. Zia Haider Rizvi, Advocate for Petitioner (in W.P. No. 29619 of 2015).

Malik Dilbahar, Advocate for Petitioner (in W.P. No. 29638 of 2015).

M/s. Tahir Mahmood Mughal and Muhammad Amer Kazi, Advocates for Petitioner (in W.P. No. 29678 of 2015).

Mian Arshad Ali Mahar, Advocate for Petitioner (in W.P. No. 29737 of 2015).

Mr. Khawar Ikram Bhatti, Addl.A.G.P. for Respondent.

Date of hearing: 7.10.2015.

ORDER

Through this judgment, this Constitutional petition as also following petitions:--

1. Writ Petition No. 29442 of 2015
2. Writ Petition No. 29533 of 2015
3. Writ Petition No. 29534 of 2015
4. Writ Petition No. 29576 of 2015.
5. Writ Petition No. 29619 of 2015
6. Writ Petition No. 29638 of 2015

7. Writ Petition No. 29678 of 2015

8. Writ Petition No. 29737 of 2015.

are to be disposed of together, as common question of law and facts is involved in all these matters.

2. In all the petitions, nomination papers of all the duly qualified persons/candidates were rejected only on the ground that, their proposers or seconders, were not the voters of the relevant Wards and appeals filed there-against were also dismissed.

3. Section 27 of the Punjab Local Government Act, 2013, which provides qualifications and disqualifications for candidates and elected members, does not contain any embargo or his proposal or secondment as to the candidature by the persons, who must be the voters of the relevant "ward".

4. In exercise of the powers conferred under Section 144 of the Act, Governor of the Punjab was pleased to make Punjab Local Governments (Conduct of Elections) Rules, 2013. Such rules provide minute details for the conduct of elections in Chapter-IV thereof. Rule 12(2) of such Rules provides that any voter of "a Union Council or Ward" may propose or second the name of any duly qualified person to be a candidate for an election of a member or as the case may be, the Chairman and the Vice-Chairman of a Union Council.

5. The word "or" figuring in between "Union Council" and "Ward" is of much significance. In view of the principles of interpretation, word "or" is commonly and ordinarily used in disjunctive sense.

Mr. S.M. Zafar, in Understanding Statutes, Canons of Construction, while giving broad principles of interpretation of word "or" has noted that the same is used in a Statute in disjunctive sense indicating an alternative, presenting a choice of either. Further, it is noted that if this disjunctive conjunction "or" is used, the various members of the sentence are to be taken separately.

Almost same view has been expressed in cases of Muhammad. *Arif and, others vs. District and Sessions Judge, Sialkot and others* (2011 SCMR 1591), *Salehon and others vs. The State* (PLD 1969 Supreme Court 267) and *Fakir Mohd. (Dead) by Lrs vs. Sita Ram* (2002 AIR (SC) 433)

6. Applying such principle of interpretation on the provisions of Rule 12(2) of the Punjab Local Governments (Conduct of Elections) Rules, 2013, the word "Union Council" and "Ward" are used separately providing two different bodies or entities for proposers and seconders of any duly qualified person as to his candidature for his election to the office of member or as the case may be, the Chairman and the Vice-Chairman of a Union Council.

7. It is nobody's case in all the matters, under consideration, that proposers or seconders are not from the relevant "Union Council". The candidature of the duly qualified persons was rejected on the sole ground that their proposers or seconders were not the voters of the relevant "Ward".

8. Firstly, the Returning Officers and then the appellate authorities also fell in error while not appreciating the real spirit and legislative intent in providing at least two entities in which either of any one can be adopted to adjudge the qualification of proposer or seconder to hold such valid position on showing their inclusion as voters in either the Union Council

or the Ward and, thus, rejection of nomination papers of the petitioners is an act, which is not supported by any law and, therefore, is not sustainable.

9. In this view of the matter, all the writ petitions are allowed; the impugned orders rejecting the nomination papers of the petitioners and dismissal of their appeals are set-aside, and the nomination papers, respectively filed by the petitioners in concerned Constituencies, stand accepted.

(R.A.) Petitions allowed.

PLJ 2016 Cr.C. (Lahore) 492
[Multan Bench Multan]
Present: **IBAD-UR-REHMAN LODHI, J.**
Mst. **MAHTAB TAYAB--Petitioner**
versus
STATE and 2 others--Respondents

Crl. Misc. No. 324-CB of 2015, decided on 11.2.2016.

Criminal Procedure Code, 1898 (V of 1898)--

----Ss. 497(5) & 498--Pakistan Penal Code, (XLV of 1860), Ss. 380, 457 & 560-B--Cancellation of bail before arrest--Protracted litigation--Cancellation was third in series seeking same relief--Accused was again forced to engage counsel--Cancellation report was furnished by police was agreed by magistrate--Validity--Even in present memo. of petition and also during arguments, nothing has been alleged against respondents as to any alleged misuse of concession of bail extended in their favour almost two years ago, and request, which is being made today for adjourning proceedings of petition on *sine-die* basis awaiting result of writ petition is again an attempt to hanging sword on heads of respondents, which cannot be given any sanction by Court--Such attempts on part of complainant must come to an end--Petitioner had played enough with process of law and already a latitude is shown to have been extended to petitioner, which is not spirit of law--Petition was dismissed. [P. 494] A

Mr. Muhammad Bilal Butt, Advocate for Petitioner.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor-General, for State.

Ch. Muhammad Imran, Advocate for Respondents No. 2 and 3.

Date of hearing: 11.2.2016.

ORDER

Through this petition, order dated 11.03.2014, passed by a learned Additional Sessions Judge, Multan, whereby he confirmed pre-arrest bail of Respondents No. 2 and 3, in case F.I.R No. 88, dated 02.02.2013, registered under Sections, 380, 457, 506-B, P.P.C., at Police Station, Shah Rukn-e-Alam, Multan, has been called in question.

2. The learned Additional Sessions Judge, Multan, by means of impugned order dated 11.03.2014, proceeded to confirm the pre-arrest bail in favour of Respondents No. 2 and 3 on the basis of a detailed discussion, highlighting not only the unexplained delay of more than one month in lodging the F.I.R, but also the joint venture of the respondents with

the complainant to run an Educational Institution and then the disputes, when crept in resulting into differences between the partners of educational business and ended into registration of such criminal case.

3. During investigation, the complainant once furnished an affidavit with the investigating agency exonerating the accused persons from the commission of offences, but subsequently while resiling from her such affidavit, again started prosecution against the accused persons.

4. Respondent No. 3-Shoukat Ali was not originally nominated in F.I.R, which got registered after a delay of more than one month of the alleged occurrence and even in case of belated F.I.R, said Shoukat Ali was subsequently implicated by means of a supplementary statement.

It seems that the real purpose of the complainant is not the cancellation of bail, but to continue to involve the respondents in protracted litigation and, therefore, on each and every occasion, when the criminal miscellaneous petitions for cancellation of bail were moved; the respondents were forced to engage the counsel and to appear before the Court and then either for non-prosecution or by not arguing the petition, the matter was letto be dismissed and lastly present criminal miscellaneous has been filed with the same prayer and then trap to entangle Respondents No. 2 and 3 in endless litigation, is re-started.

5. On each occasion, there have been three signatories of the petition as counsel for the complainant-petitioner and on every date, either one has arranged a request for adjournment without any explanation about remaining two and the matter is lingered on just in order to tease the respondents.

6. In such series of the petitions, seeking similar request, initially, Criminal Miscellaneous No. 1778-CB of 2014 (was filed, wherein, when the respondents entered their appearance, after engagement of their counsel, the same was not vigilantly prosecuted and it was dismissed for non-prosecution on 10.06.2014.

Seeking same relief, another Criminal Miscellaneous No. 5665-CB of 2014 was filed and again the respondent had to engage the services of their respective counsel, and when learned Deputy Prosecutor-General appearing for the State, on 01.12.2014, placed information before the Court regarding cancellation of the instant criminal case by the learned Magistrate *vide* order dated 07.01.2014, the matter was got adjourned by the learned counsel for the petitioner-complainant in order to ascertain such fact of cancellation of criminal case, but on the adjourned date i.e. 05.12.2014, there had been no representation for the petitioner-complainant and again the petition was dismissed, but this time, merits of the case were also discussed by this Court.

The present one viz. Criminal Miscellaneous No. 324-CB of 2015 is third in series seeking same relief and in this petition, again the respondents were forced to engage a counsel, and during whole of the year of 2015, the petition was not argued on merits and now only by placing a copy of order dated 03.04.2015, showing that the order of the learned Magistrate passed on 07.01.2014 whereby cancellation report furnished by the police was agreed to by the learned Magistrate, has been challenged and notice has been issued by suspending operation of the order of the Magistrate, the present petition for cancellation of bail is prayed to be adjourned *sine-die* tilt the decision of Writ Petition No. 4899 of 2015.

Even in the present memo. of petition and also during arguments, nothing has been alleged against the respondents as to any alleged misuse of the concession of bail extended in their favour almost two years ago, and the request, which is being made today for adjourning the proceedings of present petition on *sine-die* basis awaiting the result of the referred writ petition is again an attempt to hanging sword on the heads of the respondents, which cannot be given any sanction by the Court. Such attempts on the part of the complainant must come to an end. She had played enough with the process of law and already a latitude is shown to have been extended to the petitioner, which is not the spirit of law.

7. There is no justification to recall the bail granting order passed in favour of Respondents No. 2 and 3, by a learned Additional Sessions Judge, Multan, on 11.03.2014, and finding no force in this petition, the same is dismissed.

(R.A.) Petition dismissed.

PLJ 2016 Lahore 756
[Multan Bench Multan]
Present: **IBAD-UR-REHMAN LODHI, J.**
Mst. **GHANIA HASSAN--Appellant**
versus
SHAHID HUSSAIN SHAHID & another--Respondents

F.A.O. No. 159 of 2010, heard on 19.2.2016.

Civil Procedure Code, 1908 (V of 1908)--

----O.XXXVII Rr. 2 & 3--Claim of dower--Suit for recovery on basis of cheques, decreed--Property was attached in execution of decree--Objection petition in execution--Not entitled to cause frustration for execution of decree--Demand as dower against column of nikahnama--Suspension of execution process is on strength of an agreement--Validity--Dower is a consideration on basis of which a Muslim man and woman enter into a marriage contract and there is no concept of additional dower that too allegedly settled, after almost four years of marriage--Spouses, however, would still be at liberty to exchange gifts during their matrimonial life, but such gifted property can, in no way, be given status of dower, which is restricted to consideration fixed at time of a Muslim marriage--When admittedly appellant has filed a suit for recovery of her dower, including property, subject-matter of agreement, appellant, till final conclusion of proceedings of referred suit, cannot claim herself to be having any lien over such property--Transaction of dower completed on date of registration of marriage and title of land given in dower noted in nikahnama is validly passed in favour of wife and that entries in nikahnama showing transfer of property in lieu of dower need no further registration and entries in nikahnama would be sufficient evidence of events and arrangements, which had already been subscribed to by parties and same being not sale would not require registration--Any subsequent understanding or even unilateral offer for giving any property by a partner of matrimonial bond to another would, at no cost, be considered as additional dower, but at most, would be considered a gift. [Pp. 758 & 759] A, B & C

Syed Riaz-ul-Hassan Gilani, Advocate for Appellant.

Syed Muhammad Ali Gillani, Advocate for Respondent No. 1.

Date of hearing: 19.2.2016.

JUDGMENT

With the concurrence of learned counsel for the parties, the hearing of this appeal is being treated as *pacca* hearing.

2. In fact, whole controversy revolves around a decree granted by the learned Additional District Judge, Multan, on 26.02.2010, passed in Civil Suit No. 59/I of 2009, filed under Order XXXVII CPC, on the basis of four cheques for the recovery of Rs. 1,48,50,000/-. The judgment-debtor was Muhammad Hassan Ahmad Qureshi, whose property was attached in execution of such decree and in order to frustrate such execution process, the present appellant-*Mst.* Ghania Hassan, filed her objection petition in the execution with the contention that, she entered into marriage with judgment-debtor Muhammad Hassan Ahmad Qureshi on 20.12.2003 against a consideration of Rs. 20,000/- on demand as dower in view of the entries against Column No. 13 of Nikah nama, whereas, 15-tolas of gold ornaments were given to the objector in view of Columns No. 14 and 15 of Nikah nama and additionally, three biggas of agricultural land in village Baqir Shah, and an upper portion of a constructed house in Mohallah Qureshiyan, Ward No. 17, were also noted in Column No. 16 of Nikah nama, meant for mentioning some property or any part thereof, settled in between the parties as against the dower.

3. In addition to such claim of dower, the appellant had further claimed her right over a property measuring 282-*kanals*, 5-*marlas*, shown to have been agreed by said Muhammad Hassan Ahmad Qureshi, to be given to her as additional dower by means of an agreement, stated to have been arrived at in between the parties on 12.06.2007.

4. The objection petition was contested by the decree-holder, present Respondent No. 1, and the learned executing Court *vide* order dated 29.06.2010, proceeded to dismiss the objection petition.

5. Such dismissal was called in question by the appellant in an appeal impleading only Shahid Hussain Shahid, the decree-holder as a respondent, which appeal was pending before a learned Additional District Judge at Alipur, when it was dismissed for non-prosecution on 17.09.2010. Restoration petition of such dismissed appeal was also declined by the learned Additional District Judge, Alipur, on 11.10.2010.

6. Although through the present appeal, order dated 11.10.2010, passed by the learned Additional District Judge, Alipur, has been challenged, but the learned counsel for the appellant has argued the matter on merits also, and since the merits of the case are required to be commented upon, for the reason that, in regular first appeal, the learned first appellate Court has not dilated upon, therefore, it deem appropriate to examine the matter on merits also, so that the parties may not be entangled with endless litigation and a decree granted in 2010, which still awaits its satisfaction, is executed within some reasonable future time.

7. The main thrust of the appellant in asking for the suspension of execution process is on the strength of an agreement, stated to have been arrived at on 12.06.2007, executed by Muhammad Hassan Ahmad Qureshi/judgment-debtor of the recovery suit and husband of present appellant, claiming exclusive title of the attached property, subject- matter of the agreement, referred to herein-above in favour of the appellant.

The property, in addition to the one, noted in Nikah nama, against Columns No. 13 to 16 cannot validly be claimed by the appellant to be her dower, settled and agreed at the time of marriage i.e. 20.12.2003. Further, the concept of additional dower, which is being claimed on the strength of the agreement, is a serious question to be examined.

8. The dower is a consideration on the basis of which a Muslim man and woman enter into a marriage contract and there is no concept of additional dower that too allegedly settled, after almost four years of the marriage. The spouses, however, would still be at liberty to exchange gifts during their matrimonial life, but such gifted property can, in no way, be given the status of dower, which is restricted to the consideration fixed at the time of a Muslim marriage.

The agreement, itself, is a document worth appreciable. Even by the statement of such agreement, it cannot be considered as a concluded and finalized settlement in between the parties, particularly, on account of the following portion of said agreement:--

اب بقیہ اراضی موضع باقر شاہ شمالی 10-18 کنال بیٹ دیوان و نواں ڈیرہ کا سالم رقبہ 15-262 اور بقیہ رقبہ باقر شاہ شمالی 10-18 کنال کل رقبہ 5-282 کنال بلعوض اضافی حق المہر بحق مسماۃ غانیہ حسن زوجہ کو دیدیا ہے من مقر اراضی مذکورہ بالا کا انتقال تملیک بلعوض حق مہر عندالطلب کر دینے کا پابند ہوں اگر عندالطلب اراضی مذکورہ کا انتقال تملیک نہ کر دوں۔ تو مسماۃ غانیہ حسن زوجہ من مقر بذریعہ عدالتی کاروائی حقوق ملکیت کرنے کی حقدار ہو گی۔

In view of the above wording, it is, but clear that, even after entering into such agreement, the judgment-debtor has not finally transferred the mentioned property in favour of the appellant and further, when admittedly the appellant has filed a suit for recovery of her dower, including the property, subject-matter of the agreement, referred to herein-above, the appellant, till final conclusion of the proceedings of the referred suit, cannot claim herself to be having any lien over such property. Same still will be considered as in the ownership of Muhammad Hassan Ahmad Qureshi, Respondent No. 2/judgment-debtor in civil suit.

9. The learned counsel for the appellant has placed his reliance on *Ashiq Ali and others vs. Mst. Zamir Fatima and others* (PLD 2004 Supreme Court 10), *Mst. Tahira Begum vs. Federal Land Commission, Islamabad and 5 others* (1983 CLC 663), *Wali Dad vs. Mst. Tasneem Kausar and another* (1999 CLC 163), and *Inayat Ullah vs. Mst. Parveen Akhtar* (1989 SCMR 1871). Ratio in all the judgments is to the effect that, factum of gift of property by husband to wife in lieu of dower as recorded in Column No. 13 of Nikah nama would attach every truth, as such, the property not mentioned in Nikah nama and only noted in the agreement, which as noted earlier, is not a concluded one and in order to give effect to the terms of such agreement, even the appellant herself has sought a decree of Court in this regard. The transaction of dower completed on the date of registration of marriage and title of land given in dower noted in Nikah nama is validly passed in favour of the wife and that entries in Nikah nama showing transfer of property in lieu of dower need no further registration and the entries in Nikah nama would be sufficient evidence of events and arrangements, which had already been subscribed to by parties and the same being not sale would not require registration. It is, thus, clear that any subsequent understanding or even unilateral offer for giving any property by a partner of matrimonial bond to another would, at no cost, be considered as additional dower, but at the most, would be considered a gift.

10. The appellant herself has approached the Court seeking a decree in this regard; hence, she is not entitled to cause frustration for the execution of a decree granted in favour of Respondent No. 1-Shahid Hussain Shahid on 26.02.2010.

11. For what has been discussed above, the appeal having no force is dismissed. The learned executing Court, seized of the execution proceedings, is expected to expedite the process of execution.

(R.A.) Appeal dismissed.

PLJ 2016 Lahore 778 (DB)
[Multan Bench Multan]
***Present*: IBAD-UR-REHMAN LODHI AND SHAHID MUBEEN, JJ.**
M/s. AL-HADID MECHANICAL ENGINEERS and 4 others--Appellants
versus
M/s. HABIB BANK LIMITED--Respondent

R.F.A. No. 201 of 2014, heard on 24.2.2016.

Financial Institutions (Recovery of Finances) Ordinance, 2001--

----S. 9--Suit for recovery--Claimed as officer of bank as powers of attorney--Competence of signatories to plaint--Objection--No independent and specific power has been assigned to any of attorney to file suit--Power of attorney, under law, is to be construed strictly--Deeds of power of attorneys placed with plaint is a copy of cyclostyled proforma and after filling blanks, has been used in suit filed at Multan--In absence of any such resolution, no person can participate in proceedings of any suit filed on behalf of company--Power of attorney is to be construed strictly and such powers qua explicit object, which are expressly and specifically mentioned in power of attorney, were to be exercised by agent/attorney--Suit was filed on behalf of Bank by incompetent persons, having no such authority to file such suit--Judgment and decree passed by Banking Court which has been challenged through appeal is, thus, not sustainable and same is set-aside--Appeal was allowed. [Pp. 780 & 781] A, B, C & E

Power of Attorney--

----Power of attorneys annexed with plaint of suit, if construed on such touchstone, would not make same as valid documents and, as such, cannot be treated as valid power of attorneys. [P. 781] D

Mr. Sikandar Hayat Bhatti, Advocate for Appellants.

Syed Muhammad Nabi Abidi, Advocate, with *Javed Akhtar Sheikh,* Recovery Manager for Respondent.

Date of hearing: 24.2.2016

JUDGMENT

Ibad-ur-Rehman Lodhi, J.--The appellants have challenged the judgment and decree dated 12.02.2014, passed by the learned Judge Banking Court-III, Multan, whereby,

the suit, filed by the respondent-Bank, for recovery of Rs. 5202758.93/- was decreed with costs and cost of funds w.e.f. 31.3.2011, till the actual date of realization.

2. The plaintiff-Bank has been impleaded as a plaintiff in the following manner:

> "Habib Bank Ltd. having its Registered Office at Habib Bank Tower Jinnah Avenue Islamabad and Head Office at Habib Bank Plaza, I.I. Chundrigar Road Karachi and a branch known as Habib Bank Ltd. Sher Shah Road Branch, Multan through its duly authorized Manager/Attorneys."

Alongwith the suit, the documents, which are being claimed by learned counsel for the Bank, as Officer's Power of Attorneys, have been annexed, shown to have authorized Muhammad Aslam Bucha and S.M. Abbas Gardezi to act as attorneys on behalf of the Bank. Such two persons are shown to be the signatories to the plaint and also the verification thereof.

3. The learned counsel for the appellants-defendants, at the very outset, has objected the competence of the signatories to the plaint and its verification on the touchstone of the provisions of Section 9 of Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter to be referred as "the Ordinance") and also the law laid down by the superior Courts on the subject of power of attorneys.

4. On such preliminary objection, we have heard the learned counsel for the parties and gone through the record.

5. Section 9(1) of the Ordinance provides that:--

> **"9. Procedure of Banking Courts.--**(1) Where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the customer, may instituted a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by power of attorney or otherwise".

the above provision of law clearly indicates that, the authorization would be in a categoric terms.

The word "duly" has been used before word "authorized", and keeping in view the dictionary meaning of the word "duly", which in view of Black's Law Dictionary Sixth Edition is as under:--

> "In due or proper form or manner, according to legal requirements, upon a proper foundation, according to law in both form and substance".

as such, we have to be very conscience and mindful in interpreting the word "duly authorized", which in fact is not being taken seriously by the Banks while instituting the suits under the provisions of Ordinance, 2001, and persons, who signs the plaint and verify it commonly are not duly authorized person on behalf of the Banks.

The perusal of the power of attorneys annexed with the plaint, providing competence to the signatories to the plaint to act on behalf of the plaintiff-Bank reveals that, no independent and specific power has been assigned to any of the attorney to file the suit against the present appellants/defendants in the suit. The power of attorney, under the law, is to be construed strictly. The deeds of power of attorneys placed with the plaint is a copy of cyclostyled proforma and after filling the blanks, has been used in the suit filed at Multan.

Even the power of attorneys were notarized at Karachi and these find not mention whatsoever about any power assigned to the signatories to file a suit against M/s. Al-Hadeed Mechanical Engineers & 4 others/defendants in the suit. It cannot be denied that, the respondent-Bank is a public limited Company, registered under the Companies Ordinance, 1984, and under the law, if a Company appoints any person on its behalf, the Board of Directors is required to pass a resolution authorizing such person either to pursue any matter or to file any suit on its behalf.

In the present case, there is no such resolution available on record. In absence of any such resolution, no person can participate in the proceedings of any suit filed on behalf of the Company. Reliance can be placed on *Khan Iftikhar HussainKhan of Kamdot (represented by 6 heirs) vs. Messrs Ghulam Nabi Corporation Ltd. Lahore* (PLD 1971 SC 550), *Pak American Commercial (Pvt) Ltd. through Director vs. Humayoun Latif and 7 others* (PLD 2008 Karachi 540) and *Telecard Limited through authorized representative vs. Pakistan Telecommunication Authority through Chairman* (2014 CLD 415).

6. So far as the copies of power of attorneys annexed with the plaint are concerned, suffice it to say that, the power of attorney is to be construed strictly and such powers qua the explicit object, which are expressly and specifically mentioned in the power of attorney, were to be exercised by the agent/attorney. In this regard, reliance can be placed on *Unair Ali Khan and others vs. Faiz Rasool and others* (PLD 2013 SC 190) and *Muhammad Akhtar vs. Mst. Manna and 3 others* (2001 SCMR 1700).

7. This Court in *Crescent Jutt Products vs. A.D.J., Faisalabad & 2 others* (PLJ 2015 Lahore 800) has held that, the contents of power of attorney shall strictly be construed and no power or authorization is to be read into the same, which is not expressly set out therein and also that power of attorney must contain a separate and distinct power authorizing any of the officer of the Company, duly authorized through resolution of Board of Directors.

The power of attorneys annexed with the plaint of the suit, if construed on such touchstone, would not make the same as valid documents and, as such, cannot be treated as valid power of attorneys.

8. In view of what has been discussed above, we are of the view that the suit was filed on behalf of the respondent-Bank by incompetent persons, having no such authority to file such suit. The judgment and decree passed by the learned Judge, Banking Court-III, Multan, on 12.02.2014, which has been challenged through the present appeal is, thus, not sustainable and same is set-aside. Resultantly, this appeal is allowed and the suit, filed by the respondent-Bank, is dismissed.

(R.A.) Appeal allowed.

PLJ 2016 Lahore 960
[Rawalpindi Bench Rawalpindi]
***Present*: IBAD-UR-REHMAN LODHI, J.**
SHEIKH IRFAN AZIZ--Petitioner
versus
Lt.D. Col. (R) Dr. SAEED AHMED SHEIKH--Respondent

Civil Revision No. 05 of 2015, decided on 3.6.2016.

Civil Procedure Code, 1908 (V of 1908)--

----O. XXXVII, Rr. 1 & 2--Limitation Act, (IX of 1908), Art. 159--General Clauses Act, 1897--S. 9--Grant of unconditional leave--Limitation--For leave to appear and defend a suit under summary procedure referred to in Order XXXVII, CPC, ten days limitation has been provided--Column-3 of First Schedule of Limitation Act, 1908, is meant for time "from" which period begins to run and against Art. 159, Column-3 provides such time from point of time, when summons is served--Limitation on touchstone of Section 9 of Act is counted, first day i.e. 16.9.2014 is to be excluded from limitation and starting from 17.9.2014 and, therefore, filing of petition for leave to appear and defend suit on 26.9.2014, will be considered as within prescribed time of limitation of ten days--Objection, as such, raised by petitioner, treating petition for leave to appear and defend suit, as being barred by time, was not maintainable. [Pp. 962 & 963] A, B & C

Malik Asif Taffiqque Awan, Advocate for Petitioner.

Mr. Muhammad Akbar Butt, Advocate for Respondent.

Date of hearing: 3.6.2016.

JUDGMENT

With the concurrence of learned counsel for the parties, the hearing of this civil revision petition is being treated as pacca hearing.

2. A learned Additional District Judge at Rawalpindi, *vide* order dated 12.12.2014, proceeded to grant leave to appear and defend the suit in favour of the respondent herein, in a suit filed against the said respondent by the present petitioner, under the provisions of Order XXXVII Rules 1 and 2, CPC.

Such leave granting order has been called in question by the present petitioner on two grounds; one on the touchstone of limitation and the other one the grant of unconditional leave.

With regard to the first submission, learned counsel for the petitioner has contended that, admittedly, the defendant/respondent in the suit, received notice issued by the learned trial Court in suit under Order XXXVII, CPC on 16.09.2014, and the petition for leave to appear and defend the suit was filed on 26.09.2014; therefore, according to the calculation of the learned counsel for the petitioner, it was 11th day of the service effected upon the defendant, when the leave petition was filed, and thus the limitation of ten days, provided under Article 159 of The Limitation Act, 1908, for filing the petition was not strictly observed. Further, learned counsel for the petitioner has contended that, if at all the learned

trial Court reached to the conclusion that, it was a case of grant of leave, even then some condition must be attached with the leave granting order. In support of his contentions, learned counsel for the petitioner has placed reliance on *Mian Muhammad Amjad Amin vs. RanaBashir Ahmad* (2004 MLD 988) and *Emirate Bank International vs. Dost Muhammad Cotton Mills* (1993 MLD 54).

3. Responding to such contentions, learned counsel for the respondent has contended that, no doubt, the summons issued by the learned trial Court in the name of the respondent, were received by him on 16.09.2014 and notwithstanding such fact, the petition for leave to appear and defend the suit filed on 26.09.2014, was within such prescribed limitation. He has placed reliance on Section 9 of The General Clauses Act, 1897 and view arrived at by Hon'ble Supreme Court of Pakistan in case titled *Messrs Tribal Friends Co. vs. Province of Balochistan* (2002 SCMR 1903).

4. For leave to appear and defend a suit under summary procedure referred to in Order XXXVII, CPC, ten days limitation has been provided. Column-3 of The First Schedule of The Limitation Act, 1908, is meant for the time "from" which period begins to run and against Article 159, Column-3 provides such time from the point of time, when the summons is served.

In view of the provisions of Section 9 of The General Clauses Act, 1897, in any Central Act or Regulation made after the commencement of The General Clauses Act, it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

5. The *Hon'ble Supreme Court of Pakistan in Messrs Tribal Friends' case (supra)*, while interpreting such provision of The General Clauses Act, 1897, has held that, while computing time by use of word "from", the first day is excluded, whereas, by the use of word "to", the last day is excluded. In the same judgment, the effect of Section 9 of The General Clauses Act was extended even for computing the period of limitation as fixed by even any judgment, decree or order.

Even in both the matters relied upon by the learned counsel for the petitioner, the principle provided for calculating the limitation by using the word "from" was followed. The respondent was, thus, entitled to get benefit of interpretation of Section 9 of The General Clauses Act and, when in the case in hand, the limitation on the touchstone of Section 9 of the Act is counted, the first day i.e. 16.09.2014 is to be excluded from the limitation and starting from 17.09.2014 and, therefore, filing of petition for leave to appear and defend the suit on 26.09.2014, will be considered as within the prescribed time of limitation of ten days.

The objection, as such, raised by the learned counsel for the petitioner, treating the petition for leave to appear and defend the suit, as being barred by time, is not maintainable.

6. So far as the contention of learned counsel for the petitioner that, leave granting order must be attached with some condition is concerned, again the same is not supported by any law, for, it is not obligatory for the Court granting leave to a defendant in a summary suit to attach any condition, rather it is a discretionary relief and discretion has been exercised in a proper and judicial manner. Even if once a defendant would become

successful in establishing a *prima-facie* case, he is entitled to have an opportunity to defend himself in some proper and unfettered manner. The condition, if required to be attached with such leave granting order is, in fact, an attempt to pollute such leave granting order with unnecessary conditions, putting a restraint on the mind of the defendant, who deserves to be provided a level playing field.

7. Thus, in view of above, the learned trial Court has committed no illegality or irregularity and the impugned order, which suffers from no flaw, calls for no interference by this Court in its revisional jurisdiction.

Resultantly, this civil revision petition, having no force, is dismissed.

(R.A.) Petition dismissed.

PLJ 2016 Lahore 964
[Rawalpindi Bench Rawalpindi]
***Present*: IBAD-UR-REHMAN LODHI, J.**
BENAZIR BHUTTO HOSPITAL--Petitioner
versus
KHALID PERVEZ & others--Respondents

Civil Revision No. 601-D of 2013, heard on 13.5.2016.

Limitation Act, 1908 (IX of 1908)--

----Ss. 5 & 12--Limitation--Guilty of delay--Requisite time for obtaining copy--Interval between date of application for supply of copy when copy was ready for delivery--Non supply of required copy on fixed date--If on date fixed for supply of copies, copying agency was not contacted, defendant will be responsible for delay caused in that regard--Validity--Time between date on which copy is ready for delivery and date on which applicant chooses to take delivery, in fact, is not a time "requisite" for obtaining copy and any delay caused in such like circumstances, is not condonable under Section 5 of Limitation Act, if conduct of litigant is negligent and not due to circumstances beyond his control--It is a settled position that, time requisite for obtaining copy of order within meaning of Section 12 of Limitation Act, means only interval between date of application for supply of copy and date when it is ready for delivery and even during that interval, due diligence on part of litigant is required by law, and no delay, unless such as was caused by circumstance over which litigant had no control and which could not by due diligence be avoided, can form part of time "requisite" for obtaining copy--Petitioner had failed to justify delay caused in filing first appeal, which was admittedly filed on 37th day of limitation.

[Pp. 966 & 967] A, B & C

1975 SCMR 157, *rel*.

Appeal--

----Limitation--Necessary parties in appeal--Maintainability--On both counts i.e. limitation and non-impleadment of necessary parties in appeal, appeal was not competent. [P. 968] D

PLD 1993 Lah 439, *rel*.

Mr. Tariq Mehmood, Advocate for Petitioner.

M/s. Raja Tauqeer Ahmad Satti and Raja Maqbool Hussain, Advocate for Respondents.

Mr. Shahid Mehmood Abbasi, Additional Advocate-General Punjab.

Date of hearing: 13.5.2016.

JUDGMENT

With the concurrence of learned counsel for the parties, the hearing of this civil revision petition is being treated as pacca hearing.

2. This civil revision petition arises out of the judgment and decree, passed by the learned Additional District Judge, Rawalpindi, on 17.7.2013, whereby, the appeal filed by the present appellant against the judgment and decree, passed by the learned Civil Judge, Rawalpindi, on 11.1.2012, whereby, the suit, filed by the respondents-plaintiffs, was decreed, was dismissed by the learned first appellate Court, declaring the same as being barred by time.

3. According to the learned counsel for the petitioner, since the learned trial Court passed a decree on 11.01.2012 and on behalf of the present petitioner, an application for obtaining certified copies of the relevant record was moved with the Copying Agency concerned on 12.01.2012, but copies were received by the petitioner on 12.06.2012 and, as such, the appeal filed on 06.07.2012 could not have been held as being barred by time. In support of his such contentions, learned counsel for the petitioner has placed reliance on *Gul Muhammad vs. Allah Ditta* (PLD 1960 (W.P) Lahore 443), *Muhammad Bakhsh vs. Nizam Din* (PLD 1978 Lahore 31), *Sh. Muhammad Sharif Uppal vs. Sh. Akbar Hussain and others* (PLD 1990 Lahore 229), *Shujahat Hussain vs. Muhammad Habib and another* (2003 SCMR 176) and *Mirza Muhammad Ishaq and others vs. Additional Settlement Commissioner Lands and others* (2005 SCMR 973) and finally, the petitioner has prayed for acceptance of this revision petition and remand of the hearing of appeal to the learned first appellate Court for decision of the same on merits.

4. Responding to such contentions, learned counsel for the respondents-plaintiffs has defended the impugned appellate decree with the plea that, in fact, the petitioner, when applied for obtaining certified copies on 12.01.2012, he was given a date for delivery of copies as 14.01.2012 and by means of the receipt, issued to the petitioner, it was clarified that, in case of non-supply of the required copies on the date fixed, the learned District Judge be approached directly or the complaint in this regard be posted in the Complaint Box. It was further clarified that, if on the date fixed for supply of the copies, the Copying Agency is not contacted, the petitioner will be responsible for any delay, caused in this regard and, as such, the copies, which were prepared on 29.05.2012, were received with a delay by the petitioner and none else, but the petitioner would be responsible for the delay, caused in filing of the appeal.

5. Heard; record perused.

6. In order to obtain certified copies of the relevant record from the file of the learned Civil Court, which passed a decree in the suit of the respondents- plaintiffs on 11.01.2012, the present petitioner moved the concerned Copying Agency of District Judge, Rawalpindi, on 12.01.2012, and in view of the receipt issued to the petitioner by the said Copying Agency, the date of supply of the copies was given as 14.01.2012. The receipt does not

show as to whether either on 14.01.2012, or at any subsequent stage, the petitioner approached the Copying Agency and in response, the official of Copying Agency endorsed any future date for supply of copies. The stamp affixed on the certified copies, prepared in response to the demand of the petitioner, reveals that, the required copies were prepared on 29.05.2012 and it was the will of the petitioner that, he opted to receive such copies on 12.06.2012. Had the petitioner approached the Copying Agency on 14.01.2012, the date given to the petitioner for receipt of copies and there would be any endorsement of the Copying Agency intimating any future date for supply of copies, the position would have been different and the petitioner would not be held guilty of delay, but in absence of any such attempt, shown to have been made by the petitioner either on 14.01.2012 or subsequent thereto, in order to obtain the certified copies, the starting date in order to calculate the limitation for filing an appeal would be considered as 29.05.2012, when according to the record, the required copies were prepared by the Copying Agency.

7. In view of case-law reported as *Fateh Muhammad and others vs. Malik Qadir Bakhsh* (1975 SCMR 157), it has been held that, time requisite for obtaining copy within terms of Section 12(2) of Limitation Act, means interval between date of application for supply of copy and date when copy is ready for delivery. Time between date on which copy is ready for delivery and date on which applicant chooses to take delivery, in fact, is not a time "requisite" for obtaining copy and any delay caused in such like circumstances, is not condonable under Section 5 of Limitation Act, if conduct of litigant is negligent and not due to the circumstances beyond his control. In view of the apex Court, it is a settled position that, the time requisite for obtaining copy of order within the meaning of Section 12 of the Limitation Act, 1908, means only the interval between the date of application for supply of copy and the date when it is ready for delivery and even during this interval, due diligence on the part of the litigant is required by law, and no delay, unless such as was caused by circumstance over which the litigant had no control and which could not by due diligence be avoided, can form part of time "requisite" for obtaining the copy.

8. So far as the reliance placed by the learned counsel for the petitioner is concerned, in *Gul Muhammad's case (supra),* the delay was condoned only for the reason of the carelessness of the office of Copying Agency in giving wrong information to the applicant as to the date on which the copies would be ready, whereas, present is not a case of such like nature.

As per *Muhammad Bakhsh's case (ibid),* it is the duty of Copying Agency to intimate to applicant about date on which copy would be prepared and in the reported matter, since no such date was intimated to the applicant, therefore, the delay occurred in filing of appeal was condoned. This also is of no help to the petitioner, as from inception, when the petitioner applied for obtaining certified copies on 12.01.2012, he was given a date of 14.01.2012, when copy was expected to be prepared and as noted earlier, there is no obvious attempt on the part of the petitioner to show that, the petitioner approached the Copying Agency on the date fixed and from where he was given some other future date for said purpose.

In *Sh. Muhammad Sharif Uppal's case (supra),* the copies were not supplied to the applicant on the assumption that it was not ready and subsequently it reveals that, such assumption was not according to the facts and, therefore, the time was extended to the litigant in condoning the delay caused in filing of the appeal.

In *Shujahat Hussain's case (supra),* again the requirement of notice, to be issued by the Copying Agency to the petitioner for collecting the certified copies was pressed upon.

In the present case, the petitioner, at the moment, when he applied for obtaining certified copy, was given the date on which the copies were expected to be ready to supply.

Same is the position in *Mirza Muhammad Ishaq's case (supra).*

9. In view of the above discussion, the petitioner has failed to justify the delay caused in filing the first appeal, which was admittedly filed on 37th day of limitation.

10. Looking from another angle as to the competence of appeal, it has been observed that, in the plaint, Province of Punjab through Collector District Rawalpindi and District Collector/Deputy Commissioner, District Rawalpindi, were the defendants, whereas, during the proceedings of the suit, by means of order dated 24.11.2003, Medical Superintendent, Rawalpindi General Hospital was impleaded as an added defendant.

When the suit was decreed by the learned trial Court on 11.01.2012, the decree-sheet clearly reveals that, there were three contesting defendants i.e. Province of Punjab through Collector, District Rawalpindi, (ii)-District Collector/Deputy Commissioner, District Rawalpindi and (iii)-Medical Superintendent, Rawalpindi General Hospital, Rawalpindi. However, when such decree was challenged in appeal, the same was filed by Benazir Bhutto Hospital, Rawalpindi, and the appellant has conveniently ignored to implead Defendants No. 1 and 2 i.e. Province of Punjab through Collector District Rawalpindi and District Collector/Deputy Commissioner, District Rawalpindi, in the array of respondents. Firstly, at no stage of trial, Benazir Bhutto Hospital, Rawalpindi was formally impleaded as a party notwithstanding the fact that, presumably, the former Rawalpindi General Hospital, was subsequently renamed as "Benazir Bhutto Hospital, Rawalpindi' and secondly, in the plaint, it was not the "Hospital", rather it was "Medical Superintendent", who was a defendant in the suit. Neither original Defendant No. 3 nor the entity of the Hospital ever filed any appeal.

11. In view of law laid down in *Muhammad Qasim vs. VIth Additional District and Sessions Judge, Karachi Central and 2 others* (2008 CLC 446), it is not the whim or wish of any appellant to add, alter or delete any party from the proceedings.

From our own jurisdiction, in case of *Sher Muhammad and 27 others vs. Muhammad Mumtaz-ul-Islam through Legal Heirs and 6 others* (2001 MLD 1964), it was held that, the omission to implead a necessary party rendered appeal incompetent.

This view has further been strengthened by the Hon'ble Supreme Court of Pakistan in *Mst. Maqbool Begum etc vs. Gullan and others* (PLD 1982 Supreme Court 46).

Same view was taken by this Court in *Faquir Muhammad and 48 others vs. Province of Punjab through Collector/Deputy Commissioner and 4 others* (PLD 1993 Lahore 439), holding that, necessary parties in the appeal were left out and the appeal is liable to be rejected on this score alone.

12. On both counts i.e. limitation and non-impleadment of necessary parties in the appeal, the appeal was not competent. It was rightly dismissed and the learned first appellate Court has committed no illegality or irregularity, while passing the impugned judgment

dated 17.07.2013. No exception is taken from such valid findings of the learned first appellate Court.

Resultantly, this civil revision petition fails and is dismissed.

(R.A.) Petition dismissed.

PLJ 2016 Lahore 969
[Multan Bench, Multan]
***Present*: IBAD-UR-REHMAN LODHI, J.**
***Mst.* WAZIRAN MAI and another--Petitioners**
versus
ALLAH WASAYA and others--Respondents

Civil Revision No. 810 of 2013, decided on 30.3.2016.

Civil Procedure Code, 1908 (V of 1908)--

-----O. XLI, R. 27--Evidence in rebuttal--Refusing to provide opportunity to present in appeal to produce evidence in rebuttal--Fundamental rule of justice--Validity--It is a fundamental rule of justice that whenever additional evidence is led in, opposite party has to be permitted to rebut it; otherwise it will lead to grave injustice--Leading evidence in rebuttal is also a part of plaintiff's evidence, whether he leads it in one go *qua* all issues and close his evidence or reserve his right to lead rebuttal evidence--Since no opportunity had been allowed to produce evidence in rebuttal merely on ground that additional evidence is in shape of revenue record, it is fair that such an opportunity must be allowed.
[P. 971] A & B

Ch. Liaqat Ali, Advocate for Petitioners.
Malik Muhammad Latif Khokhar, Advocate for Respondents.
Date of hearing: 30.3.2016

ORDER

By filing this civil revision petition, the petitioners have called in question the order dated 30.10.2013 passed by the learned Additional District Judge, Layyah refusing to provide an opportunity to the present petitioners/respondents in appeal to produce any evidence in rebuttal.

2. Precise relevant facts to the present controversy are that this Court in Civil Revision No. 1267 of 2011 on 06.06.2012 permitted the present respondents to produce additional evidence during pendency of appeal in terms of Order XLI Rule 27, C.P.C. As a consequence of such permission, the learned counsel for the appellants before the learned first appellate Court on 30.10.2013 produced the documents in additional evidence. After such production, a request was made before the learned Additional District Judge on behalf of the present petitioners/respondents in first appeal to provide an opportunity to produce evidence in rebuttal, which was refused on the pretext that only the appellants before the learned Additional District Judge were allowed by this Court to produce additional evidence, thus, rebuttal was not possible. Hence, this civil revision petition.

3. The procedure prescribed for recording of evidence is mainly based upon common sense. Insofar as a plaintiff is concerned, while examining his evidence in affirmative, he has no idea as to by which evidence, the defendant is to rebut his evidence, whereas the defendant, while leading his evidence, knows exactly what evidence has been led by the plaintiff and by which evidence he has to rebut the same. The defendant is, thus, to be permitted to lead evidence with regard to whole case, which right has also been given to the plaintiff by way of rebuttal.

In case of *Harichand and others versus Mst. Bachan Kaur and others* (AIR 1971 Punjab & Haryana 355), it was held that it is a fundamental rule of justice that whenever additional evidence is led in, the opposite party has to be permitted to rebut it; otherwise it will lead to grave injustice, particularly when the evidence is of such a nature that it raises a rebuttal presumption, and that rebuttal presumption can only be displaced if an opportunity is given in that behalf. As no opportunity has been allowed merely on the ground that the additional evidence is in the shape of revenue record, it is fair that such an opportunity should be allowed and the High Court allowed such opportunity.

In case of *The Land Acquisition Officer, City Improvement Trust Board, Bangalore versus H. Narayanaiah etc.* (AIR 1976 Supreme Court 2403), the rule laid down was that subsequent to taking additional evidence on record under Order XLI Rule 27, C.P.C. for good reasons, it is incumbent upon the said competent authority/Court to allow the opposite party an opportunity of rebuttal.

A Division Bench of Punjab and Haryana at Chandigarh in case titled *Avtar Singh and another versus Baldev Singh and others* (Punjab And Haryana) (D.B.) 2015(1) CivCC 728 on the issue of evidence in rebuttal has held that it is imperative right of the plaintiff to lead evidence in rebuttal to such issues onus of which is put on the defendant and that the procedural law is not mandatory, but directory in nature and in such circumstances, it would not be necessary for the plaintiff to reserve a right to lead evidence in affirmative, when such plaintiff has otherwise such right and law permits him to lead evidence in rebuttal to such issues.

In case titled *(1) The Secretary to the Government of West Pakistan, Communication & Works Department and (2) the Advisor, Town Planning versus Gulzar Muhammad* (PLD 1969 Supreme Court 60), our Apex Court has laid down a principle that whenever additional evidence is allowed in appeal, an opportunity of adducing rebutting evidence would also be provided to the respondent in appeal.

4. It is, thus, held that it is a fundamental rule of justice that whenever additional evidence is led in, the opposite party has to be permitted to rebut it; otherwise it will lead to grave injustice. It is further needful to assert that leading evidence in rebuttal is also a part of the plaintiff's evidence, whether he leads it in one go *qua* all the issues and close his evidence or reserve his right to lead rebuttal evidence.

Since no opportunity has been allowed to the present petitioners to produce evidence in rebuttal merely on the ground that the additional evidence is in the shape of revenue record, it is fair that such an opportunity must be allowed and I hold accordingly.

5. Resultantly, this civil revision petition is allowed and the impugned order dated 30.10.2013 passed by the learned Additional District Judge is set aside and the present petitioners/respondents in appeal/plaintiffs in the suit are allowed to produce their evidence

in rebuttal to whatever has been brought on record by the present respondents/defendants in the suit by means of additional evidence.

(R.A.) Petition allowed.

2017 C L C 857
[Lahore (Multan Bench)]
Before Ibad-ur-Rehman Lodhi, J
ALI ASSOCIATES through Managing Director----Appellant
Versus
NOOR HUSSAIN and 24 others----Respondents

F.A.O. No.31 of 2016, decided on 12th April, 2016.

(a) Civil Procedure Code (V of 1908)---

----O. XLIII, R. 1(r) & O.XXXIX R. 3---Specific Relief Act (I of 1877), Ss.12 & 54---Suit for specific performance along with application for injunction---Direction to defendants to file written statement---Appeal under O.XLIII, R.1(r), C.P.C. lay only against an order under Rr.1, 2, 4 & 10 of O.XXXIX, C.P.C---Mere direction of issuing notice to the defendants came under the provisions of O.XXXIX, R.3 C.P.C. which was not appealable under O.XLIII R.1(r), C.P.C.---Trial court neither refused to grant injunction nor granted any relief in favor of plaintiff but passed an order/direction for issuance of notice on injunction application---Appeal, in law, could not proceed further and was dismissed accordingly.

(b) Words and phrases---

----"Direction"---Meaning.

Black's Law Dictionary, Sixth Edition; Concise Oxford Dictionary and Words Web Dictionary ref.

(c) Words and phrases---

----"Order"---Meaning.

Black's Law Dictionary, Sixth Edition; Concise Oxford Dictionary, Words Web Dictionary ref.

Syed Tajammal Hussain Bukhari for Appellant.
Malik Javed Akhtar Wains for Respondents Nos.1 to 3 and 13 to 17.
Syed Qamar Nasik for Respondent No.19.

ORDER

IBAD-UR-REHMAN LODHI, J.--- The learned trial court, seized of the proceedings of a suit for specific performance, filed by the present appellant, when was asked for grant a relief of injunction on an application filed under Order XXXIX Rules 1 and 2, C.P.C. read

with Section 151, C.P.C., along with plaint, instead of granting or refusing such relief of injunction, considered it proper to issue notices to the respondents for filing of written reply to such application, by means of order dated 18.01.2016.

Such order has been challenged in the present appeal filed under the provisions of Order XLIII, Rule 1(r) C.P.C.

2. Learned counsel for the appellant was directed to argue as to the maintainability and availability of the present appeal.

3. Respondents Nos.1 to 3, 13 to 17 and 19 have entered their appearance through their learned counsel in response to notice issued under Order XLIII, Rule 3, C.P.C. before filing of this appeal.

All have been heard.

4. In view of provisions of Order XLIII, Rule 1(r), C.P.C., an appeal lies from an "order" under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX, C.P.C.

A "direction" to the defendants in the suit/respondents in the said application issued to file written reply to such application seeking injunction cannot be equated with an 'order' passed on application under Order XXXIX, Rules 1 and 2, C.P.C. It is merely a "direction" requiring the other side of the proceeding to file reply of the filed petition.

5. Learned counsel for the appellant, in support of his contentions, has contended that even such direction to appear and file reply would be considered as an 'order' within the meaning of Order XLIII, Rule 1(r), C.P.C., enabling the aggrieved person to file an appeal under the above provision of law. He has placed his reliance on case laws titled (Messrs.) The Associated Cement Companies Ltd. (a Corporation registered in India under the Companies Act, carrying on the trade and business in Pakistan and having its Head Office in A.C.C. Building at 1, Queens Road, Bombay, India) v. The Province of Punjab, (PLD 1954 Lahore 151) and Piran Ditta v. Haji Habib Ashraf etc. (PLD 1982 Lah. 234).

In both of the reported judgments, an order refusing to issue an interim injunction pending decision on application for temporary injunction or granting such injunction keeping the application for temporary injunction pending, are held as appealable within the meaning of Order XLIII Rule 1(r) C.P.C.

6. In order to differentiate the terms 'direction' and `order', we have to consult the dictionary meaning of both such terms.

The term "direction" has been defined inter alia in the following manner in the below referred dictionaries:-

Black's Law Dictionary, Sixth Edition.

> `a guiding or authoritative instruction; the line or course upon which anything is moving or aimed to move.'

Concise Oxford English Dictionary.

`the action of directing or managing.'

Wordweb Dictionary.

`helpful suggestions regarding a decision or future course of action, the act of setting and holding a course, a message describing how something is to be done.'

Whereas, the term "order" has been defined in the following dictionaries as follows:--

Black's Law Dictionary, Sixth Edition.

`a mandate, command or direction authoritatively given.'

Concise Oxford English Dictionary.

`an authoritative command or direction.'

Wordweb Dictionary.

`a legally binding command or decision entered on the court record, give instructions to or direct somebody to do something with authority.'

Hence, asking a defendant or respondent in a proceeding to appear and file reply can in no way be termed as an "order", but it is a "direction", as such, the remedy of appeal provided from an order in view of Order XLIII, Rule l(r), C.P.C. would not be available to the present appellants, on whose application moved under Order XXXIX, Rules 1 and 2, C.P.C., instead of passing any order, the learned trial court directed the respondents/defendants in the suit to appear and file reply thereto.

7. Keeping in view the above discussion, it is apparent that an appeal under Order XLIII, Rule 1(r), C.P.C. lies only against an order under rule 1, rule 2, rule 4 and rule 10 of Order XXXIX, C.P.C. The mere direction of issuing notice to the respondents on an application for grant of an injunction clearly comes under the provisions of Order XXXIX, Rule 3 C.P.C., which is not appealable under Order XLIII, Rule 1(r), C.P.C. It is, therefore, clear that whenever a court passes an order/direction for issuance of notice on an injunction application, the same is not appealable under Order XLIII, Rule l(r), C.P.C.

8. Perusal of impugned order dated 18.01.2016 clearly reveals that the learned trial court neither refused to grant injunction nor granted any relief in favour of the appellants, thus, the appellant by misinterpreting the enabling provisions of law has filed this incompetent appeal. The same is not further proceed-able and is dismissed.

WA/A-74/L Appeal dismissed.

2017 C L C 1488
[Lahore (Rawalpindi Bench)]
Before Ibad-ur-Rehman Lodhi, J
ATIQ-UR-REHMAN and another----Petitioners
Versus
RETURNING OFFICER, U.C. Nos.57 to 63 and 6 others----Respondents
W.P. No.3354 of 2015, decided on 11th December, 2015.

(a) Punjab Local Government (Conduct of Elections) Rules, 2013---
----Rr. 38, 62 & 53---Recounting of votes---Loss of ballot papers---Effect---Recounting of votes were ordered by the Returning Officer and as a result of such recounting votes of a polling station were reduced and some votes were found missing---Validity---Conduct adopted by the election staff did not show that free, fair and just election was conducted in their supervision---Neither there was any discipline maintained during polling time at polling station nor the polling staff was careful while preparing the final result---No trust could be attached with such counts---Nothing was on record as to where the missing ballot papers had gone---Election which was to be challenged before the Election Tribunal by way of an election petition was only the declaration notified by means of notification---Such stage was still to come as by now no such notification had ever been issued---High Court had every jurisdiction to redress the grievance of any party before the elections were notified and authorities were amenable to its constitutional jurisdiction with regard to their acts or proceedings performed or taken prior to issuance of notification of election---Election staff could not claim immunity from any challenge to their illegal or unauthorized acts before publication of election and an aggrieved person would be competent to invoke the constitutional jurisdiction of High Court---Acts and proceedings taken by the respondents were without lawful authority and of no legal effect---Proceedings carried out by the respondents in conduct of election of union council after recounting were of no legal effect and same were set aside---Such process should be taken afresh for which purpose Election Commission would issue a fresh schedule according to law---Constitutional petition was allowed in circumstances.

(b) Constitution of Pakistan---
----Art. 199(1)(a)(ii)---Punjab Local Government (Conduct of Elections) Rules, 2013, Rr. 38, 62 & 53--- Constitutional petition---Maintainability---Challenge to election proceedings---Scope.

(c) Constitution of Pakistan---
----Art. 199---Constitutional jurisdiction of High Court---Scope---High Court had jurisdiction to make an order on the application of any aggrieved party declaring that any act done or proceeding taken within its territorial jurisdiction by a person performing functions in connection with the affairs of the Federation a Province or a local authority had been done or taken without lawful authority and same was of no legal effect. [p. 1492] B

Sheikh Ahsan-ud-Din, Mohammad Ilyas Sheikh and Mohammad Taimoor Malik for Petitioners.

Tanveer Iqbal Khan and Malik Fazal-ur-Rehman for Respondents.

Rashid Hafeez, Addl. Advocate General Punjab with Dr. Abdul Rehman, ARO.

ORDER

IBAD-UR-REHMAN LODHI, J.--- The petitioners were candidates for the offices of Chairman and Vice-Chairman, respectively, for Union Council No.61, Basal, Tehsil Jand, District Attock, in the elections conducted on 19.11.2015, in second phase of the Local Governments elections in Province of Punjab, and they were allocated symbol of "Tiger", whereas, respondents Nos.3 and 4, as one set for the same seats, were candidates and contested the same election under the election symbol of "Bicycle"; the third set of candidates consisted upon respondents Nos.5 and 6 and they contested the election under the election symbol of "Bucket".

2. In view of the Ballot Paper Account for Polling Station No.2 i.e. Government Girls Elementary School, Bhatiot, prepared by the Presiding Officer, in total, 1200 ballot papers were received at the polling station from serial Nos.1401 to 2600 and out of said ballot papers, a total number of ballot papers, which were taken out of the ballot box or boxes and were counted as '806'; the total number of tendered ballot papers were '02', the spoilt and cancelled were '04', as such-total number of ballot papers under above three items came to '812'.

3. After receipt of the result from different Polling Stations, the petitioners were shown to have obtained 3694 votes, whereas, respondents Nos.3 and 4 were shown to have obtained 3692 votes.

4. The Polling Station, in question, is Polling Station No..2 i.e. Government Girls Elementary School, Bhatiot (Female) and Presiding Officer of the same Polling Station, by virtue of Form-XI, prepared and handed over the statement of the account, showing 444 votes obtained by the petitioners, 285 by respondents Nos.3 and 4 and 33 by respondents Nos.5 and 6. In the same Form, total number of votes (including challenged votes), polled in favour of all contesting candidates were shown as 762, whereas, total out of doubtful votes excluded from the count (including the doubtful challenged votes), were shown as 44, total number of which came to 806.

5. During the night between 19/20.11.2015, the Returning Officer was approached by the candidates, asking for recounting of the votes and, therefore, on acceding to such request, recounting was ordered to be carried out on 20.11.2015 at 04:00 p.m., and as a result of such recounting, the petitioners' votes in Polling Station No.2 were reduced from 444 to 432, whereas, the votes of respondents Nos.3 and 4 were reduced from 285 to 283, whereas, respondents Nos.5 and 6 were shown to have obtained same number of 33 votes, even in recounting.

6. Such reduction in the ballot papers created doubts and presumably for that reason or in order to cover such glaring lapse, the Presiding Officer of concerned Polling Station i.e. Bibi Ayesha, Headmistress, Government Girls Secondary School, Mithial, District Attock, was asked to explain, who on 23.11.2015, produced a written explanation, wherein a strange plea was extended that while preparing the statement of account at Polling Station on the day of polling, 444 votes were inadvertently shown to have been obtained by the petitioners, which,

in fact, were 435 votes. Regarding loss of nine ballot papers, it was explained by the said Presiding Officer that either the voters took away the same with them or the same were torn out, but the Polling Staff did not know about the fate of such nine lost ballot papers. The Returning Officer, on 23.11.2015, intimated all such process to the District Returning Officer without any formal declaration in favour of any of the seat of candidates.

7. When a report was called for by the Returning Officer in the present writ petition, he, after placing reliance on the statement of Presiding Officer, termed the number of votes, shown to have been secured by the petitioners as '444' a result of arithmetic mistake and came forward with a novel kind of explanation that, since the Constituency of U.C.No.61, Basal, entirely consists of rural area and has very less literacy rate; therefore, possibility of non-tendering of seven ballot papers, cannot be ruled out and the same might have been concealed or brought out of Polling Station by the voters themselves.

8. The conduct shown to have been adopted by the election staff, deputed by the Election Commission of Pakistan, does not show that in their supervision, free, fair and just election was conducted and the process, as has been pointed out above, do indicate that neither there was any discipline maintained during polling time at the Polling Station nor the polling staff was careful enough while preparing the final result and, thus, no trust can be attached with such prepared counts. No explanation or justification has been extended by the polling staff as to where nine (9) or at least seven (7) missing ballot papers gone. Again there is no justification in accepting the belated explanation of the Presiding Officer, who on fourth day of the polling, in a very simple manner, has submitted that 444 votes were shown to have been obtained by the petitioners as a result of some inadvertence, whereas, in fact, it was a figure of 435, and ultimately, the Returning Officer has put every blame on the less literacy rate in the area of Constituency. If such illiteracy played its role in Polling Station No.2, it is a question as to how all other Polling Stations of the same Constituency were not affected badly on account of such less rate of literacy.

9. The learned counsel for respondents Nos.3 and 4 has objected to the maintainability of this Constitutional petition, mainly on the plea that "Election" can only be called in question by means of an election petition, to be preferred before the Election Tribunal.

10. To address such submission, it would be suffice to say that the "election", which is to be challenged before the Election Tribunal by way of an election petition is only the declaration notified by means of notification within the meaning of Rule 38 read with Rule 62 of the Punjab Local Governments (Conduct of Elections) Rules, 2013. Such stage was still to come as by now no such notification has ever been issued. The election, however, has not been challenged in the present writ petition. In fact, these are the acts done and proceedings taken by the Presiding Officer and the Returning Officer concerned, who in violation of the settled legal position, have proceeded in a manner, which has no lawful authority and the same are of no legal effect. The said authorities have been performing the functions in connection with the affairs of the Federation and also a Province and in view of the provisions of Article 199(1)(a)(ii) of the Constitution of Islamic Republic of Pakistan, 1973, this Court has a jurisdiction to make an order on the application of any aggrieved party declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a

Province or a local authority has been done or taken without lawful authority and of no legal effect; therefore, it is declared that before the elections are notified, this Court has every jurisdiction to redress the grievance of any party and the authorities, as noted herein-above, are amenable to the Constitutional jurisdiction of this Court with regards to their acts or proceedings performed or taken prior to issuance of notification by the Election Commission of Pakistan relating to elections in question.

The term "election" has been defined in Section 2(na) of The Punjab Local Government Act, 2013, which means "an election held under this Act and includes a bye-election". Such election will be deemed as conclusive only, when a declaration in shape of notification published in Official Gazette is made by the Election Commission of Pakistan by meeting the requirements of Rule 53 of the Punjab Local Governments (Conduct of Elections) Rules, 2013, and once the elections are declared by publication in Official Gazette, only then it would be liable to be challenged by means of an election petition within the meaning of Rule 62 of Rules, 2013. However, before such publication, the election staff would not be in a position to claim immunity from any challenge to their illegal or unauthorized acts and an aggrieved person on account of such unauthorized and illegal acts on the part of the election staff, would certainly be competent to invoke the jurisdiction of this Court by calling in question such illegalities within the meaning of Article 199(1)(a)(ii) of the Constitution of Islamic Republic of Pakistan, 1973.

11. In view of above peroration, it is declared that the acts and proceedings taken by the respondents, as highlighted in paras supra, were without lawful authority and of no legal effect and result would be that the proceedings carried out in the conduct of elections of U.C.No.61, Basal, Tehsil Jand, District Attock, for the seats of Chairman and Vice Chairman, by means of Forms No.XI, XII and XIII, after recounting, are of no legal effect and are set aside. Such process is required to be taken afresh for which purpose, the Election Commission of Pakistan (respondent No.7) will issue a fresh schedule, according to law.

Writ petition stands allowed.

ZC/A-27/L Petition allowed.

2017 C L D 650
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Mst. ANWAR BEGUM through L.R.---Appellant
Versus
STATE LIFE INSURANCE CORPORATION OF PAKISTAN and another---Respondents

F.A.O No.213 of 2015, decided on 14th October, 2016.

Insurance Act (IV of 1938)---
----Ss. 2(6), 47B & 53---Civil Procedure Code (V of 1908), S. 15 & O.VII, R.10---Insurance claim---Principal civil court---Jurisdiction---Claimant filed suit before Additional District

Judge seeking award of interest (liquidated damages) on account of settlement of group claim under S. 47B of Insurance Act, 1938---Additional District Judge returned the plaint under O. VII, R. 10, C.P.C. for filing before civil court---Validity---Ordinary suits were instituted and regulated under Civil Procedure Code, 1908, and were instituted in the court of the lowest grade competent to try it but suits or proceedings instituted under any other special law had to be instituted in the forum specifically provided in such special law---When special law viz. Insurance Act, 1938, provided a forum of 'principal civil court' then such suits or proceedings could not be filed before Court of Civil Judge---High Court set aside order passed by Additional District Judge, as the same was misconceived and was not supported by law---Case was remanded to District Judge to entertain claim filed under Insurance Act, 1938---Appeal was allowed accordingly.

Mst. Robina Bibi v. State Life Insurance and others 2013 CLD 477; State Life Insurance Corporation of Pakistan through Attorney v. Mst. Kaneez Bibi 2014 CLD 1323; State Life Insurance Corporation of Pakistan through Attorney v. Mst. Bashiran Bibi 2015 CLD 342; Patricia Anne Patel v. Gerald Cowling Patel PLD 1972 Kar. 444; Messrs S. Ghulam Dastgir and Sons v. Union Insurance Company of Pakistan Limited PLD 1995 Lah. 290; All India Motor Transport Mutual Insurance Co. Ltd. v. Rapheel George of Bombay Indian Inhabitant AIR 1963 Bombay 7 and Syed Akhtar Hussain Zaidi v. Sheikh Abdul Majeed PLD 1986 Lah. 663 ref.

Liaqat Ali Butt for Appellant.
Ibrar Ahmad for Respondents.
Date of hearing: 5th October, 2016

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---This judgment shall decide the instant appeal as well as the appeals listed in the schedule as the question involved in all these cases is as to which Court will be considered as "principal Civil Court" in order to exercise the jurisdiction to adjudicate upon the claims preferred under erstwhile Insurance Act, 1938.

2. The appellant herein, approached the Court of District Judge at Gujranwala seeking an award of interest (liquidated damages) on account of settlement of group claim under section 47-B of the Insurance Act, 1938. The learned Additional District Judge, Gujranwala, to whom the matter was entrusted, by means of impugned order dated 09.04.2015 has accepted the application moved by the respondent-State Life Insurance Corporation of Pakistan under Order VII, Rule 10, C.P.C. and plaint was ordered to be returned to the plaintiff/appellant for its presentation before the learned Civil Court.

3. Heard. Record perused.

4. Before commencement of Insurance Ordinance, 2000 the matters relating to business of insurance were being dealt with through the Insurance Act, 1938 (Act IV of 1938) (hereinafter referred to as an "Act").

By means of section 2(6) of the Act "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original Civil jurisdiction.

5. The learned Additional District Judge while returning the plaint to the appellant has placed reliance on the judgments of this Court reported as Mst. Robina Bibi v. State Life Insurance and others (FB) (2013 CLD 477), State Life Insurance Corporation of Pakistan through Attorney v. Mst. Kaneez Bibi (2014 CLD 1323) and State Life Insurance Corporation of Pakistan through Attorney v. Mst. Bashiran Bibi (2015 CLD 342).

In Mst. Robina Bibi's case (Supra), the learned Full Bench of this Court in paras 9, 12, 15, 21(ii) (iv) has held as under:-

> "9. Brief review of the insurance laws show that under section 46 of erstwhile Insurance Act, 1938 (Act No. IV of 1938) ("Act") holder of an insurance policy obtained after the commencement of the Act could sue for any relief in respect of the policy in any Court of competent jurisdiction in Pakistan. Under section 2(6) of the Act, "Court" meant the principal Civil Court of original jurisdiction in a district and included the High Court in exercise of its original jurisdiction. The period of limitation for such a suit not being provided under the Act, was three years under Article 86(a) of the Limitation Act, 1908 which states:-

Description of suit	Period of Limitation Three years	Time from which period begins to run (a) The date of the death of the deceased
86(a) On a policy of Insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.		

> 12. Collective reading of the above provisions of law shows that only the claims arising under insurance policies issued after the commencement of the Ordinance can be brought before the Insurance Tribunal while the insurance policies issued prior to the commencement of the Ordinance continue to be governed under the repealed Insurance Act, 1938 and will continue to be agitated before the court of competent jurisdiction in terms of section 2(6) of the Act.

> 15. For the above reasons there is no need to touch the merits or the grounds of appeals/petition in these cases, when at the very outset the Insurance Tribunal had no jurisdiction to entertain the Application of the appellants. These-appeals/petitions are, therefore, allowed and the impugned orders are set aside with the direction to the Insurance Tribunal to return the applications of the appellants to be filed before the court of competent jurisdiction.

> 21(ii). There is no provision under the Ordinance to transfer pending cases under the repealed Act to the Insurance Tribunal, hence, claims arising out of insurance policies prior to the commencement of the Ordinance shall continue under the repealed Act i.e., Insurance Act, 1938 before the court of appropriate jurisdiction.

(iv). Claims arising out of insurance policies prior to the commencement of the Ordinance may apply to the court of competent jurisdiction under the repealed Act, subject to the provisions of Limitation Act, 1908, which will be considered by the respective court on its merits in accordance with law."

Earlier to that learned Full Bench in Karachi High Court in case titled Patricia Anne Patel v. Gerald Cowling Patel (PLD 1972 Karachi 444) has held that the Courts of the District Judges established by or under the West Pakistan Civil Courts Ordinance, 1962, within the limits of their respective pecuniary jurisdiction, will be deemed to be the principal civil Courts of original jurisdiction.

This Court in the case of Messrs S. Ghulam Dastgir and Sons v. Union Insurance Company of Pakistan Limited (PLD 1995 Lahore 290) while referring the case of All India Motor Transport Mutual Isurance Co. Ltd. v. Rapheel George of Bombay Indian Inhabitant (AIR 1963 Bombay 7) has held that if the principal place of business of an insurance company is situated within a district which has no High Court, then the Court which could have jurisdiction under section 53 of the Insurance Act would be the principal Court of original civil jurisdiction in that district, that is, the District Court.

6. A learned Single Bench of this Court in case of Syed Akhtar Hussain Zaidi v. Sheikh Abdul Majeed (PLD 1986 Lahore 663) has held that District Court is principal Civil Court of original jurisdiction within a district presided over by District Judge or Additional District Judge.

On 08.01.1962 an Ordinance namely the Civil Courts Ordinance, 1962 (II of 1962) was promulgated to amend and consolidate the laws related to Civil Courts in all provinces. Section 3 whereof provides classes of Civil Courts which read as under:-

"Besides a Court established under the Small Claims and Minor Offences Courts Ordinance, 2002 (XXVI of 2002) and the Courts established under any other enactment for the time being in force, there shall be the following classes of Civil Courts, namely:-

(a) the Court of the District Judge;

(b) the Court of the Additional District Judge; and

(c) the Court of the Civil Judge;"

7. Learned counsel for the respondents, by referring section 15 of the C.P.C., has submitted that every suit shall be instituted in the Court of the lowest grade competent to try it.

8. I am afraid the contention of learned counsel for the respondents has no weight. While placing reliance on the section 15 of the C.P.C., respondents have conveniently ignored the significance of the word "principal Civil Court" as used in section 2(6) of the Act. No doubt the ordinary suits to be instituted and regulated under the Code of Civil Procedure ought to be instituted in the Court of lowest grade competent to try it but the suits or the proceedings to be instituted under any other special law have to be instituted in the forum specifically provided in such special law.

9. In this case when the special law viz. the Act provides the Forum of "principal Civil Court" then it cannot be argued that the suits or proceedings to be instituted under the Act are to be filed before the Court of Civil Judge. If this practice is allowed, it would defeat the very intent of the specific provisions of the Act which is a special law, provisions of which have to be given preference over general law.

This fact is also note worthy that while repealing the Insurance Act, 1938 by promulgating Insurance Ordinance, 2000 (Ordinance No.XXXIX of 2000 promulgated on 19.08.2000) again the Court of District Judge has been designated as Tribunal to entertain and adjudicate the claims arising out of insurance policies. By virtue of section 121 of the Insurance Ordinance, 2000 an appeal from any findings of the Tribunal is provided in view of section 124 of the Insurance Ordinance, 2000 before the High Court.

10. In the Insurance Act, 1938 section 47 is an enabling provisions providing remedy to the aggrieved family of deceased policy holder to claim the policy amount and the forum provided to sue for any such relief is "Court of competent jurisdiction in Pakistan". Such forum provided in said provision of law is referable to the Court defined under Section 2(6) of the Act which means only the "principal Civil Court of original jurisdiction in a District".

11. The learned Additional District Judge while returning the plaint to the appellant has placed reliance on the cases of Mst. Robina Bibi and State Life Insurance Company of Pakistan (Supra) but in fact has misapplied the said reported matters, for, in all the reported matters it was either the principal Civil Court or the Court of competent jurisdiction which has been held as appropriate forum to entertain or adjudicate the claims under the Act and in view of the law laid down, discussed hereinabove and the statutory provisions already referred, it is the Court of District Judge or at the most the Additional District Judge which is considered to be the principal Civil Court and not the Court of Civil Judge.

12. The final conclusion arrived at by the learned Additional District Judge while returning the plaint for its presentation to the Court of Civil Judge is thus misconceived which is not supported by any law, the same is not sustainable.

The impugned orders therefore are set aside by allowing the appeals with a direction to all the District Judges and the Additional District Judges to entertain the claims filed under thy Act being the principal Civil Court of original jurisdiction.

SCHEDULE

F.A.Os. Nos.213, 214, 215, 216, 218, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 289, 290, 291 and 292 of 2015.

MH/A-116/L Appeal allowed.

2017 M L D 1161
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Mst. SHAMSHAD AKHTAR through L.Rs.---Applicant
Versus
MUHAMMAD RAFIQUE THAKAYDA---Respondent

Transfer Application No.340 of 2016, decided on 2nd December, 2016.

Civil Procedure Code (V of 1908)---
----Ss. 24 & 115---Transfer of proceedings by District Judge---Scope---"Case decided"---Scope---Revision---Comptence---Transfer application filed before the High Court under S. 24, C.P.C.---Validity---District Judge had two kinds of jurisdiction to transfer the proceedings first by taking suo motu notice and second on the application of any of the parties involved in the litigation---When District Judge had exercised jurisdiction on suo motu basis, he had passed an administrative direction not effecting the merits of the case or any of the rights of the parties---Such order could not be called 'a case decided' qualifying any aggrieved person to invoke the revisional jurisdiction of High Court---Where District Judge had exercised jurisdiction under S. 24, C.P.C. on the application of any party, such order would qualify to be an order which was a 'case decided'; however when the District Judge was moved by a party to the litigation then revision against such order was competent---Petitioner had opted to withdraw the present petition to avail the alternate remedy under the law---Petition for transfer of proceedings was disposed of accordingly.

American Life Insurance Company v. M.S. Khawaja PLD 1960 Kar. 568; Dayabhai Jiwandas and others v. A.M.M. Murugappa Chettyar AIR 1935 Rangoon 267; Majeeda Begum v. Muhammad Din 1982 CLC 1560; Muhammad Tufail and others v. Nazir Ahmad Khan 1992 ALD 531; Chowdhury Muhammad Sarwar v. Sakhawat Hossain and others PLD 1968 Dacca 849; Qureshi Mahmud Ali v. (K.B) Malik Bashir Ahmad Khan PLD 1953 Bal. 9; Baijnath Prasad Singh v. Dasrath Prasad Singh and another AIR 1958 Patna 9 and Narinjan Singh and others v. Kirpal Singh AIR 1925 Lah. 189 rel.

Ch. Ghulam Mustafa Shahzad for Applicant.

ORDER

IBAD-UR-REHMAN LODHI, J.---Through this transfer application under Section 24 of The Code of Civil Procedure, 1908, the order passed by learned District Judge, Lahore, on 17.11.2016, while exercising jurisdiction vested under Section 24 C.P.C., has been called in question.

2. Learned counsel for the petitioner, at the very outset of the hearing of this petition, has been asked to show the competence of transfer application under section 24, C.P.C. before this Court challenging the findings arrived at by learned District Judge in exercise of his powers vested in him under the same provision of law, to which he had no satisfactory reply.

3. For ready reference the provisions of Section 24 of The Code of Civil Procedure, 1908 are reproduced herein below:--

General power of transfer and withdrawal.--

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage---

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceeded from the point at which it was transferred or withdrawn.

(3) For the purposes of this Section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

4. It is, thus, obvious that the District Judge, in fact, exercises two kinds of jurisdictions, first by taking suo motu notice and secondly on the application of any of the parties involved in the litigation. When the District Judge exercises the jurisdiction on suo motu basis he, in fact, supposes to pass an administrative direction not affecting the merits of the case or any of the rights of the parties and, thus, such order cannot be called "a case decided" qualifying any aggrieved person to invoke the revisional jurisdiction of this Court under Section 115, C.P.C. However, whenever the District Judge exercises a jurisdiction under Section 24, C.P.C. on the application of any party, the order concluding such proceeding is no doubt qualifies to be an order, which can be called as a "case decided" and in this regard reliance can be placed on "American Life Insurance Company v. M.S. Khawaja" (PLD 1960 Karachi 568). "Dayabhai Jiwandas and others v. A.M.M. Murugappa Chettyar" (AIR 1935 Rangoon 267) (Full Bench) and "Majeeda Begum v. Muhammad Din" (1982 CLC 1560).

5. In all the cases where jurisdiction under Section 24, C.P.C. is exercised by learned District Judge on the move of a party in the litigation, a revision from his final order is competent. Reliance in this regard is placed on the cases titled "Muhammad Tufail and

others v. Nazir Ahmad Khan" (1992 ALD 531), "Chowdhury Muhammad Sarwar v. Sakhawat Hossain and others" (PLD 1968 Dacca 849), "Qureshi Mahmud Ali v. (K.B) Malik Bashir Ahmad Khan" (PLD 1953 Balochistan 9), "Baijnath Prasad Singh v. Dasrath Prasad Singh and another" (AIR 1958 Patna 9) and "Narinjan Singh and others v. Kirpal Singh" (AIR 1925 Lahore 189).

6. It is, thus, held that if the proceeding is not transferred by the learned District Judge by exercising his suo motu power on administrative side but the jurisdiction under Section 24, C.P.C., in fact, is exercised on the move of one of the parties in the litigation, the said order can competently be called in question through a revision petition before this Court under section 115, C.P.C.

7. Learned counsel for the petitioner, at this stage, opted to withdraw this transfer application in order to avail alternate remedy under the law.

8. This petition is disposed of as such.

ZC/S-17/L Order accordingly.

2017 M L D 1397
[Lahore]
Before Ibad ur Rehman Lodhi, J
ASIF MAHMOOD---Petitioner
Versus
MEMBER, BOARD OF REVENUE, PUNJAB, LAHORE and others---Respondents

Writ Petition No.16059 of 2012, heard on 8th November, 2016.

Punjab Land Revenue Rules, 1968--------R. 17---Lambardar, appointment of---Requirements---Respondent was appointed as lambardar by District Collector---Contention of petitioner was that respondent was minor when he applied for the appointment of lambardar and that petitioner had better qualification than that of respondent---Validity---No age limit had been provided to be kept in regard while making appointment of lambardar---Educational qualification was also not a consideration for such appointment---Respondent was minor when he applied for appointment as lambardar but he crossed the said hurdle of minority when he was appointment as lambardar---Respondent had been performing his duties after appointment as of lambardar without there being any complaint as to his working---Recommendations of original Revenue Officer must be given due weight while making appointment of lambardar---Both Tehsildar and Deputy District Officer (Revenue) had recommended the respondent for appointment as lambardar---Additional Commissioner (Revenue) recorded findings in favour of petitioner but said wrong committed by him had been corrected by the Board of Revenue by giving valid and justified reasoning---No illegality, irregularity, or jurisdictional defect had been pointed out in the impugned order---Constitutional petition was dismissed in circumstances.

Ahmad Din v. Member, Board of Revenue, Punjab, Lahore and another 1983 CLC 1385; Maqbool Ahmad Qureshi v. The State Islamic Republic of Pakistan PLD 1999 SC 484 and M. Nazir Ahmad v. Muhammad Aslam and others 2013 SCMR 363 rel.

Malik Noor Muhammad Awan for Petitioner.
Subah Sadiq Watto, Additional Advocate General, for Respondents Nos.1 and 2.
Sameer Ijaz for Respondent No.3.
Date of hearing: 8th November, 2016.

JUDGMENT

IBAD UR REHMAN LODHI, J.---Through this constitutional petition, the petitioner has called in question the findings arrived at by Senior Member, Board of Revenue on 10.05.2012 in ROR No.1 of 2012 who proceeded to allow the revision filed before the Board of Revenue by the respondent and after setting aside order passed by the Additional Commissioner (Revenue) on 21.12.2011, restored the order dated 27.05.2009 passed by the District Collector, District Officer (Revenue) Faisalabad appointing the respondent herein as headman/Lambardar of Chak No.52/GB, Tehsil Samundri, District Faisalabad.

2. The post of Lambardar/headman of Chak No.52/GB, Tehsil Samundri, District Faisalabad fell vacant on account of death of Irshad Khan, the previous Lambardar. Applications from the eligible candidates were invited which attracted four persons namely Abdul Razzaq, Noshad Tazeem, Alia Tazeem and Asif Mehmood who applied for the said post. Tehsildar concerned, after initial proceedings recommended the name of Noshad Tazeem, the present respondent as a suitable candidate for the post of Lambardar and forwarded the case to the Deputy District Officer (Revenue), who with his recommendation which was in-line with the recommendations of Tehsildar forwarded the case to the District Collector, Faisalabad. During the proceedings before the District Collector, two candidates i.e. Abdul Razzaq and Alia Tazeem withdrew their candidatures in favour of present respondent Noshad Tazeem and the contest was left in between Noshad Tazeem and Asif Mehmood, present parties to the writ petition. The District Collector, District Officer (Revenue), vide order dated 27.05.2009 ordered the appointment of Noshad Tazeem, present respondent as Lambardar. Asif Mehmood appealed against order dated 27.05.2009 which was accepted by Additional Commissioner (Revenue) on 21.12.2011. The learned Member Board of Revenue in his revisional jurisdiction proceeded to set aside the order passed by the Additional Commissioner (Revenue) on 21.12.2011 and restored the earlier order dated 27.05.2009 passed by the District Collector appointing the respondent herein as Lambardar of the village.

3. Learned counsel for the petitioner has submitted that at the time when respondent applied for his appointment as Lambardar, he was minor in age and further that petitioner was better qualified than that of the respondent but only the hereditary claim of respondents has been given preference by appointing him as Lambardar.

According to learned counsel, it is not an absolute rule that appointing a Lambardar, hereditary claim is to be preferred but the same can be a consideration in addition to others and if the case of the petitioner is examined keeping in view his ownership of the property and strength of the community his case will be on better footing as compared to respondent.

4. Responding to such contentions, learned counsel for the respondent has submitted that not only father but grandfather and also great grandfather of the respondent had been the

Lambardar of the village and in addition to such superior hereditary claim, the respondent has an edge over the petitioner for appointment as Lambardar for the reason that two candidates withdrew their candidatures in favour of the respondent. By placing on record a copy of provisional result card issued on 10.09.2015 by Allama Iqbal Open University, Faisalabad, learned counsel for the respondent has submitted that during the period intervening the appointment of respondent as Lambardar and pendency of litigation over such question, the respondent has improved his education and has completed successfully the degree of Bachelor of Arts in general group.

5. Rule 17 of West Pakistan Land Revenue Rules, 1968 provides the considerations to be kept in view for first appointment of headman/Lambardar which for the convenience of ready reference are reproduced herein below:--

(a) the hereditary claims of the candidate;

(b) extent of property in the estate, if there are no sub-divisions of the estate, and in case there be subdivisions of the estate, the extent of the property in the sub-division for which appointment is to be made, possessed by the candidate;

(c) services rendered to the Government by him or by his family;

(d) his personal influence, character, ability and freedom from indebtedness;

(e) the strength and importance of the community from which selection of a headman is to be made;

(f) his ability to undergo training in Civil Defence in the case of headmen in Tehsils situated along the Border.

Such above considerations clearly denote that no age limit has been provided to be kept in regard by making appointment of Lambardar. Further the educational qualification is also not a consideration for such purposes.

6. Although the question of minority of the respondent at the time of making application for appointment as Lambardar has been raised for the first time in constitutional jurisdiction of this Court by the petitioner and by making reference to the case of "Ahmad Din v. Member, Board of Revenue, Punjab, Lahore and another" (1983 CLC 1385), learned counsel for the respondent has argued that when petitioner has failed to point out such alleged deficiency in eligibility of candidature of the respondent for appointment of Lambardar, he must not be allowed to raise such point for the first time in constitutional jurisdiction of this Court.

The Hon'ble Supreme Court of Pakistan in the case of "Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan" (PLD 1999 Supreme Court 484) while analyzing different provisions of Land Revenue Act and Land Revenue Rules has held that the matter pertains to the entitlement or otherwise of females or minors to be appointed to the post of headman has in fact become non-existent with the changes that have evolved on the grounds.

7. From the matriculation certificate issued in favour of the respondent, a copy of which is available on the record, it revealed that his date of birth is admittedly 14.08.1990. Application for appointment of Lambardar was moved by the respondent on 03.05.2007 when according to learned counsel for the petitioner, he was only of the age of 16 years and

09 months and according to learned counsel, he was not eligible to be considered for appointment as Lambardar. Although such application by the respondent was moved on 03.05.2007, but for the first time, the respondent was appointed as headman/Lambardar on 27.05.2009 when the respondent attained the age of 19 years and became a major.

8. The Hon'ble Supreme Court of Pakistan in the case of "M. Nazir Ahmad v. Muhammad Aslam and others" (2013 SCMR 363) has dealt with a similar matter and has held that where there was an impediment in the way of candidate at the date of applying for appointment, but he crossed the threshold or removed the hurdle with which he was earlier confronted while the matter was being processed and scrutinized and before final decision was taken by the competent forum, such candidate/applicant, notwithstanding the ineligibility on the date of applying, should be considered by the revenue authorities for the post/assignment as a valid candidate for the reason that during the intervening period, such candidate had already overcome the impediment pointed out by the other side.

9, Applying such principle in the present case, although minority can be attached with the respondent on 03.05.2007 when he, applied for the post of Lambardar but when on 27.05.2009, he was appointed as Lambardar, he had already crossed the hurdle of minority as by that time he attained the age of almost 19 years.

10. As noted earlier, the respondent has improved his education and now he is also a graduate with which educational qualification the petitioner claims having been equipped.

Further this fact has not been denied by the petitioner that after his appointment as Lambardar w.e.f 27.05.2009, the respondent had been performing his duty without there being any complaint as to his working and now almost seven years have gone while the respondent is performing his such duty.

11. It is also settled proposition of law that for appointment of Lambardar, the recommendations of the original Revenue Officer must be given due weight. In the present case, Tehsildar and DDO (R), both the officers at original level of the revenue hierarchy have, recommended the name of respondent for the appointment of Lambardar. It is only the findings of Additional Commissioner, (Revenue) which were arrived at in favour of the petitioner. Such wrong committed by the Additional Commissioner, (Revenue) has been corrected by the Board of Revenue by giving valid and justified reasoning.

12. Learned counsel for the petitioner has failed to point out any illegality, irregularity, or jurisdictional defect in the impugned order which is not liable to be interfered with in constitutional jurisdiction of this Court and resultantly while dismissing the present writ petition, the impugned order dated 10.05.2012 is upheld.

13. For what has been discussed above, instant writ petition is dismissed.

ZC/A-113/L Petition dismissed.

2017 M L D 1552
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
WASAB KHAN and another---Petitioners
Versus
Mst. BAGH BHARI and 5 others---Respondents

Civil Revision No. 2083 of 2007, heard on 16th February, 2015.

(a) Contract Act (IX of 1872)---
----Ss. 214 & 215---Gift deed---Proof---Principal and attorney, relationship of---Transfer of property in the name of wife by attorney---Plaintiff instituted suit to declare the gift made by defendant to his wife to be ineffective---Plaintiff had appointed defendant as attorney who transferred suit property in the name of his wife---Defence witness, not mentioned in pleadings, had deposed that defendant informed plaintiff of alienation---Trial Court dismissed the suit but Lower Appellate Court allowed the appeal---Validity---Law required that "prior permission" of principal was to be acquired by agent for alienation of principal's property in favour of his close relative---Informing principal about alienation was necessarily an act done subsequently that would not equalize "prior permission"---Principal had a right to repudiate said transaction if it was proved that material facts were dishonestly concealed by agent---Revision was dismissed by High Court.

Maqsood Ahmad and others v. Salman Ali PLD 2003 SC 31; Kishwar Iqbal Khan v. Muhammad Ali Zaki Khan and others 2007 CLC 1290 and Wali Muhammad v. Muhammad Ibrahim and others PLD 1989 Lah. 440 rel.

(b) Civil Procedure Code (V of 1908)---
----O. VIII, R 5---Allegation of fact, principle---Every allegation of fact in plaint, if was not specifically denied or stated to be not admitted in pleadings of defendant should be taken as admitted except as against a person under disability.

Mohammad Hanif Niazi and Malik Matee Ullah for Petitioners.
Ejaz Ahmad Chaudhry for Respondent.
Date of hearing: 16th February, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The suit for declaration, filed by the present respondents, was dismissed by the learned trial court on 01.03.2007; however, in appeal, the suit was decreed on 05.06.2007, by the learned first appellate court.

2. The petitioners, by means of their suit, sought declaration to the effect that gift deed dated 31.07.2002 through which, defendant No.1, in his capacity of the attorney on behalf of the plaintiffs, alienated the suit land in favour of defendant No.2, his wife, was ineffective upon the rights of petitioners and liable to be cancelled. In para-3 of the plaint, it was specifically pleaded that, for such alienation, by means of gift, defendant No.1 has never sought any separate and specific permission of the plaintiffs and, thus, the act of the

alienation by the attorney in favour of his wife, was beyond the scope of the powers to be executed by the agent.

3. The defendants, in their written statement, by means of corresponding paragraph No.3, have denied the contents of para-3 of the plaint in the following manner:--

In the written statement, it is nowhere pleaded that, ever a specific permission of the principal was obtained by the attorney for transfer of the subject property in favour of his close relative i.e. wife.

4. In view of the provisions of Order VIII, Rule 5, C.P.C., every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the defendant shall be taken to be admitted except as against a person under disability.

5. The learned counsel for the petitioners has contended that, notwithstanding such denial in para-3 of the written statement, a witness i.e. DW.2-Khan Zaman Khan was produced by the defendants, who has deposed that in his presence, defendant No.1 "informed" the plaintiffs that he has alienated the property in favour of his wife.

Such deposition is of no avail to the defendants for variety of reasons; firstly, that said Khan Zaman Khan is nowhere mentioned in the pleadings as a person in whose presence, such information was conveyed and, secondly; the requirement of law is acquiring prior permission of the principal by the agent for alienation of the principal's property in favour of a close relative of the attorney, whereas, according to DW.2, defendant No.1 informed the plaintiffs, after once the property was already alienated by means of gift in favour of wife of the attorney and, thus, such extending information would not equalize the prior permission of the principal. To inform someone about any incident is necessarily is an act done subsequent to happening of actual incident.

6. The Hon'ble Supreme Court of Pakistan in case of Maqsood Ahmad and others v. Salman Ali (PLD 2003 Supreme Court 31) with reference to Sections 211 and 215 of the Contract Act, 1872, has held that it is incumbent upon the agent to have sought prior approval of the Principal before transferring of the land in the name of his close relative.

In Kishwar Iqbal Khan v. Muhammad Ali Zaki Khan and others (2007 CLC 1290), it was specifically held that Section 215 of Contract Act, 1872 specifies that if an agent intends to enter into any agreement for his own benefit, he is required to take the consent of his principal and such principal has a right to repudiate the said transaction, if it is proved that certain material facts were dishonestly concealed from him by the agent.

This Court in case of Wali Muhammad v. Muhammad Ibrahim and others (PLD 1989 Lahore 440), by interpreting Section 215 of Contract Act, 1872, has held that the agent in such relationship, occupies the position of dominant influence and thus could not be permitted to make a transfer of the property of the principal in his own favour or in favour of his associates without the consent of his principal, and if the attorney by flagrant abuse of his authority entered into a contract of transfer with his son or associate, the principal in such circumstances was legally justified to repudiate such impugned transfer.

7. Keeping in view the above facts, it is held that the learned trial court was not justified to dismiss the suit of the plaintiffs, rather the learned appellate court, on correct appreciation of law and available material on record, reached to a just and right conclusion, while passing a decree in favour of the plaintiffs. The learned first appellate court has committed no illegality in allowing the appeal, filed by the plaintiffs.

8. Resultantly, this revision petition has no force and the same is, therefore, dismissed by upholding the judgment and decree passed by the learned first appellate court on 05.06.2007. The suit, filed by the present respondents, thus, stands decreed.

MM/W-6/L Revision dismissed.

2017 P Cr. L J 306
[Lahore (Rawalpindi Bench)]
Before Ibad ur Rehman Lodhi, J
GHULAM ALI ASGHAR---Appellant
Versus
The STATE and another---Respondents

Criminal Appeal No. 29 of 2013, decided on 18th December, 2015.

Penal Code (XLV of 1860)---
----S. 295-A---Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs---Appreciation of evidence---Person who reported the matter to Police was not a direct witness of what was allegedly uttered by accused---One of prosecution witnesses was a professional driver; and the other one had no basic knowledge of religious teaching---Police Inspector, who started investigation statedly after consultation of some Ulema gave final verdict as to the guilt of accused, but neither any of the religious scholar, who was consulted by the Police, had been named, nor any one was produced as a witness---Even any opinion of any religious scholar, had not been made part of the record---Offence under S.295-A, P.P.C., was not constituted, even in view of the statements of the prosecution witnesses---Prosecution, had failed to bring home guilt to accused on the charge levelled against him---Trial Court, ignored the facts and failed to confront the charge framed under S. 295-A, P.P.C., to the accused and convicted the accused without there being any corroborative and confidence inspiring evidence available on record---Conviction and sentence recorded by the Trial Court against accused under S.295-A, P.P.C., was not sustainable which was set aside and accused was ordered to be set at liberty, in circumstances.

Muhammad Mahboob alias Booba v. The State PLD 2002 Lah. 587 ref.

Malik Nadeem Iqbal for Appellant.
Mohammad Waqas Anwar, Deputy Prosecutor-General for the State.
Malik Waheed Anjum for Respondent No.2.
Date of hearing: 9th December, 2015.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The appellant, in this matter, was charged on 25.07.2012, under sections, 295-A, 295-C and 298-A P.P.C., in a case, wherein allegedly he uttered derogatory words on 02.11.2011 in respect of Hazrat Mohammad (Peace Be Upon Him), which matter was formally reported to police on 12.11.2011 through FIR No.359 of 2011, at Police Station, Sadar Talagang, District Chakwal, by a person i.e. Naseer Ahmad, who, in fact, was not a direct witness of what allegedly was uttered by the appellant.

2. Mohammad Ahsan-PW.2 and Mohammad Akram-PW.3 are the star witnesses of the prosecution, who stated to be present in the sitting, when the appellant allegedly used filthy language and disgraceful remarks in respect of Hazrat Mohammad (Peace Be Upon Him) and when said two persons, out of whom, one is a professional Driver and the other one too has no basic knowledge of religious teachings, allegedly disclosed such incident to the complainant, he formally lodged the FIR and a Police Officer of Inspector level started investigation, who statedly after consultation of some Ulema, gave final verdict as to the guilt of present appellant. Neither any of the religious Scholar, who was consulted by the police has been named nor naturally any one was produced as a witness. Even any opinion of any religious Scholar has not been made part of the record.

PW.2-Mohammad Ahsan, when appeared in the witness-box, deposed as under:-

> "He never uttered even a single word against the faith of others. He did not dare to insult/injure the feelings of others during the last 30 years. Even he did not interfere in the religious matters of any other school of thought. He never indulged himself in any religious debate in his prime age.
>
> Ghulam Ali Asghar accused remained with us for about 30 or 45 minutes and joined the conversation. During this period, he did not utter a single insulting word. The personality of Hazrat Ayesha Siddiqa (Razi Allah Ta'Aala Anha) was not discussed during that period.
>
> We did not have any conflict with the accused on the verse of the Holy Quran and the Hadiths. Neither I nor the accused had any bad intention to injure the feelings of each other. Again said, the accused might have bad intention. It is incorrect to suggest that volunteered portion of my statement is false and based on presumption. We offered the accused for Kaffara. I did not narrate this part of discussion to any one. I joined the police investigation and the I.O recorded my statement under section 161, Cr.P.C. On 04.11.2011, I, Akram and Tanvir summoned the accused in a hotel situated near to my petrol pump and remained there till 2.00 a.m. night. I, Akram and Tanvir forced him for "Towba" and "Kaffara" but in vain. I joined investigation before the DSP, Talagang who recorded my statement in his office on 10.11.2011. We went to the office of DSP on the asking of Thanedar at P.S Sadar, Talagang. We were six in numbers. Their names are Dr. Ghaffar, Mian Abdul Aziz, Ahsan Rasheed, Malik Naseer, Akram, Asghar accused and myself. DSP insulted me in his office by saying that I was murderer of my father and how could I speak the truth. He also insulted Akram PW by saying that he was a driver and vagabond. It

was the version of Naseer PW that the accused had insulted Hazrat Muhammad (PBUH) by using filthy language whereas as being illiterate, it was not my version and version of Muhammad Akram PW."

The other star witness, namely, Mohammad Akram-PW.3 has deposed as under:-

"Our feelings were not injured by quoting the Hadith by the accused but his way of presentation injured our feelings and belief."

PW.5-Yahya Hassan Virk, is the Investigating Officer of this case and deposed as under:-

"It was also observed by the S.S.P. Special Branch that feelings of common man was injured due to Hadees narrated by accused and any undue incident can be occurred in the area and create of fuss in two sects.

It is correct that I have gone through the contents of said Hadees and also consulted the "Olmaye-i-Karaams" of different sects especially from "Shia" sect for interpretation of Hadees No.293".

From the joint reading of above depositions, no other view is possible than to conclude that the offence under section 295-A, P.P.C. was not constituted even in view of the statements of the prosecution witnesses and that the persons, who were comparatively having better academic background also stated to have been initially associated with the investigation, but neither their any deposition was brought on record nor either of them was produced in witness-box.

3. By means of final impugned judgment dated 08.01.2013, the appellant was acquitted from the charges under sections 295-C and 298-A, P.P.C., whereas, he has been convicted and sentenced only under section 295-A, P.P.C. It is relevant to note here that the derogatory words, allegedly uttered by the appellant, were confronted in charge framed under section 298-A, P.P.C., whereas, such words with reference to charge under section 295-A, P.P.C. was never confronted to the appellant. It is also a fact relevant to note that, the prosecution witnesses, who appeared in witness-box, have never deposed that from any act of the appellant, their religious feelings were hurt. No class of persons has been notified by the prosecution, whose religious feelings were hurt on account of any act of the appellant and similarly no person representing such class appeared in witness-box.

4. In statement under section 342, Cr.P.C., in response to Question No.7, the appellant had come forward with a plea that he believed in Hazrat Mohammad (Peace Be Upon Him) and he never uttered the alleged words, rather he will prefer death than to even think over to use such words.

5. The appellant was summoned from the Jail to appear in person and he was produced before the Court on 09.12.2015. He again, before this Court on oath has reiterated his stance, as was taken at the time, when his statement under section 342, Cr.P.C. was recorded.

6. A learned Division Bench of this Court, in similar circumstances, in case of Muhammad Mahboob alias Booba v. The State (PLD 2002 Lahore 587) has dealt with the

question of blasphemy. I have been benefited of the research work, conducted by my learned Brothers (as they then were) in said reported matter. Some relevant portions, which are not only relevant, but also beneficial in order to understand the question involved in such like matters, are reproduced herein-below:-

> "Such quality of evidence could not be relied in a case as serious as the present one and reflected inefficiency, inaptitude, apathy and perfunctory working on the part of Police Officials and the way they collect evidence. If the case of the prosecution was per se infirm, then going into a debate pertaining to Fiqah at the end of the Trial by Court was totally unnecessary, particularly when the Trial Court had taken no help from any juris consult or any Islamic Scholar having known credentials. Nature of the accusations overwhelmed the Trial Court to such an extent that the Court became oblivious of the fact that the standard of proof for establishing such accusation and as required, was missing.
>
> Mere accusation should not have created a prejudice or a bias and the duty of the Court as ordained by the Holy Prophet was to ascertain the facts and the circumstances and look for the truth will all the perseverance at its command. Accused had not confessed and had stated that he had not committed any offence and through his affidavit he had expressed his profound respect for the Hoy Prophet in his own words.
>
> Increase in the number of registration of blasphemy cases and element of mischief involved therein calls for extra care at the end of the Prosecuting Officers. Failure, inefficiency and incompetence of the Investigation in handling the case of blasphemy. Directions by High Court with regard to investigation and trial of cases of blasphemy.
>
> High Court, in circumstances, directed the Inspector-General of Police of the Province to ensure that whenever such a case is registered, the same may be entrusted for purposes of investigation to a team of at least two Gazetted Investigating Officers preferably those conversant with the Islamic Jurisprudence and in case they themselves are not conversant with Islamic law, a scholar of known reputation and integrity may be added to the team and the team should then investigate as to whether an offence is committed or not and if the team comes to the conclusion that the offence is committed, the police may only then proceed further in the matter. Trial in such a case be held by a Court presided over by a Judicial Officer who himself is not less than the rank of District and Sessions Judge.
>
> Ever since the law became more stringent, there has been an increase in the number of registration of the blasphemy cases. A report from a leading newspaper of Pakistan says that between 1948 and 1979, 11 cases of blasphemy were registered. Three cases were reported between the period 1979 to 1986. Forty four cases were registered between 1987 to 1999. In 2000, fifty two cases were registered and strangely 43 cases had been registered against the Muslims while 9 cases were registered against the non-Muslims. The report further states that this shows that the law was being abused more blatantly by Muslims against the Muslims to settle their

scores. This was because the police would readily register such a case without checking the veracity of the facts and without taking proper guidance from any well-known and unbiased religious scholar, would proceed to arrest an accused. That an Assistant Sub-Inspector or a Moharrir was academically not competent to adjudge whether or not the circumstances constitute an act of blasphemy.

The subject blasphemy is under a lot of focus and people are expressing their opinions on the subject particularly with respect to the accusations which can readily be made and the sentence which is prescribed in the offence. In another of its articles published in the said daily on the subject of blasphemy, the following are the remarks of the correspondent and are relevant:-"

" The trouble is that over the years bigotry and intolerance have made such deep inroads into our society that all three parties in the blasphemy cycle-complainant, police officer, Judge-think that they are doing the right thing and also earning divine favour into the bargain, when they are pressing charges under this law. This is zeal sanctioned by law and clothed in self-righteousness."

"But coming back to blasphemy, to seek it in acts of obvious insanity is to devalue both Islam and the notion of blasphemy."

The greatest blasphemy of all is a child going hungry, a child condemned to the slow death of starvation. The miscarriage of justice is blasphemy. Misgovernment is blasphemy. An unconscionable gap between rich and poor is blasphemy. Denial of treatment to the sick, denial of education to the child, are alike examples of blasphemy."

Such directions were passed by this Court in the year, 2002, but it has been noted, with great pain, that in a case registered in 2011, the investigating agency has not bothered to take any guidance from such principles laid down by this Court in 2002 and for that reason, the investigation in this case, was not conducted in efficient and perfect manner. At the cost of repetition, it is again observed that, increase in the number of registration of blasphemy cases and element of mischief involved therein calls for extra care at the end of the Prosecuting Officers. Registration of such like cases cannot be allowed in a very free and careless manner and a class of citizens, who have not much knowledge of religion, must not be allowed to use the law in question to settle their score. This reminded me a couplet of Hakeem Mehmood Ahmad Sarv Saharanpuri:-

7. The figures, so arrived at by this Court in 2002, were advanced with the passage of time, and the Hon'ble Supreme Court of Pakistan in Criminal Appeals Nos.210 and 211 of 2015 titled "Malik Muhammad Mumtaz Qadri v. The State", decided on 07.10.2015, has further elaborated the position of blasphemy cases in Pakistan. By reproducing some extracts from the Judicial Training Toolkits prepared by the Legal Aid Society, Karachi, the following statistics have been recorded:-

> "The known blasphemy cases in Pakistan show that from 1953 to July 2012, there were 434 offenders of blasphemy laws in Pakistan and among them were, 258 Muslims (Sunni/Shia), 114 Christians, 57 Ahmadis, and 4 Hindus. Since 1990, 52 people have been extra-judicially murdered, for being implicated in blasphemy charges. Among these were 25 Muslims, 15 Christians, 5 Ahmadis, 1 Buddhist and a Hindu.
>
> During 2013, 34 new cases were registered under the blasphemy laws. While at least one death sentence for blasphemy was overturned during the year, at least another 17 people were awaiting execution for blasphemy and at least 20 others were serving life sentences. Although the government has never carried out a death sentence for blasphemy, NGOs reported that at least five persons accused of blasphemy had died in police custody in recent years.
>
> The majority of blasphemy cases are based on false accusations stemming from property issues or other personal or family vendettas rather than genuine instances of blasphemy and they inevitably lead to mob violence against the entire community."

8. The prosecution has miserably failed to bring home guilt with the appellant on the charge levelled against him and it seems that the learned trial court was under much pressure that it while ignoring the fact that, even derogatory words were not confronted in the charge framed under section 295-A, P.P.C., convicted the appellant in such offence without there being any corroborative and confidence inspiring evidence available on record.

9. Result of above discussion is that conviction and sentence recorded by the learned trial court against the appellant under section 295-A, P.P.C., on 08.01.2013, is not sustainable; the same is set-aside. The appellant is ordered to be set at liberty, if not required in any other criminal case.

HBT/G-7/L Appeal allowed.

2017 P L C (C.S.) Note 52
[Lahore High Court (Rawalpindi Bench)]
Before Ibad-ur-Rehman Lodhi, J
ATTIQUE ZAIDI and 6 others
Versus
INSPECTOR GENERAL PUNJAB POLICE and 3 others

Writ Petition No.1945 of 2015, decided on 3rd September, 2015.

Police Rules (1934)---

----Rr. 10.64 & 12.16 & Form No.10.64--- Circular No.SO(H&D)1-7/65 dated 14-09-1965---Appointment as constable in police department---Colour blindness and squint problem---Candidate not considered to be appointed in police department---Word 'sight'---Scope---Petitioners after having been declared successful in written test were referred for their medical examination---Medical authorities found the petitioners as colour blind and having squint problems in their eyes---Petitioners were discarded from being considered to be appointed as constable in police department--Validity---Petitioners suffered from such conditions which were not originally made applicable for persons to be appointed as constable in police department---Medical authorities were not required to adjudge the candidates for appointment as constable in police department---Word 'sight' did not include the capability of a person to differentiate different colours---Person having squint problems in his eyes could not be termed as a person having no eyesight or less eyesight---Medical authorities could not enter into minute details of eyesight rather were required to determine the presence of any disease, constitutional affection or bodily infirmity---Only such infirmity which must be a disqualification for a candidate was to be indicated---Medical authorities had not certified whether such defects if existed would lead to bodily infirmity or constitutional affection---Medical authorities had exceeded their jurisdiction in circumstances---Impugned action on the part of medical authorities was of no legal effect---Police department was directed to provide the petitioners job of police constables with immediate effect---If any of the petitioners had crossed age limit on account of unauthorized acts of department then over age limit be relaxed and candidates be considered as valid candidates for appointment---Constitutional petition was allowed in circumstances. [Paras. 10, 12, 13, 15 & 16 of the judgment]

Raja Ikram Ameen Minhas for Petitioners.
Shahid Mehmood Abbasi, Additional Advocate General Punjab.
Dr. Irfan Khilji, DMS District Headquarter Hospital, Rawalpindi.
Muhammad Ameer Abdullah, S.P. Headquarters, Rawalpindi.
Ahsan Abbas Kazmi SI, Legal Branch, CPO Office, Rawalpindi.

ORDER

IBAD-UR-REHMAN LODHI, J.--- The petitioners were amongst those, who applied for their appointments as police constables in B.P.S.5 in Police Department, Punjab in the year 2014. They were required to appear in the test arranged by the National Testing Service. The result of their written test was communicated to the Inspector General, Punjab Police,

Lahore and the petitioners were declared successful in such written test. They also undergone the process of interview and thereafter, on completion of necessary formalities i.e. verification of character antecedents and academic qualifications, they were referred to the Medical Superintendent, District Headquarters Hospital, Rawalpindi for their medical examination.

2. On the basis of the opinion of medical authorities who found some of the petitioners as colour blind and some having squint problems in their eyes, reported to the Police Department, the petitioners were discarded from being considered to be appointed as constables in Police Department, Punjab.

3. The petitioners have challenged the steps taken by the medical authorities in rendering the petitioners unfit for appointment as constables and their having not been considered for appointment by the Police Department for the just reason of such medical opinion, on the plea that the medical authorities in fact exceeded to their jurisdiction vested in them for the purposes of taking medical examination of the persons desirous to get appointment of constables in Police Department and as such, discarding the petitioners by Police Department to be considered for such appointment on the strength of such medical report was an act, which is without lawful authority and having no legal effect.

4. In written report and comments furnished by respondent No.3-City Police Officer, Rawalpindi, after reiteration the above narrated facts, it was disclosed that when basis for medical opinion was sought for from the medical authorities, they have made a reference to some instructions issued on 14.09.1965 providing a standard for vision test for the first entry into the Government service (Police Department).

5. I have heard the learned counsel for the parties and gone through the record along with the report and parawise comments.

6. Copy of the Circular No.SO(H&D)l-7/65, dated 14.09.1965 indicates that the then Governor of West Pakistan provided a revised standard of vision test for the first entry into the Government service containing such standard for Police Department also by means of clause 6(ii) which reads as under:-

> "Distant Vision 6/9 in each eye without glasses. Near vision as in Civil Service. They should have good muscle-balance, visual fields and colour vision, night vision and binocular vision."

7. The affairs in Police Department, Punjab are being regulated by the Police Rules, 1934. Rule 10.64 provides that a medical certificate of health is required in support of the first claim made for the pay of a person substantively appointed to a permanent post in Government service. Such certificate shall in all cases of appointment in Police Department be in Form No.10.64 and shall be signed by the District Health Officer of the District in which appointment is made whereas rule 12.16 of the same Rules provides that every recruit shall, before enrollment, be medically examined and certified physically fit for service by the Civil Surgeon.

8. A certificate, in the prescribed form (10.64), signed by the Civil Surgeon personally, is an essential requirement for enrolment. Such rule further provides that the examination by the Civil Surgeon will consist upon test of eye sight, speech and hearing of the candidate, his freedom from physical defects, organic contagious disease, or any other defect or tendency likely to render him unfit, and his age. Such rule further provides that candidates shall be rejected for any disease or defect, which is likely to render them unfit in the full duties of a police officer.

9. The advertisement originally made inviting the applications from the candidates for their appointments as police constables indicated that the candidates will be adjudged as to their mental and physical competence and they should be medically healthy persons.

10. Keeping in view such criteria, when the petitioners were tested and declared either as colour blind or having squint problems in their eyes, were thus sufferers from such conditions as were not originally made applicable for persons to be appointed as constables in the Police Department.

11. Both under rules 10.64 and 12.16, a certificate from the medical authorities is required as provided in Form No.10.64 of Police Rules, 1934. For ready reference and convenience, such form is reproduced herein below:-

"FORM No.10.64.

Police Department _____ Dated

CERTIFICATE

I do hereby certify that I have examined_____, a candidate for employment in the Police Department, and cannot discover that he has any disease constitutional affection, or bodily infirmity, except ---

I do not consider this a disqualification for employment in the office of_____

His age is according to his own statement _____years, and by appearance about _____years.

Dated _____

District Health Officer"

12. The original conditions, which were announced in the initial advertisement inviting applications from the suitable candidates and Form No.10.64 as reproduced herein above do indicate that the medical authorities were not required to adjudge the candidates for the appointment of police constables as to their colour blindness or squint problems. What in fact was required is the "eye sight" and keeping in view the Dictionary meaning of "sight", the same does not include the capability of a person to differentiate different colours and further that a person having squint problems to some extent in his eyes, cannot be termed as a person having no eyesight or less eyesight.

13. Even otherwise, the certificate in Form No.10.64 never require the health authority to enter into some minute details of eyesight. What in fact was required from such health authority, is presence of any disease, constitutional affection or bodily infirmity. Only such infirmity, which must be a disqualification for a candidate is to be indicated. Although with reference to the petitioners; colour blindness to some extent or squint problem was indicated by the health authorities but it was never certified that such defects if exists would lead to bodily infirmity or constitutional affection, as such, the findings of the medical authorities indicating some disqualifications with the petitioners for their appointments as police constables is not only violative to the standards even provided for the health authorities but also a result of exceeding the jurisdiction vested in the medical authorities, who are strictly required to provide report as provided in Form No.10.64.

14. I have been told by the learned counsel for the petitioners that during whole of this cumbersome process, most of the candidates have crossed their age limits as provided for first entry into the service of the Police Department and therefore, according to the learned counsel for the petitioners, they are required to be dealt with sympathetically.

15. For what has been discussed above, it is held that by indicating some sort of colour blindness or squint problems in the petitioners, the medical authorities in fact exceeded to their jurisdiction provided to them by the Health Department and also the Police Rules, and as such, the act on the part of Police Department in disqualifying the petitioners from their appointments as police constables in Punjab Police Department, are acts, which are without lawful authority and of no legal effect, and the same are declared as such, with a further direction to the respondents to provide the petitioners, the job of police constables in Police Department with immediate effect.

16. Since the petitioners, when entered into process of appointment in question were having the prescribed age limits but on account of unauthorized acts of the respondents, some of them have crossed their age limits, therefore, it is directed that over age limit in relevant cases is relaxed and it is directed that they be considered as valid candidates for such appointments irrespective of their having been crossed the age limit.

17. This constitutional petition is allowed.

ZC/A-147/L Petition allowed.

P L D 2017 Lahore 703
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD BASHIR---Appellant
Versus
Chaudhary ABDUL RASHEED---Respondent

Regular First Appeal No.177 of 2011, heard on 20th February, 2017.

Civil Procedure Code (V of 1908)---

----O. XXXVII, Rr. 1 & 2---Qarz-e-Hasna---Scope---Plaintiff contended that though loan facility extended to the defendant was named as Qarz-e-Hasna but a pronote and receipt were also separately executed---Plaintiff submitted that term Qarz-e-Hasna actually denoted to a loan---Term was not used as a fiscal transaction amongst creature of pronote---Defendant contended that Qarz-e-Hasna was a loan repayable at borrower's convenience which was not recoverable unless the borrower was in a position to repay the same---Defendant denied signatures and thumb impression on the pronote and the receipt---Validity---Holy Quran is the basic and primary source of law and it is complete code of life---Term Qarz-e-Hasna was not coined by anybody, rather it was found in holy Quran itself---Qarz-e-Hasna/goodly loan signified whatever was given to another selflessly and absolutely with the belief that he would get the reward in the next world---Stipulation, however, was that the loan should be a "goodly" one i.e. it should not be tainted with selfish designs and it should be given for the sake of Allah, for the purpose of pleasing Allah---Term Qarz-e-Hasna was not available for a loan to be extended by a person in this world to another person---Although basic transaction was termed by the plaintiff in his plaint and evidence as Qarz-e-Hasna, but at the same time, such transaction was reduced into writing in the shape of pronote and receipt showing such fiscal transanction in between the parties---Execution of pronote although had been denied by the defendant, but both documents were shown to have been signed by the defendant---Signatures had been denied but not only Trial Court but High Court had also obtained his signatures in open court and, while comparing the same with the signatures available on referred documents, this was the consensus that both the documents were duly signed by the defendant---With the consent of the plaintiff/decree holder, the decretal amount was allowed by the High Court to be paid by the defendant/judgment debtor by means of monthly installments---Any single default would entitled the decree holder for lump sum recovery of the remaining decretal amount and for that purpose executing court, if approached, would be at liberty to proceed against judgment debtor---Appeal was dismissed accordingly.

Sura Al-Baqra, Ayats 245 and 267; Tadabbar Quran, Jild-e-Awal by Maulana Amin Ahsan Islahi; Sura Al-Maida, Ayat No.12; Sura Al-Hadeed, Ayat Nos.57 and 16; Ahadid by Hazrat Abdullah Bin Masood; Sura Al-Hadeed, Ayat No.18; Sura Al-Tighabun, Ayat No.17; Sura Al-Muzammal, Ayat Nos.20 and 25 ref.

Haroon Irshad Janjua for Appellant.
Muhammad Kashif for Respondent.
Date of hearing: 20th February, 2017.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---By means of this appeal, the appellant has challenged the decree dated 12.07.2011 granted in favour of the respondent in his suit filed under Order XXXVII C.P.C. for recovery of Rs.2,30,000/- by the Additional District Judge, Chakwal.

2. In the plaint, the plaintiff/present respondent had come forward with the plea that loan facility of Rs.2,30,000/- was extended by him to the appellant and such deal was named as Qarz-e-Hasna. A pronote and receipt of such loan facility were also separately executed on 25.07.2008, but on account of failure on the part of the defendant/present appellant to repay the same, the plaintiff/present respondent had to file the referred suit for recovery of amount of pronote. The plaintiff, when appeared in the witness box as PW-1, has again deposed that the amount of Rs.2,30,000/- was given by him to the defendant as Qarz-e-Hasna. The learned trial Judge after recording respective evidence of the parties proceeded to decree the suit of the plaintiff as prayed for by means of impugned judgment and decree dated 12.07.2011.

3. When learned counsel for the appellant started arguments on the appeal, the learned counsel for the respondent/plaintiff was directed to demonstrate as to what would be the consequential effect if admittedly some amount changed hands and the person extending such financial facility in favour of the other one call such deal as Qarz-e-Hasna and what would be the legal consequences if such amount is demanded back by the creditor.

Learned counsel for the appellant by placing reliance on cases titled Dr. M Aslam Khaki v. Syed Muhammad Hashim and 2 others PLD 2000 SC 225) (Shariat Appellate Jurisdiction), Muhammad Anwar Wahla v. Muhammad Tariq Tung 2002 CLC 1779, Habib Bank v. Messrs Qayyum Spinning Ltd. 2001 MLD 1351 and Badshah Jan v. Allah Ditta Sethi and others PLD 2013 Islamabad 39 has submitted that Qarz-e-Hasna is a loan repayable at borrower's convenience and the same cannot be recovered unless the borrower is in a position to repay the same and that it is a loan given on compassionate ground free from interest, mark-up or service charges and repayable if and when the borrower is able to pay.

4. In comparison whereof, learned counsel for the respondent/ plaintiff with reference to Ayat Nos.177, 245, 282 of Sura Baqra, Ayat No.12 of Sura Maida, Ayat No.18 of Sura Al-Hadeed, Ayat No.17 of Sura Taghabun, Ayat No.20 of Sura Muzammal, as also Tafheem-ul-Quran by Moulana Syed Abul-Aala Modoodi and Tadabar-e-Quran by Moulana Ameen Ahsan Islahi has submitted that term Qarz-e-Hasna in fact is one, used by Allah Almighty in the Holy Quran and wherever this term is used, it denotes to a loan given by the creature to the Creator and nowhere the term Qarz-e-Hasna is used as a fiscal transaction in between two persons amongst creature and such Qarz-e Gasna mainly consists of Aml-e-Salah and Sadqa Jaria and return of said Qarz is left on Almighty Allah Raheem-o-Kareem on the day of judgment.

5. The Holy Quran is the basic and primary source of law and it is complete code of life. In case of any controversy in any matter, one has to recourse to Holy Quran first and in case of any ambiguity, then to other sources of law. The word Qarz-e-Hasna is not coined by anybody, rather it is from Allah Himself and is found in the Holy Quran itself as referred to hereinabove by learned counsel for the respondent during arguments. For ready reference, the verses revealed

in Holy Quran in the referred Suras along with its translation and elucidation/explanation by the learned authors of referred Tafseer are reproduced herein below:-

From above verses, one can imagine that the almighty Allah, who can create anything by just saying "Kun", is asking humans to give Him loan. Hence, anything that we spend in the way of Allah, in fact, is bestowed by Him. It is only because of His graciousness that He calls it a loan that we spend it in His way and He promises to return it to us in manifold. When He is asking for loan, it does not mean the loan that we get from some individual or bank for our needs, rather "Qarz-e-Hasna/goodly loan" signifies whatever is given to another for selflessly and absolutely pure motives with the belief that he shall get the reward in the next world. The stipulation, however, is that the loan should be a "goodly" one, that is, it should not be tainted with selfish designs and it should be given for the sake of Allah, for the purposes of pleasing Him.

In view of above discussion, it is, thus, declared that term Qarz-e Hasna is not available for a loan to be extended by a person in this world to another person.

6. Further in this particular case, although the basic transaction was termed in the plaint and evidence as Qarz-e-Hasna, but at the same time, such transaction was reduced in writing in the shape of pronote and receipt showing such fiscal transaction in between the parties. The execution of pronote although has been denied by the defendant/present appellant, but both the documents Exh.P-1 and Exh.P-2 are shown to have been signed by Muhammad Bashir defendant/appellant. The signatures have been denied by Muhammad Bashir, but not only the learned trial court, but this Court also obtained his signatures in the open Court and, while comparing the same with the signatures available on the referred documents, this is the consensus that both the documents were duly signed by Muhammad Bashir defendant/appellant.

While apprehending the dismissal of the appeal and maintaining the decree granted by the learned trial court, the appellant, who is present in person along with his learned counsel requests for return of the decretal amount in some easy installments in view of the present financial constraints being faced by him.

With the consent of the decree holder/respondent herein, the decretal amount of Rs.2,30,000/- is, thus, allowed to be paid by the defendant/appellant/judgment debtor by means of monthly installments of Rs.7500/- each per month and first installment in that respect will be made on or by 01.03.2017. It is also agreed in between the parties that by every first date of each month, the amount of Rs.7500/- as installment will be paid by the judgment debtor/appellant/defendant by depositing the same in Bank account No.0010018681740017 of the respondent/ plaintiff in the suit being maintained at Allied Bank Limited, Talagang Road, Chakwal having Branch Code No.0060 and any single default in this regard would tantamount to forthwith and lump sum recovery of the remaining decretal amount and for that purpose, learned Executing Court, if approached, will be at liberty to proceed against the judgment debtor/appellant without notice and without adopting the coercive measures including forfeiture of bank guarantee furnished by him with the learned Executing Court in compliance with direction of order dated 20.09.2011 passed by this Court, when this appeal was admitted to regular hearing.

7. Before parting with this judgment, this Court extends profound gratitude to Mr. Muhammad Kashif, Advocate for the respondent, who rendered his valuable assistance to the Court in reaching a just decision on such intricate question.

8. With these observations, this appeal having no force is dismissed.

MQ/M-43/L Appeal dismissed.

2017 Y L R Note 240
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
Dr. SAJID RAFIQUE---Petitioner
Versus
The FEDERATION OF PAKISTAN through Secretary, Ministry of Interior, Islamabad and 2 others---Respondents

Writ Petition No.7373 of 2015, decided on 2nd June, 2015.

(a) Exit from Pakistan (Control) Ordinance (XLVI of 1981)---

----S. 2(1) & (3)---Exit Control List---Non-specifying the grounds---Principles---Federal Government is not absolved of its duty at least to mention reasons for not specifying grounds for action under S.2(1) of Exit from Pakistan (Control) Ordinance, 1981. [Para. 9 of the judgment]

(b) Exit from Pakistan (Control) Ordinance (XLVI of 1981)---

----S. 2---Exit from Pakistan (Control) Rules, 2010, R. 3---Constitution of Pakistan, Arts. 14, 15 & 199---Constitutional petition---Exit Control List---Bond of service---Petitioner was an employee of "SUPARCO" who was denied exit from Pakistan at the airport---Validity---Memorandum in question did not specify any reason for placing name of petitioner on Exit Control List but in view of S.2(1)(a) to (g) of Exit from Pakistan (Control) Ordinance, 1981, circumstances and grounds were provided which could be made basis for placing anybody's name on Exit Control List---None of such considerations were considered by Federal Government by placing name of petitioner on Exit Control List---Terms of bond got furnished by "SUPARCO" at the best could have been enforced but authorities had no jurisdiction to deny fundamental right of petitioner enshrined under Arts.14 & 15 of the Constitution---In absence of any reasonable restrictions imposed by law as envisaged under Arts. 14 & 15 of the Constitution, the authorities had in fact acted illegally by denying constitutional right of petitioner---If at all, the parent department of petitioner had any grievance, it could have approached court of law and enforced agreement of bond or claim any relief under civil litigation---High Court declared placing of petitioner's name in Exit Control List without lawful authority and of no legal effect---Petition was allowed under circumstances. [Paras. 9 & 13 of the judgment]

Higher Education Commission through Project Manager v. Sajid Anwar and others 2012 SCMR 186; Nazir Adenwala v. Islamic Republic of Pakistan through Secretary Ministry of Interior, Islamabad and 2 others PLD 2013 Sindh 186; Riaz Ahmed v. Government of Pakistan and others PLD 2014 Isl. 29 and Wasatullah Jaffery v. Ministry of Interior through Secretary, Federal Government of Pakistan and 4 others PLD 2014 Sindh 28 rel.

Syed Ali Zafar and Suleman Ahmad for Petitioner.
Zikreya Sheikh, Deputy Attorney General.
Ch. Zahid Nawaz Cheema for Respondents.
Muhammad Munir Akhtar on behalf of SUPARCO.

ORDER

IBAD-UR-REHMAN LODHI, J.---The petitioner was in attempt to board on the Plane, scheduled to leave Lahore for Sweden on 20.12.2014, through Emirates Air Lines Flight No.EK-623 and during immigration process at Lahore Airport, the petitioner's particulars were hit in the Exit Control List (herein after referred to as ECL) category vide I.D.No.14446 and his matter was referred to Federal Investigation Agency (Anti Human Trafficking Circle), Lahore for further investigation, which resulted into registration of F.I.R.No.1057 of 2014, against the petitioner.

2. The petitioner after his release on bail in the referred criminal case probed as to the reasons for such incident at Airport, which disclosed that reportedly his name was put on the ECL by the Federal Government and, therefore, he was not allowed to board on the flight to Sweden.

3. Since, according to petitioner, he never received any intimation as to the fact of placing his name on the ECL, therefore, the impugned act on the part of the respondents, in placing his name reportedly on ECL was called in question through the present writ petition, without making any particular reference to any order passed in this regard.

4. The report and para-wise comments from the respondents were called for, in response whereto the Federal Government of Pakistan, has offered the following report:--

> "It is submitted that the name of the petitioner was placed on ECL on 25.09.2013, on the recommendation of security agency, as he was exposed to a sensitive job and was likely to abscond abroad without obtaining formal approval from the competent authority. The Security Agency has been asked to provide the latest status of the case. The response is awaited."

5. The report from the Director General, Federal Investigating Agency has added no material fact as it was reported by the Director General that the Federal Investigating Agency is only the implementing agency of the orders passed by the competent Authority under the provisions of Exit from Pakistan (Control) Ordinance, 1981 (herein after referred to be as Ordinance).

6. Pakistan Space and Upper Atmosphere Research Commission-Respondent No.2, has given in detail the reasons, which resulted into placing the name of the petitioner on the ECL. The main and basic reason as was reported by the SUPARCO was that the petitioner,

who has been an employee of the said Commission was not sincere in his commitments as were arrived at by means of surety bond, which bound the petitioner to serve compulsorily the Commission for a certain period and before expiry of such bond period, the petitioner attempted to proceed abroad.

7. The Federal Government, even along with the report and parawise comments, has never furnished the copy of the order, placing the name of the petitioner on ECL and for that reason at the time of the hearing of this petition, the official appearing from Ministry of Interior, Government of Pakistan was directed to provide copy of the said order, who from his Master File has produced the copy of Memorandum No.12/290/2013-ECL, dated 25.09.2013. Copy of the same was also directed to be handed over to the learned counsel for the petitioner.

8. Learned counsel for the parties as also the learned Deputy Attorney General have argued the matter at length.

9. After hearing the parties and going through the record, I am of the view that the act on the part of the Federal Government in Ministry of Interior, in placing the name of the petitioner on ECL was an act, which was performed without observing the requirements as have been made incumbent for such Authority, not only in view of the provisions of Exit From Pakistan (Control) Ordinance, 1981 but also the Exit from Pakistan (Control) Rules, 2010 and, thus, is not sustainable for the following reasons:-

In the report furnished by the Federal Government, the basis for the impugned order has been shown, some recommendation of Security Agency on the apprehension that the petitioner was likely to abscond abroad, without obtaining formal approval from the competent Authority. On such recommendations of the Security Agency, the impugned order was passed on 25.09.2013, however, when report was furnished in this writ petition on 26.03.2015, it was reported that the Security Agency concerned was asked to provide the latest status of the matter, which was still awaited, even after lapse of a period of about two years. From the order impugned i.e. Memorandum No.12/290/2013-ECL, dated 25.09.2013, it does not borne out that what were the justifications before the Federal Government in placing the name of the petitioner on ECL. The impugned memorandum is completely silent in this regard. In view of Sub-Section 2(3) of the Act, it is the requirement that if while making an order under subsection (1), it appears to the Federal Government that it will not be in the public interest to specify the grounds on which the order is passed, it shall not be necessary for the Federal Government to specify such grounds. By such provision, the Federal Government is not absolved of its duty at least to mention the reasons for not specifying the grounds for an action under Section 2(1) of the Act.

* The impugned memorandum does contain an endorsement that copy of the memorandum was forwarded to the person concerned. Such simple endorsement is not a sufficient and strict compliance of Rule 3 of the Rules which provide that an order made under Section 2(1) of the Ordinance shall be served on the person concerned, either through local Authorities or the staff of the immigration check-post or by registered post. No such mode has been adopted in this case.

* Although the impugned memorandum has not specified any reason for placing of the name of the petitioner on ECL but in view of Rule 2(1)(a to g), the circumstances and grounds are provided, which could be made basis for placing any body's name on the ECL and none of such consideration seems to have been considered by the Federal Government by placing the name of the petitioner on ECL.

* Article 15 of The Constitution of Islamic Republic of Pakistan, 1973, has provided a fundamental right to every citizen of Pakistan to remain in, and, subject to any reasonable restriction imposed by the law in the public interest, enter and move freely.

* The terms of the bond got furnished by the SUPARCO at the best could have been enforced but the authorities have no jurisdiction to deny such fundamental right of the petitioner enshrined under Articles 14 and 15 of the Constitution. In absence of any reasonable restriction imposed by law as it had been envisaged under such Articles of Constitution, the respondent authorities had in fact acted illegally by denying the Constitutional right of the petitioner. If at all, the parent department of the petitioner had any grievance, it could have approached the court of law and enforced the agreement of bond or claim any relief under civil litigation.

* No criminal action torturing an educated person, like the petitioner, in not allowing him to be boarded on the Plane at the instance of SUPARCO and keeping him in lock up could be justified.

* It is by now a settled position of law that where the Government proposed to place the name of any person on ECL and there were circumstances, which justified that such grounds were not to be disclosed in the public interest, then there had to be recorded findings giving justification for not disclosing reasons to withhold such grounds in public interest.

* In absence of any public interest, Government could not exercise any power to withhold the grounds, therefore, it is not unbridled authority of the Government to withhold reasons and grounds under any circumstances.

* From the tenor of the report furnished by the Federal Government, it is obvious that the name of the petitioner was placed on ECL by Ministry of Interior in an arbitrary and mechanical manner only on the basis of some recommendation by an unknown agency and there seems to be no independent application of mind by the competent Authority in Ministry of Interior. Such act on the part of the Federal Government is nothing but unfair and unreasonable, defeating the fundamental Constitutional rights of the petitioner.

10. The learned Deputy Attorney General as well as learned counsel representing SUPARCO, have mainly relied upon Section 3 of the Ordinance, providing a remedy by way of representation of review before the Federal Government and according to them, in presence of such remedy, the Constitutional petition directly filed, by challenging the order passed, under Section 2 of the Ordinance is not maintainable. Such arguments have no force, for, the review before the same authority, which passed the original order, is nothing but an

illusion. It is settled position that no one is permitted to be Judge of his own cause, therefore, the petitioner is held entitled to challenge the placement of his name on ECL by the Federal Government, by directly filing Constitutional petition before this Court.

11. Another objection as has been raised by the respondents, as to the maintainability of the Constitutional petition before this Court, is on the touchstone of the second proviso to section 9(2) of the National Command Authority Act, 2010, as according to the respondents, the petitioner being employee of SUPARCO, is subject to the provisions of Pakistan Army Act, 1952. Here, the respondents are again mistaken, for, referred proviso made applicable, to the employees in the service of "Authority". The "Authority" as defined in Section 2(a) is the National Command Authority constituted under Section 3 of the Ordinance. The 'Strategic Organization', which include the SUPARCO has been defined in section 2(d) of the National Command Authority Act, 2010, and same have never been subject to the Pakistan Army Act, 1952. As such the barring clause of Article 199 would not be available to the respondents to attack on the maintainability of the Constitutional petition before this Court by an employee of a strategic organization.

12. If any judgment is required in support of the above contentions of the petitioner, Higher Education Commission through Project Manager v. Sajid Anwar and others (2012 SCMR 186), 'Nazir Adenwala v. Islamic Republic of Pakistan through Secretary Ministry of Interior, Islamabad and 2 others' (PLD 2013 Sindh 186), 'Riaz Ahmed v. Government of Pakistan and others' (PLD 2014 Islamabad 29) and 'Wasatullah Jaffery) v. Ministry of Interior through Secretary, Federal Government of Pakistan and 4 others' (PLD 2014 Sindh 28), can be referred.

13. For what has been discussed above, this petition is allowed and the order issued by means of Memorandum No.12/290/ 2013-ECL, dated 25.09.2013, is declared as having been issued without lawful authority and no legal effect.

MH/S-83/L Petition allowed.

2017 Y L R Note 326
[Lahore (Multan Bench)]
Before Ibad-ur-Rehman Lodhi, J
MUHAMMAD YOUNIS and 3 others---Petitioners
Versus
The STATE and 2 others---Respondents

Criminal Revision No.139 of 2014, decided on 28th October, 2014.

Criminal Procedure Code (V of 1898)--

----S.173---Police Rules, 1934, R.25.57---Summoning of accused not named in Column Nos.2, 3, 4 of report under S.173, Cr.P.C.---Report under S.173, Cr.P.C., submitted before the Trial Court did not show name of accused persons in its Column Nos.2, 3 & 4, but in

view of the details given by the Investigating Agency regarding the occurrence, same was mentioned in Column No.7---Trial Court seized of the proceedings, ordered the summoning of accused persons mentioned in Column No.7 of the report under S.173, Cr.P.C.--- Accused persons, so summoned, had called in question the order of their summoning and contended that unless the names of accused persons, were noted in Column Nos.2, 3, 4 of the report under S.173, Cr.P.C., court had no jurisdiction to summon them to face the trial---Validity---When the cognizance, was taken by the court, it was to be taken as a whole; and court was not bound to take note of particular fact mentioned against a particular column; and to ignore, if the same fact had been noted against some other column, meant for providing of some other information by the Investigating Agency---Trial Court, after taking notice of the role of accused persons, as had been detailed in column No.7 of the final report under S.173, Cr.P.C., had rightly exercised its jurisdiction by summoning accused persons mentioned in column No.7 thereof and committed no illegality---In the absence of any illegality, irregularity or jurisdictional defect in the impugned order, which suffered from no defect; and had been passed while exercising jurisdiction available to the Trial Court was upheld. [Paras. 6, 7, 9, 13, 14, 15 & 16 of the judgment]

Raja Khushbakhtur Rehman and another v. The State 1985 SCMR 1314; Muhammad Yaqub v. The State PLD 1998 Lah. 523 and Muhammad Ikram v. The State and another 2012 PCr.LJ 1097 ref.

Sh. Jamshed Hayat for Petitioners.

Nazar Muhammad Fatiana for Respondent No.2.

Muhammad Abdul Wadood, Deputy Prosecutor General for the State.

ORDER

Criminal Miscellaneous No.570-M of 2014.

IBAD-UR-REHMAN LODHI, J.---Through this criminal miscellaneous, the orders dated 15.04.2014 17.05.2014, 21.05.2014 and 28.05.2014 are prayed for to be suspended.

2. Since in the Criminal Revision, the order dated 15.04.2014 has been challenged, therefore, the Criminal Miscellaneous with regard to orders subsequently passed is misconceived, whereas, with regard to order dated 15.04.2014, the interim order has already been passed by this Court on 02.06.2014.

3. This Criminal Miscellaneous is misconceived and is dismissed.

Criminal Miscellaneous No.672-M of 2014.

4. Through this Criminal Miscellaneous extension of injunctive order dated 02.06.2014 has been prayed for.

5. Since the main criminal revision is finally being argued today, therefore, extension in the injunctive order is irrelevant, hence, this Criminal Miscellaneous is dismissed.

Main Case (Criminal Revision No.139 of 2014)

6. The report under Section 173 Cr.P.C. was before the learned Additional Sessions Judge, Sahiwal containing no name of accused in Columns Nos.2, 3 and 4 thereof; but keeping in view the details given by the Investigating Agency regarding the occurrence, column No.7, which included the names of accused persons, the learned Additional Sessions Judge, seized of the proceedings ordered the summoning of the accused persons mentioned in column No.7 of the report under section 173, Cr.P.C. The accused persons, so summoned, have called in question the order of their summoning by means of the present criminal revision.

7. In support of this petition, the learned counsel for the petitioners contended that unless the names of accused persons in any criminal matter are noted in columns Nos.2, 3, and 4 of the report under section 173, Cr.P.C. the court has no jurisdiction to summon them to face the trial. According to the learned counsel for the petitioners; since the order of summoning is bad in law, therefore, all subsequent proceedings are liable to be vitiated.

8. Contrary to that while responding, learned counsel for the complainant has contended that the courts always take cognizance of the offence and not the offender and irrespective of the fact that the names of accused noted in columns Nos.2, 3 and 4 of the report under section 173, Cr,P.C. or anywhere else, the court was having ample jurisdiction to order summoning of accused persons.

9. After hearing the learned counsel for the parties and going through the record minutely, I am of the view that the learned Additional Session Judge has committed no illegality while ordered summoning of the accused persons whose names have been mentioned in column No.7 of the report under section 173, Cr.P.C.

10. Such question has been under consideration before the Courts earlier also and I can get guidance from the case law titled 'Raja Khushbakhtur Rehman and another v. The State' (1985 SCMR 1314), wherein it was held that the trial court takes cognizance of offence and not the offender, thus it was cognizance of case as a whole and not qua some of accused persons found by the police to be implicated in the case. Cognizance can be taken even if the offenders be unknown and on taking cognizance of the offence, Court acquires jurisdiction over all persons involved and not only over the persons against whom challan is submitted.

In the same judgment word 'cognizance' has been defined in the manner that it is a term of art implying application of mind to facts of a case in order to determine whether facts disclosed, constituted an offence triable-by a court or not.

11. This Court in the case of 'Muhammad Yaqub v. The State' (PLD 1998 Lahore 523) has held that when a case is sent up for trial to the Sessions Court with brief facts of the case stated in the column No.7 of the challan, Court is at liberty to summon any person appearing to be involved in commission of an offence irrespective of the fact whether his name finds mention in column No.2 or 3 of the challan or not. Similarly, in case titled 'Muhammad Ikram v. The State and another' (2012 PCr.LJ 1097) the view of this Court was that the Court of Sessions being trial court takes cognizance of an offence and not an offender and on taking cognizance of the offence, it acquired jurisdiction over all persons involved and

not only over persons against whom challan was submitted. 12. The Police Rules, 1934, provide the details as to in what manner the Department of Police is required to proceed in its sphere of work. Volume III Chapter XXV of the said Rules deals with the investigation and Rule 25.57 provides as to in which manner the final investigation report is required to be prepared and furnished before the Court. Form No.25.57(2) is the Performa provided for Investigating Officer according to which he is required to furnish the final report under section 173 Cr.P.C. For ready reference, Form is reproduced herein below:--

FORM No.25.57(2)
FINAL REPORT UNDER
SECTION 173,
CRIMINAL PROCEDURE CODE
District_____ Final Report No._____ dated____19

Police Station_____ in first information No.____

dated_____ 19

1. Name and address of complainant or informant.

2. Nature of charge or complaint.

3. Description of property stolen, if any

4. Name and addresses of accused persons, if any

5. If arrested, date and hour of arrest.

6. Date and hour of release and whether on bail or recognizance.

7. Property (including weapons) found, with particulars of where, when by whom, found and whether forwarded to Magistrate.

8. Brief description of information or complaint, action taken by police with result, and reasons for not proceeding further with investigation.

A.M.

Despatched at_____ on ____ 19

P.M.

Signature of Investigation Officer

N.B.-The Magistrate should record his order on the back.

It is clear that the police rules and forms appended therewith are provided for convenience purpose and are not of mandatory in nature. In fact, it is required by the Investigation Officer to place before the court complete information as to the name and address of the complainant or informant, nature of charge or complaint, description of property stolen, if any, name and addresses of accused persons, if any, if arrested, date and hour tf arrest, date

and hour of release and whether they are on bail or not, property (including weapons) found, with particulars of where, when and by whom, found and brief description of information or complaint, action taken by .police with result, and reasons for not proceeding further with investigation.

13. As noted earlier, the court taking cognizance of the matter would not be debarred from taking note of any fact mentioned in either column of form No.25.75(2). When the cognizance is taken by the Court, it is to be taken as a whole and court must not bound to take note of a particular fact mentioned against a particular column and to ignore if some fact has been noted against some other column meant for providing of some other information by the investigating agency.

14. It is the final report under section 173, Cr.P.C. in whatever manner it is filed before the court, which is to be taken into consideration as a whole by the Court ignoring as to what has been noted against respective columns of the said form.

15. In the present case, when the learned Additional Sessions Judge after taking notice of the role of the accused persons as has been detailed in column No.7 of the final report has rightly exercised his jurisdiction by summoning the accused mentioned in column No.7 thereof.

16. The learned counsel for the petitioner has failed to point out any illegality, irregularity or jurisdictional defect in the order impugned herein, which suffers from no defect and has been passed while exercising the jurisdiction available to the learned Additional Sessions Judge, thus finding no force in this petition, the same is dismissed.

HBT/M-25/L Petition dismissed.

2017 Y L R 1497
[Lahore (Rawalpindi Bench)]
Before Ibad-ur-Rehman Lodhi, J
FAROOQ MEHNDI---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.206-B of 2017, decided on 15th February, 2017.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302 & 34---Qatl-i-amd, common intention---Bail, grant of---Although the presence of accused at the crime scene along with a pistol had been alleged in First Information Report, but except his such presence no overt act had been attributed to him---Co-accused was attributed the role of raising a lalkara had been allowed bail by High Court---Such release of co-accused had never been challenged by the complainant side or the State---Alleged role of accused in the reported crime was less than that of co-accused and case of accused, thus, for his release on post arrest bail was on better footing than that of the earlier released co-accused---Accused was behind the bars since

28.06.2016 and present detention, in such circumstances, would be nothing but a pre-trial punishment which was not the intention of law---Bail was granted accordingly.

Zeeshan Riaz Cheema, for Petitioner.

Naveed Ahmed Warraich, Deputy District Public Prosecutor for the State with Risalat, Sub-Inspector with record.

Complainant in person.

ORDER

IBAD-UR-REHMAN LODHI, J.---Farooq Mehndi-petitioner seeks post arrest bail in case FIR No.303, dated 10.04.2016 offence under Section 302 read with Section 34, P.P.C. registered at Police Station Airport, District Rawalpindi.

2. Mst. Aziza Bibi-complainant, on appearance, seeks time to engage a counsel and then to instruct him to represent her in this matter. On probe, she has candidly admitted that she has already engaged a lawyer in order to represent her in the case and, in fact, said lawyer has instructed her to get an adjournment for his appearance on the next date of hearing.

3. This has become almost a routine in all criminal matters, particularly, the petitions for release of some under trial prisoner on post arrest bail that on one date of hearing the complainant appears in person and gets time to engage a counsel and on the next date of hearing a counsel appears with the submission that since he has recently been engaged, he be given some time for preparation of the matter. In such like manner a petition which has to be decided, at the most, by adjourning the same, for one or two occasions takes practically quite a number of adjournments for its conclusion. In cases registered through FIRs, it is, in fact, the responsibility of the State to prosecute the stance of the complainant side and in view of the provisions of Section 493 of Criminal Procedure Code, 1898, it is the Public Prosecutor, who is supposed to plead in all the Courts, for prosecution and even if a pleader is privately engaged to look after the interest of the complainant, he would only be competent to render assistance to the learned Public Prosecutor and nothing else. If the complainant of the case is interested in independent representation of his cause, he may avail such opportunity by filing a private complaint and in that event the privately engaged counsel would have every competence to represent the complainant independently.

4. Learned Deputy District Public Prosecutor for the State is present and he is not in need of any assistance to be provided by the learned counsel for the complainant, hence, the petition is directed to be argued by learned counsel for the petitioner as well as learned Deputy District Public Prosecutor for the State.

5. Although the presence of the present petitioner at the crime scene along with a pistol has been alleged in the First Information Report, but except his such presence no overt act has been attributed against him.

6. A co-accused of the petitioner, namely, Amir Altaf, who was attributed the role of raising a lalkara, was allowed bail by this Court on 30.08.2016 in Criminal Miscellaneous No.1527-B of 2016. Such release of Amir Altaf has never been challenged by the complainant side or the

State. The alleged role of the present petitioner in the reported crime is less than that of Amir Altaf noted above and case of the petitioner, thus, for his release on post arrest bail is on better footing than that of the earlier released co-accused of the petitioner. The petitioner is behind the bars since 28.06.2016 and present detention, in such circumstances, would be nothing but a pre-trial punishment, which is not the intention of law.

7. Resultantly, this application is allowed and the petitioner is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.5,00,000/- (rupees five lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

WA/F-5/L Bail granted.

2017 Y L R 2111
[Lahore (Rawalpindi Bench)]
Before Ibad-ur-Rehman Lodhi, J
IFTIKHAR ALI MALIK and 3 others---Petitioners
Versus
GOVERNMENT OF PAKISTAN, MINISTRY OF DEFENCE through Secretary Defence, Rawalpindi and 3 others---Respondents

Writ Petition No.1479 of 2012, heard on 9th January, 2017.

Cantonments Land Administration Rules, 1937---

----Sched. IX-C---Lease deed, conversion of---Grievance of petitioners was that they applied to the authorities for grant of commercial leases in year, 2007, therefore, they had to be charged for such premium and other charges in view of the policy---Validity---Cantonment Board had sanctioned site-plan for commercial building in favour of petitioner vide resolution dated 23-6-2006 and subsequent thereto, the building had been erected and the same was being charged for the purposes of property tax by Cantonment authorities---High Court set aside orders in question as demand of excessive amount by authorities was declared illegal and without lawful authority---Authorities were directed to proceed accordingly and final order be passed within next 30 days positively for conversion of old grant lease into regular lease in Sched. IX-C of Cantonment Land Administration Rules, 1937 for commercial purposes, as requisite amount was already deposited by petitioners with Cantonment Board---Constitutional petition was allowed accordingly.

Sh. Zamir Hussain for Petitioners (in W.P. No.1480 of 2012).
Mujeeb-ur-Rehman Kiani for Petitioner (in W.P. No.3320 of 2012).
Ch. Muhammad Masroof, Standing Counsel for Federation of Pakistan.
Ch. Muhammad Yaqoob, Cantonment Board for Respondents.
Date of hearing: 9th January, 2017.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---By means of this single order, I intend to dispose of this petition and Writ Petition No.1480 of 2012 filed by the present petitioners and also W.P.

No.3320 of 2012 filed by Muhammad Sadiq, as the petitioners have challenged the impugned demand raised by the respondents' authorities regarding conversion of lease vide letters dated 04.01.2012 and 25.10.2012.

2. With the consent of learned counsel for the parties, the hearing of this petition and all referred petitions is being treated as pacca one.

3. The present petitioners are in possession of properties Nos.230 and 231, Survey No.162/848 and 223 and 233, Survey No.162/849, whereas Muhammad Sadiq petitioner in W.P. No.3320/2012 is in possession of residential plot No.2, Survey No.431/2.

Iftikhar Ali Malik etc./present petitioners on the basis of revised policy of Government of Pakistan in the year 2007 vide letter No.3/6/D-12(ML&C)/97-2007, dated 31.12.2007 have applied the Cantonment Board, Rawalpindi for conversion of their properties held on old grant lease into regular lease in Schedule IX-C of The Cantonment Land Administration Rules, 1937 (C.L.A.) for commercial purposes. On the other hand, Muhammad Sadiq petitioner in W.P. No.3320/2012 with respect of his property has applied the Cantonment Board for conversion of lease from Schedule VIII to Schedule IX-C of The Cantonment Land Administration Rules, 1937 from residential to commercial purpose. The Cantonment Board, Rawalpindi has accorded sanction in all the applications of the petitioners vide impugned letters dated 04.01.2012 and 25.10.2012 with certain conditions including payment of premium, surcharge, development charges and annual ground rent, which were calculated in view of the policy revised in the year 2012.

4. The case of the present petitioners is that since they have applied to the respondent authorities for grant of commercial leases in the year 2007, therefore, they have to be charged for such premium and other charges in view of the policy, which was in vogue in the year 2007.

5. Learned counsel for respondents' Board and learned Standing Counsel appearing for Military Estates Officer, Rawalpindi both have submitted that the petitioners have applied the Board for conversion of their properly use in the year 2007, whereas revised clauses in policy of 2007 for conversion of properties held on old grant/Cantt code leases into regular leases under the CLA Rules 1937 and conversion/change of purpose of regular leases into fresh leases was promulgated on 12.01.2011. After giving the date of promulgation of such revised policy, learned counsel representing the Board has submitted that since on the date, when originally the petitioners have applied the Board for conversion, no such policy was in existence, therefore, the provisions as were revised in year 2011 were to be applied in the cases of petitioners, but not at the rates, which were originally provided on 31.12.2007. It is also the version of the Cantt Board that in fact final sanction was granted to the petitioners in the year 2012 and the rates prevailed in the said year in view of the revised policy were to be charged from the petitioners.

6. In a case of similar background, the Hon'ble Supreme Court of Pakistan in case titled "City District Government, Karachi v. Muhammad Irfan and others" (2010 SCMR 1186), has found as under:--

"5. As in instant case respondents have submitted application for conversion of land use much prior to issuance of the new policy, which now has been framed, therefore, the respondents shall be liable to pay the charges which were prevailing at the time when application for seeking permission was submitted by them and the learned High Court vide order dated 21st April, 2004 has rightly invoked above principle of law in instant case."

Similarly, a Division Bench of Sindh High Court in case titled "Works Co-Operative Housing Society, Karachi and another v. The Karachi Development Authority" (PLD 1978 Karachi 529), has observed in the following manner:--

"Housing Scheme---Development charge---Supreme Court in previous proceedings relating to same case directing that respondent do honour commitments made by Central and Provincial Governments to petitioner-Society and allot them land as expressed in notification dated 9th June 1964---Order of Supreme Court, held, must be implemented in light of rates and charges prevalent on 9th June 1964 and respondents not entitled to higher rates determined subsequently."

While dealing with the same question involved in this matter, this Court in case titled "Syed Ali Shah v. Government of Pakistan through Ministry of Defence and 2 others" (1994 CLC 369), has held that:--

"---Sched. X (Modified)---Estoppel--Promissory estoppels--- Appli-cability--Petitioner's application for seeking division of property in question, into commercial plots was granted at the rate specified in the order conveyed to petitioner---Petitioner depositing amount in question---Subsequently Authority issuing official order conveying grant of permission of commercialization of such property at an enhanced rate---Validity---Petitioner had applied for division of property into commercial plot in 1984 and as per initial demand notice he had deposited required amount---Official order was delayed due to inter-departmental conflict and during such conflict, rate for commercialization of plot had considerably increased---Ultimately in 1991, sanction was granted and new enhanced rates were demanded---Petitioner having applied in 1984 and initial demand having been made before enhancement of such rate (in 1989), petitioner was entitled to the grant of division/commercialization of his property at the rate which was prevailing at the time he made such application and deposited the amount as per demand of Authority before enhanced rates were enforced in 1989---Charging of price at the enhanced rate merely for the reason that formal order had been passed/issued in 1991 due to the lapse on part of Authority would not entitle it to charge at the enhanced rate subsequently enforced---Petitioner having deposited amount of initial premium as per demand of Authority he could not be burdened with enhanced rates subsequently enforced, on the principle of promissory estoppels whereby respondent could not charge enhanced rates."

It is interesting to note that the Cantonment Board, Rawalpindi has sanctioned site plan for commercial building in favour of Muhammad Sadiq-petitioner of W.P. No.3320/2012 vide resolution No.59(112/A), dated 23.06.2006 and subsequent thereto, the building has

been erected and the same is being charged for the purpose of property tax by the Cantonment authorities.

Hence, in view of above precedents, the demand excessive to the rates, as were originally introduced on 31.12.2007 are held as unauthorized and excessive to the rates being claimed by the respondent authorities.

7. It is also evident from the record that on 29.06.2012, in this petition and in the connected W. P. No. 1480/2012, whereas on 21.12.2012, in W.P. No.3320/ 2012, the operation of impugned orders dated 04.01.2012 and 25.10.2012 were suspended subject to deposit of lease money at the rate of the year 2007 with the respondent-Board. The record further reveals that the present petitioners have deposited the directed amount in this petition and W.P. No.1480/2012 on 04.09.2012.

It also transpired from record that Muhammad Sadiq petitioner in W.P. No.3320/2012 could not deposit the directed amount within stipulated period, whereupon he moved C.M. No.163 of 2013 praying for a direction to the Military Estate Officer/Board to receive the amount in view of the order passed by this Court on 21.12.2012 along with an application moved by the petitioner before the office of Military Estates Officer, Rawalpindi Circle, Rawalpindi Cantt, which was received in the latter's office against diary No.1827 on 31.12.2012. The respondents are under notice in the said C.M.

According to learned counsel for the petitioner, the said application of the petitioner has not so far been disposed of in any manner by the Military Estates Officer. The non-disposal of such application of the petitioner is confirmed by the learned Standing Counsel. As such, the Military Estates Officer-respondent is directed to receive the due amount according to the rates prevailing in the year 2007 from the petitioner within next 30-days.

8. The demand of excessive amount by the respondent authorities is declared illegal and without lawful authority and the impugned orders dated 04.01.2012 and 25.10.2012 are set aside.

9. Since the requisite amount has already been deposited by the petitioners in this petition and in connected W.P. No.1480/2012 with the respondent's Board, therefore, the respondents are directed to proceed accordingly and final order be passed within next 30-days positively for conversion of their properties held on old grant lease into regular lease in Schedule IX-C of The Cantonment Land Administration Rules, 1937 for commercial purposes, whereas in W.P. No.3320 of 2012, when the directed amount by the petitioner to the respondents is deposited within 30-days, the petitioner in that petition be extended same relief, as is granted in W.Ps. Nos. 1479 and 1480 of 2012 for conversion of lease of his property from Schedule VIII to Schedule IX-C of The Cantonment Land Administration Rules, 1937 from residential to commercial.

10. With these observations, all the Constitutional petitions are allowed.

MH/I-3/L Petition allowed.

2017 Y L R 2194
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
CHIEF ADMINISTRATOR OF AUQAF PUNJAB, LAHORE---Appellant
Versus
MUHAMMAD AMIN---Respondent

F.A.O. No.68 of 2000, heard on 1st December, 2016.

(a) Punjab Waqf Properties Ordinance (XXVIII of 1961)---

----Ss. 6 & 7---Punjab General Clauses Act (VI of 1956), S. 2 (41)---Acquisition of property as waqf property---Notification not published in the Official Gazette---Effect---Petition against declaring the property as waqf property was filed which was accepted---Validity---Notification in question was not published in the Official Gazette at the relevant time rather published on 06-01-1993---Proposed notification issued by the department on 23-08-1992 was having no legal value and same could not be enforced through any judicial proceedings as before the publication, same had no substance---Claim of petitioner before the District Judge by challenging notification dated 23-08-1992 could not be adjudicated upon by a Court of law---No relief was available to the petitioner with reference to the notification published in the year 1993 in the Official Gazette---Trial Court had not only set aside the notification dated 23-08-1992 but also subsequent notification published in the Official Gazette on 06-01-1993---Relief qua notification dated 06-01-1993 was an excessive relief than that of one claimed by the petitioner in his petition---Impugned order to such extent was result of illegality and in excess of jurisdiction---Petition moved before the District Judge was declared to be defective one and no proceedings were required to be initiated on such petition---Findings recorded by the Trial Court were based on erroneous consideration which were not sustainable in the eye of law and same were set aside---Petition filed by the petitioner before the District Judge was dismissed---Appeal was allowed in circumstances.

(b) Notification---

----Notification not published in the Official Gazette had no legal sanctity.

Muhammad Suleman and others v. Abdul Ghani PLD 1978 SC 190 and Government of the Punjab, Food Department through Secretary Food and another v. Messrs United Sugar Mills Ltd., and another 2008 SCMR 1148 rel.

Ihsan Sabri Chaudhary for Appellant.

Ch. Abdul Salam for Respondent.

Date of hearing: 1st December, 2016.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The present respondent has challenged the validity of Notification No.SOP-II-3(39)A/ 92, dated 23.08.1992 issued by the present appellant, whereby he took over the control and management of property Khanqah Sharif Kheway Wali by declaring the same as Waqf property, by means of an application under Section 7 of

The West Pakistan Waqf Properties Ordinance, 1961, which was decided by the learned Additional District Judge, Faisalabad vide impugned decision dated 22.01.2000.

2. The present appellant has challenged such findings in this appeal, which earlier was dismissed for non-prosecution on 29.11.2006 and for its restoration; the appellant has moved C.M. No.01-C of 2008, which was also dismissed for non-prosecution on 24.05.2010. Thereafter, the appellant has moved another C.M. No.1240-C of 2010 for restoration of earlier dismissed C.M., which was dismissed by this Court vide order dated 05.10.2010.

Feeling aggrieved, the appellant has moved Civil Petition No.2052-L of 2010 before the Hon'ble Supreme Court of Pakistan, where, after converting the Civil Petition into appeal, the same was allowed by setting aside order dated 05.10.2010 passed by this Court on the consenting statement of respondent's son appearing in the said petition and this appeal was remanded to this Court for its decision.

3. Section 6 of The West Pakistan Waqf Properties Ordinance, 1961 empowers the Chief Administrator of Auqaf to take over waqf property by "notification". For ready reference, the same is reproduced herein below:--

> "(1) Notwithstanding anything to the contrary contained in Section 22 of the Religious Endowments Act, 1863, or any other law for the time being in force, or in any custom or usage, or in any decree, judgment or order of any Court or other authority or in any proceeding pending before any Court or other authority, the Chief Administrator may, by notification, take over and assume the administration, control, management and maintenance of a Waqf property."

The term 'notification' used in the above Section is defined in section 2(41) of West Pakistan General Clauses Act, 1956 (VI of 1956) in the following manner:--

> "Notification shall mean a notification published under proper authority in the Official Gazette.

The above definition of "notification" has also been interpreted by the Hon'ble Supreme Court of Pakistan in the same manner in case titled "Muhammad Suleman and others v. Abdul Ghani" (PLD 1978 Supreme Court 190).

Hence, it is clear from the above definition and law laid down by the Hon'ble Supreme Court of Pakistan that a notified order or notification, which is not published in the Official Gazette, has no legal sanctity.

Admittedly, the respondent has challenged the Notification No.SOP-II-3(39)A/92, dated 23.08.1992 (Exh.P-6) in his petition, which was not published in the Official Gazette at the relevant time, rather the same was published in Official Gazette on 06.01.1993 through Exh.P-5. Hence, the proposed notification issued by the Department on 23.08.1992 (Exh.P-6) was having no legal value and the same cannot be enforced through any judicial proceedings for the reason that before publication in Official Gazette, the same was of no substance. As such, the claim of the petitioner before the District Judge by challenging only Notification dated 23.08.1992 (Exh.P-5) was not adjudicate-able by a Court of law.

I am fortified in my this view from the kind guidelines provided by the Hon'ble Supreme Court of Pakistan in case titled "Government of The Punjab, Food Department through Secretary Food and another v. Messrs United Sugar Mills Ltd. and another" (2008 SCMR 1148). In the said judgment, the Hon'ble Supreme Court of Pakistan has observed as under:--

> "---S.3(1)---West Pakistan General Clauses Act (VI of 1956), S.2(41)---Control, supply, distribution, disposal of foodstuffs by notified order---Scope---Notified order---Connotation---Notified order would mean notification through publication in official Gazette and not by passing an order and keeping same in office of department concerned---Notifica-tion not published in official Gazette would be invalid---Notified declaration could take effect from date of publication in Gazette and not from any prior date."

4. As the respondent has only called in question notification dated 23.08.1992 (Exh.P-6), which in fact was the proposed notification to be published in Official Gazette, but at no stage of time, the original petition was got amended by adding challenge to notification dated 06.01.1993 (Exh.P-5), no relief was possibly available to respondent with reference to said notification published in Official Gazette, however, strangely the learned Additional District Judge, Faisalabad, while passing the impugned judgment, has proceeded not only to set aside the notification dated 23.08.1992, but also subsequent notification published in Official Gazette on 06.01.1993. The relief qua notification dated 06.01.1993 is definitely an excessive relief than that of one claimed by the petitioner in his petition. To such extent, the order of the learned Additional District Judge, Faisalabad is result of illegality and in excess of jurisdiction.

5. The petition moved by the respondent before the learned District Judge is declared to be defective one and no proceedings were required to be initiated on such petition, wherein notification published in Official Gazette was never called in question. The findings arrived at by the learned trial court is based on erroneous consideration, which are not sustainable in the eye of law and the same are set aside.

6. Resultantly, this appeal succeeds and the same is allowed in view of above findings and the petition filed by the present respondent before the learned District Judge, Faisalabad stands dismissed.

ZC/C-7/L Appeal allowed.

PLJ 2017 Lahore 79

***Present*: IBAD-UR-REHMAN LODHI, J.**

MAQSOOD ALAM and others--Petitioners

versus

SHAHBAZ ALI and others--Respondents

C.R. No. 1919 of 2009, decided on 18.10.2016.

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Arts. 17 & 79--Document--Marginal witnesses--Mandatorily to appear in evidence--In absence of marginal witnesses of alleged agreement, even no secondary evidence was led by plaintiff--Moreover, scribe of agreement was not produced to prove such document--Even plaintiff/executant of alleged agreement did not bother to appear in witness box and on his behalf, his son/special attorney has deposed--No doubt, plaintiff could appoint an attorney to pursue suit, but being an executant of alleged agreement, his personal act would be required to be proved by him through his own statement and an attorney would not be substitute of plaintiff, as statement of attorney is based on hearsay evidence. [P. 81] A

Unilateral agreement--

----Scope--Not bear signature, hence, such agreements have no legal sanction. [P. 82] B

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Civil revision--Suit for confirmation of possession through specific performance of agreement--Loan was obtained with condition that if defendant could not return and agreement will be treated as sole agreement--Suit was filed after about 30 years of execution of alleged agreement, dismissed--Validity--Alleged agreements are fake and fictitious, whereas general power of attorneys were obtained from legal heirs by plaintiff by way of fraud on pretext of transferring disputed house in their names from department--Even no illegality or irregularity has been found in impugned judgments warranting interference by High Court in its revisional jurisdiction. [Pp. 83 & 84] C & D

Syed Nisar Ali Shah, Advocate for Petitioners.

M/s. Muhammad Rafique Ch.-I and Ch. Muhammad Imran Bhatti, Advocate for Respondents No. 1 to 4.

Date of hearing: 18.10.2016.

ORDER

The suit for confirmation of possession through specific performance of agreements filed by Khushi Muhammad predecessor-in-interest of present petitioners has concurrently been dismissed by the learned Courts below, firstly by the learned trial Court on 22.10.2004 and then by the learned first appellate Court on 09.06.2008, when appeal filed against dismissal of suit was dismissed.

2. Through the referred suit, Khushi Muhammad predecessor-in-interest of present petitioners had sought performance of four agreements allegedly executed between the parties. The first agreement was executed between Khushi Muhammad plaintiff/predecessor-in-interest of present petitioners and Subah Sadiq predecessor-in-interest of defendants/respondents on 05.09.1964, whereby Subah Sadiq had obtained Rs.

18,000/- from plaintiff as loan on interest with the condition that if within three months, he could not return the said amount, the house in question will be sold to plaintiff and the agreement will be treated as sale agreement and in this regard, he also executed pronote in his favour. The plaintiff alleged that Subah Sadiq predecessor-in-interest of defendants/ respondents could not return the loan within stipulated period, whereupon he handed over possession of house to the plaintiff. The plaintiff has further alleged that he paid Rs. 2 lacs further to the defendants/respondents on their demand for transfer of house in question in his favour and in this respect, agreements dated 10.07.1994, 18.07.1994 and 20.07.1994 were executed between the plaintiff and defendants/legal heirs of Subah Sadiq. Later on, the defendants refused to get transferred the house in question in favour of the plaintiff.

3. As regard agreement dated 05.09.1964, it is observed that the said agreement is basic one, as whole case of the plaintiff is based upon this agreement. The marginal witnesses of said agreement were Aziz-ur-Rehman and Muhammad Rasheed, but they were not produced in the witness box. PW-5 Rana Abid Hussain son/special attorney of plaintiff deposed that Muhammad Rasheed was unknown, whereas second marginal witness Aziz-ur-Rehman had passed away.

In view of Article 17 of The Qanun-e-Shahadat Order, 1984, in order to prove such like document, at least two marginal witnesses are required mandatorily to appear in evidence and where such evidence is not produced, the document in view of Article 79 of said Order is not permitted to be taken into consideration as a piece of evidence.

In case titled *"Farzand Ali and another versus Khuda Bakhsh and others"* (PLD 2015 Supreme Court 187), the Hon'ble Supreme Court of Pakistan has held as under:

> "Considering the proposition if the agreement of the appellants was required to be proved by the examination of two attesting witnesses, it is settled law that an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is sine qua non for the validity of the agreement. For the purposes of proof of such agreement, it is mandatory that two attesting witnesses must be examined by the party to the lis as per Article 79 of the Order ibid."

It is pertinent to mention that in absence of marginal witnesses of alleged agreement, even no secondary evidence was led by the plaintiff. Moreover, the scribe of said agreement was not produced to prove such document. Even the plaintiff/executant of alleged agreement did not bother to appear in the witness box and on his behalf, his son/special attorney has deposed. No doubt, the plaintiff could appoint an attorney to pursue suit, but being an executant of alleged agreement, his personal act would be required to be proved by him through his own statement and an attorney would not be substitute of plaintiff, as statement of attorney is based on hearsay evidence.

It is also evident from the record that the plaintiff had not instituted the suit for specific performance of agreement in the lifetime of Subah Sadiq, who had died in the year 1974, rather he had filed the suit on 11.06.1995 after about 30-years of execution of alleged agreement and this fact was candidly admitted by PW-5 during cross-examination.

PW-5 Rana Abid Hussain real son/special attorney of plaintiff Khushi Muhammad during cross-examination deposed that agreement dated 05.09.1964 was reduced in writing before him. He further deposed that the amount was paid by Khushi Muhammad and at that time, he was also present there. The record reveals that PW-5, while recording his statement on 11.04.2002, has got mentioned his age as 44 years, whereas the alleged agreement was executed on 05.09.1964, meaning thereby that at the time of execution of agreement, he was six years old and naturally being minor, he was not mature at the relevant time, hence, his statement is not believable.

4. So far as the remaining agreements dated 10.07.1994, 18.07.1994 and 20.07.1994 are concerned, the execution of such agreements and further payment of Rs. 2 lacs to legal heirs of deceased Subah Sadiq/defendants are beyond understanding, as when the plaintiff has categorically alleged that in compliance of earlier agreement dated 05.09.1964, Subah Sadiq predecessor-in-interest of the defendants had given possession of the disputed house to him, then why he could not get executed said agreement or transferred the suit property in his favour during lifetime of Subah Sadiq.

PW-1 Naimat Ali scribe and Basharat Ali marginal witness of such agreements (Exh.P-1 to Exh.P-3) during cross-examination candidly admitted that payment was not made before them. On the other hand, other marginal witnesses of said agreements PW-3 Muhammad Riaz and PW-5 Rana Abid Hussain have deposed that such payment was made in their presence. PW-5 during cross-examination candidly admitted that no receipt was taken from Razia Begum regarding such payment.

Exh.P-1 to Exh.P-3 are unilateral, agreements, as it did not bear the signature of Khushi Muhammad plaintiff, hence, such agreements have no legal sanction. In *Farzand Ali's case supra,* the hon'ble Supreme Court of Pakistan has observed as under:

> "The first, and the foremost requisite of a contract (agreement) is that the parties should have reached agreement, which unmistakably means, that an agreement is founded upon offer and acceptance. Thus for the purposes of a valid contract (agreement) there should be the meeting of minds of the contracting parties (who are competent in, law to contract). And where a contract is reduced into writing, not only should it be founded upon the imperative elements of offer and acceptance, but its proof is also dependent upon the execution of the contract by both the contracting parties i.e. by signing or affixing their thumb impression. So that it should reflect and establish their "consensus Advocate idem", which obviously is the inherent and basic element of the meeting of the minds, which connotes the mutuality of assent, and reflects and proves the intention of the parties thereto. In particular, it refers to the situation where there is a common understanding of the parties in the formation of the contract in the absence of which there is neither a concept nor the possibility of a valid contract. But in this case this is conspicuously lacking by virtue of non-execution (non-signing) of the agreement by the vendee/appellants, therefore, in law and fact it is no contract (agreement)."

5. The petitioners/defendants have controverted the stance of the plaintiff by alleging that Subah Sadiq predecessor-in-interest of petitioners had friendship with Khushi Muhammad and the disputed house was given to Khushi Muhammad on rent on the basis of good relations. They further alleged that the alleged agreements are fake and fictitious,

whereas general power of attorneys were obtained from legal heirs of Subah Sadiq by the plaintiff by way of fraud on the pretext of transferring the disputed house in their names from the concerned Department.

Admittedly, the disputed house was owned by Subah Sadiq. The friendship of Subah Sadiq with the plaintiff is admitted by PW-3 Muhammad Riaz during cross-examination. He further showed his ignorance of the fact as to in what capacity, the plaintiff was residing in the house of Subah Sadiq. DW-1 Shaukat Ali real brother of Subah Sadiq during cross-examination to a specific question put by learned counsel for the plaintiffs has deposed as under:

''مدعی نے نا جائز فائدہ یہ اٹھایا ہے کہ مدعا علیہم سے کہا کہ ان کے نام مکان منتقل کرا دیں گے۔''

DW-2 Muhammad Ahmad during cross-examination has deposed that rent of disputed house was settled in his presence and in presence of wife and son of Subah Sadiq. Regarding execution of general power of attorney, said witness during cross-examination deposed as under:

''میں نے کوئی کاغذ نہ دیکھا ہے جو کہ صبح صادق نے کسی کے حق میں تحریر کیا ہو۔ از خود کہا کہ صبح صادق نے مختار نامہ عام خوشی محمد کو دیا تھا کہ وہ مکان ان کے نام کروا دے گا۔''

It is evident from the record that such version of the defendants was not denied by the plaintiffs during cross-examination by putting single suggestion to any of the witness.

6. The Courts below have rightly appreciated the evidence available on record in its true perspective and have rightly proceeded to dismiss the suit of the petitioners. Even no illegality or irregularity has been found in the impugned judgments warranting interference by this Court in its revisional jurisdiction.

7. Resultantly, finding no force, this civil revision petition is dismissed.

(R.A.) Petition dismissed.

PLJ 2017 Lahore 644
[Rawalpindi Bench Rawalpindi]
Present: **IBAD-UR-REHMAN LODHI, J.**
MUBASHAR IFTIKHAR--Petitioner
versus
GOVERNMENT OF PUNJAB and others--Respondents

W.P. No. 672 of 2016, decided on 21.2.2017.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Posts of lecturer--Written test--Merit list--Additional marks were not awarded--Entitled of--Validity period of merit list--After expiry of period, provision of substitutes was refused--If he was awarded five addlmarks on completion of duty as CTI and as result of wrong tabulation by depriving from marks--Process of written test and interview for getting job of lecturer--Validity--Entitled to get additional five marks for his experience as CTI, then benefit of such marks must have been presumed with effect from very initial date, when process for appointment to posts of lecturer (male) started and also for another reason that benefit of additional five marks was directed not to be extended in favourof petitioner for future job opportunity--

Appointment to would be given effect as a result of process started and thus, grant of five additional marks to the petitioner would be having the effect on already started process, but it would not be treated as having some consequential effect for future job opportunity. [Pp. 647] A, B & C

Ch. Zubair Sarfraz, Advocate for Petitioner.
Mr. Shahid Mehmood Abbasi, Additional Advocate-General Punjab for Respondents.
Date of hearing: 21.2.2017.

ORDER

Punjab Public Service Commission invited the applications from suitable candidates *inter alia* for 19 posts of Lecturer Geography (male) and the petitioner was one of the candidates, who applied for the said job. The written test was held for the said job on 24.09.2011 and the petitioner was included in those 96 candidates, who were provisionally cleared for the next step *i.e.* interview. After interview, on the basis of merit list prepared, the candidates fall from Serial No. 1 to 19 in the said list, were offered jobs of Lecturers in Geography. The petitioner, however, was shown at Serial No. 30 of the said merit list.

The petitioner feeling deprived on account of the reason that he was not awarded five additional marks for which, he was entitled after having been served as College Teaching Intern (CTI) in Government College, Jhelum and in case, such five marks are added in his obtained marks, he would have been accelerated in his merit position and would be succeeded in getting merit position at Serial No. 20 and for another reason that candidates shown at Serial No. 3 and 11 of the merit list never joined the duties, therefore, in order to fill 19 vacancies, the candidates obtained the positions at Serial No. 20 and 21 of the merit list were to be offered the jobs being next seniors, the petitioner had earlier filed Writ Petition No. 2560 of 2012 on 03.05.2012, which was taken up by a learned Single Judge of this Court on 15.04.2015 and was disposed of by means of the following order:--

> "After arguing the case at certain length, learned counsel for the petitioner states that petitioner is satisfied if a direction is issued to Respondent No. 1 (Secretary Education) to redress the grievance of the petitioner.
>
> 2. The request of the learned counsel for the petitioner is justifiable. I am inclined to transmit a copy of this petition alongwith its all annexures to Respondent No. 1, who shall treat it as a part of pending application of the petitioner and will decide the same strictly in accordance with law as per prescribed procedure through a well reasoned order after hearing all necessary parties within a period of one-month after receipt of this order.
>
> 3. With the above direction, this petition is disposed of.
>
> 4. Compliance report shall be submitted to the Deputy Registrar (Judicial) of this Court."

The Secretary in Higher Education Department, Government of Punjab in compliance of above direction has decided the issue *vide* order dated 27.10.2015 and rejected the representation of the petitioner.

The petitioner still feeling aggrieved sought a review of the said rejection of his representation and the Secretary, Higher Education Department in Government of Punjab

vide order dated 20.01.2016 accepted such review petition and granted five additional marks to the petitioner for having experience of CTI. However, some handwritten portion was added in the said review order to the effect that acceptance of the review petition would not create any liability vis-à-vis the Higher Education Department Punjab in terms of a future job opportunity.

After acceptance of his review application, which was never further challenged by either of the respondents, the petitioner approached the respondent department in order to get a job of Lecturer in Geography, but such request has not been acceded to mainly for the reason that earlier when the Administrative Department requested Punjab Public Service Commission for providing the substitutes of two posts of Lecturer Geography (male), the same was turned down by the Commission for the simple reason that the validity period of merit list *i.e.* one year from the date of issuance of recommendations stood expired on 11.12.2012, therefore, after expiry of such period, the provision of substitutes was refused and such earlier refusal by the Commission was made basis of the subsequent refusal on the part of the Department notwithstanding the fact that after obtaining five additional marks as a result of the acceptance of review petition of the petitioner by the Secretary, Higher Education Department, the petitioner improved his position in the merit list and he was placed at Serial No. 20 thereof.

2. The petitioner was entitled to be placed at Serial No. 20 of the originally prepared merit list, if he was awarded five additional marks on completion of his duty as CTI and as a result of wrong tabulation on the part of respondents by depriving the petitioner from such marks, he was placed at Serial No. 30 of the merit list. If in the originally prepared merit list, the petitioner would have been given his due place *i.e.* Serial No. 20 in the merit list, he would have been conveniently accommodated against one of two vacant posts of Lecturer Geography (male), against which the candidates shown at Serial Nos. 3 and 11 in the merit list did not join, whereas subsequently the petitioner has been made victim of a wrong doing of the respondents, to which, the petitioner was not at all guilty or at fault.

The Administrative Department feeling requirement that the vacant jobs of Lecturer Geography be filled in totality, made a request to Punjab Public Service Commission, but such request has been refused simply for the reason that in view of the policy of the Commission, the validity period of the merit list came to an end on 11.12.2012. This position is of no avail to the respondents for the reason that much before the expiry of stated validity of the merit list, the petitioner seeking justice had already knocked the door of this Constitutional Court on 03.05.2012 and when this Court had already taken cognizance of this issue, all subsequent events were subject to the ultimate decision of the petition by this Court.

The petitioner was entitled to have the benefit of such additional five marks, which if included in his tabulated marks, he would have easily been achieved the position at Serial No. 20 of the merit list even before expiry of the validity period of the said merit list and would have been appointed against one of two vacant posts, which remained vacant on account of non-joining by the candidates shown at Serial No. 3 and 11 of the merit list. The petitioner has been deprived of such position just on account of mismanagement on the part of the respondents and also delay caused by the functionaries in Respondents Department for which, the petitioner must not be suffered.

The Secretary, Higher Education Department although has granted five marks to the petitioner, but such uncalled for order dated 20.01.2016 has been subsequently added by a handwritten footnote, which must not be considered as an obstacle in way of the petitioner for the simple reason that when the petitioner was held entitled to get additional five marks for his experience as CTI, then the benefit of such marks must have been presumed with effect from the very initial date, when the process for appointment to the posts of Lecturer Geography (male) started and also for another reason that benefit of additional five marks was directed not to be extended in favour of the petitioner for future job opportunity. Five additional marks are not only for glorification purposes. The petitioner must have been provided some practical benefit of the same. The appointment to the post of Lecturer Geography (male) would be given effect as a result of process started in the year 2011 and thus, the grant of five additional marks to the petitioner would be having the effect on already started process, but it would not be treated as having some consequential effect for future job opportunity.

3. The petitioner after having obtained Master degree had undergone the process of a written test and interview for getting the job of Lecturer of Geography and out of 448 applicants, according to his merits, became entitled to fetch a position at Serial No. 20 of the merit list and for all purposes was qualified to be appointed, but was made victim of the red tapism and bureaucratic obstacles with which a youth of this country is being victimized daily. During such a long process, the petitioner must have crossed the age limit provided for induction into Government jobs. We must inculcate some hope in the eyes of future of this country and if the youth like the petitioner is deprived of his future, such position would result in disaster. We must hand over the affairs of our tomorrow in the hands of a confident future generation, which can perceive that it has been given a legacy that it can carry on to the best of their abilities.

4. For what has been discussed above, this petition is allowed and the respondents are directed to proceed in the manner that the petitioner be given appointment to the post of Lecturer Geography (male) within a period of 15-days from today positively under intimation to this Court through Deputy Registrar (Judicial) of this Bench. The initial period of appointment of five years for which the other appointments were made, will be started from the date, when appointment letter to the petitioner as directed hereinabove, will be issued.

(R.A.) Petition allowed.

PLJ 2017 Lahore 725
[Multan Bench Multan]
***Present*: IBAD-UR-REHMAN LODHI, J.**
AKBAR ALI and another--Petitioners
versus
BOARD OF INTERMEDIATE & SECONDARY EDUCATION through Chairman B.I.S.E., D.G. Khan and others--Respondents

C.R. No. 618-D of 2009, heard on 27.1.2016.

Punjab Boards of Intermediate & Secondary Education Act, 1976 (XIII of 1976)--

----S. 30--Bar of jurisdiction of Civil Courts--Jurisdiction of Civil Courts is absolutely not barred and an aggrieved person from any act purportedly based on *mala fide* on part of a committee, Board, can competently invoked plenary jurisdiction of Civil Courts. [P. 727] A

Civil Procedure Code, 1908 (V of 1908)--

----O.VII, R. 11--Rejection of plaint--Depriving peititoners to establish their stance taken in plaint by non suiting them at initial stage without providing opportunity to produce evidence and that too on a consideration, which is not available in penal provisions of Order VII Rule 11, CPC are acts on part of Courts below, which have no legal sanction--Revision was allowed. [P. 728] B

Mr. Bashir Ahmed Khan Buzdar, Advocate for Petitioners.

Mr. Allah Bakhsh Khan Kulachi, Advocate for Respondents No. 1 to 4.

Malik Muhammad Latif Khokhar, Advocate for Respondent No. 8.

Date of hearing: 27.1.2016.

JUDGMENT

This civil revision petition is still at pre-admission stage, thus, with the concurrence of learned counsel for the parties, the same is being heard as PACCA case today and arguments of both the sides have been heard.

2. The findings so arrived at, firstly, by the learned trial Court on 25.01.2007, when plaint of the suit of the present petitioners was rejected and, secondly, when appeal filed against such rejection of plaint was dismissed by learned first appellate Court on 16.04.2009, are challenged by means of the present civil revision petition.

3. The petitioners were declared pass in matriculation examination held in 1992 and such result became under threat and on receipt of notice intimating the initiation of an inquiry in the year 2003, the same was called in question by the petitioners by filing a declaratory suit on 05.12.2003 highlighting the background of initiation of such inquiry proceedings in the Board of Education by specifically alleging *mala fides* as against the defendants/respondents in the suit/petition and termed the same as colourable exercise in collusion with the private respondents, who had a dispute with respondent over issue of lumberdari in the village.

Learned trial Court proceeded to reject the plaint of suit holding the same as barred under the provisions of Sections 29 and 31 of The Punjab Boards of Intermediate and Secondary Education Act, 1976 and such findings in appeal, when were called in question by the present petitioners were affirmed by the learned first appellate Court.

4. For ready reference, Sections 29 and 31 of The Punjab Boards of Intermediate and Secondary Education Act, 1976 are reproduced herein below:--

Section 29:--"No act done, order made or proceeding taken by a Board in pursuance of the provisions of this Act shall be called in question in any Court.

Section 31.-No suit for damages or other legal proceedings shall be instituted against Government, the Controller Authority, a Board, a Committee, a member of a Committee or an officer or employee of a Board in respect of anything done or

purported to have been done in good faith in pursuance of the provisions of this Act and the regulations and rules made thereunder ".

5. Perusal of the above said provisions of law clearly indicates that the jurisdiction of Civil Courts is absolutely not barred and an aggrieved person from any act purportedly based on *mala fides* on the part of a Committee, Board, etc., can competently invoke the plenary jurisdiction of the Civil Courts. The plaintiffs in Paragraph No.4 of their plaint have clearly alleged the *mala fides* on the part of the defendants.

The Hon'ble Supreme Court of Pakistan in case of *Hamid Husain versus Government of West Pakistan and others* (1974 SCMR 356) in a matter relating to the Displaced Persons (Land Settlement) Act, 1958, while dealing with the question of bar of jurisdiction of civil Courts has held that even if jurisdiction of Civil Courts is barred and conferred upon special tribunals, Civil Courts being Courts of ultimate jurisdiction still would be competent to examine the acts of such forums by eventuality if such acts are in accordance with law, or illegal or even *mala fide*.

In another case of *Board of Intermediate and Secondary Education and others versus Khalil Ahmad and others* (2008 PLC (C.S) 270) while dealing with the effect of Sections 29 and 31 of The Punjab Boards of Intermediate and Secondary Education Act, 1976, the Hon'ble Supreme Court of Pakistan has authoritatively held that such provisions did not oust the jurisdiction of civil Courts generally but only barred suits against the officials of Board acting in good faith, as such, jurisdiction of civil Courts was not completely ousted preventing jthe civil Courts to examine as to whether action taken was within the framework of law.

This Court in a matter relating to the provisions of The Punjab Boards of Intermediate and Secondary Education Act (XIII of 1976), in case of *Board of Intermediate and Secondary Education through Chairman and 4 others versus ShahidJaved Shaheen and 2 others* (2006 YLR 687) has held that Civil Court is competent to examine the validity of the proceedings being carried out before any administrative committee of the Education Board and to see as to whether any act also done by such committee is in accordance with law or otherwise.

6. Learned counsel for the respondent-Board has argued that after filing of suit by the petitioners, the result of petitioners stood cancelled by the Board and, therefore, the suit was rightly held having become infructuous and plaint of the suit was rightly rejected.

Such act on the part of the Board is in clear violation of a restraint order passed by the learned Civil Judge, Layyah on 05.12.2003, whereby, the Board Authorities were specifically restrainled from cancelling the matriculation certificates of the petitioners. The said injunctive order was never specifically recalled at any subsequent stage and, thus, the rejection of plaint on the ground that on account of such cancellation of result, the suit had become infructuous, was, in fact, not an order covered under any eventuality provided in the provisions of Order VII Rule 11 CPC.

7. Learned counsel for the petitioners has rightly pointed out towards an order passed by this Court on 28.02.2005 while disposing of Writ Petition No.2445 of 2004 holding that the question involved in the suit of the petitioners did require the recording of evidence.

8. Depriving the petitioners to establish their stance taken in the plaint by non-suiting them at initial stage without providing opportunity to produce evidence and that too on a

consideration, which is not available in the penal provisions of Order VII Rule 11 CPC are acts on the part of the Courts below, which have no legal sanction. The suit of the plaintiffs deserve a fulfledged trial and technical knock out was not the appropriate answer. Both the judgments under challenge are not sustainable and the same are, therefore, set aside by accepting this civil revision petition.

9. The suit titled *"Akbar Ali and another versus Board of Intermediate and Secondary Education and others"* would be deemed to be pending before the learned trial Court and it will be decided on merits after affording complete opportunity to the parties to adduce their respective evidence.

(Z.I.S.) Revision allowed.

2017 Law Notes 490
[Rawalpindi]
Present: **KHALID MEHMOOD MALIK and IBAD-UR-REHMAN LODHI, JJ.**
Muhammad Ishaq
Versus
The State

Criminal Appeal No. 48 of 2012, Capital Sentence Reference No. 5 of 2012 and Criminal Revision No. 35 of 2012, decided on 24th February, 2017.

CONCLUSION

(1) Where a mandatory condition for the exercise of jurisdiction was not fulfilled, then the entire proceedings would become corum non judice, illegal and without jurisdiction.

Criminal Procedure Code (V of 1898)---

---Ss. 156-A, 196-A---Pakistan Penal Code, 1860, Ss. 295-A, 295-C---Blasphemy charge, irregularities, effect of---Appellant was tried for using derogatory remarks in respect of Holy Prophet (Peace Be Upon Him) and outraging deligious feelings of the people, and was convicted and sentenced to death, ten years rigorous imprisonment and fine---Investigation agency was put to motion by a private person in violation of Section 196, Cr.P.C., whereas Investigation of the offence under Section 295-C, PPC by a Sub-Inspector of Police was again violative to mandatory provision of Section 156-A, Cr.P.C.---**Held:** Violation of Section 196, Cr.P.C. was not a curable irregularity---Prosecution had miserably failed to bring home guilt with the appellant of any crime he was charged with---Appellant's conviction and sentence was set aside and he was acquitted from the charges levelled against him---Appeal allowed.

(Paras 3, 8, 12, 14, 15)

Ref. 2000 P.Cr.L.J. 902, PLD 2002 Lahore 587, PLD 2016 SC 17.

معزز عدالتِ عالیہ نے اپیل کنندہ کے خلاف الزامات ثابت نہ کئے جانے پر اپیل کنندہ کو تمام الزامات سے باعزت بری کر دیا تھا۔

[The Court allowed the appeal an acquitted the appellant from all the charges levelled against him a snot proved by the prosecution].

For the Appellant: **Ch. Mahmood Akhtar Khanand Barrister Gohar Ali Khan, Advocates.**

For the State: **Muhammad Usman, Deputy Prosecutor-General.**

For the Complainant: **Malik Muhammad Kabir and Malik Tariq Mehmood, Advocates.**

Date of hearing: **24th February, 2017.**

JUDGMENT

IBAD-UR-REHMAN LODHI, J. --- Muhammad Ishaq son of Muhammad Anwar-appellant was tried by learned Additional Sessions Judge, Jhelum in case F.I.R. No.106, dated 08.07.2009, under Sections 295-A, 295-C P.P.C., registered with Police Station City Talagang, District Chakwal for using derogatory remarks in respect of Holy Prophet (Peace Be Upon Him) and outraging religious feelings of the people. Vide judgment dated 30.01.2012, the learned trial court convicted and sentenced the appellant as under:-

i) **under Section 295-C P.P.C. to death with fine of rupees two lacs or in default thereof to undergo S.I. for six months**.

ii) **under Section 295-A P.P.C. to ten years R.I. However, he was extended benefit of Section 382-B Cr.P.C.**

2. **Capital Sentence Reference No.05 of 2012** seeking confirmation or otherwise of death sentence awarded to Muhammad Ishaq-appellant has been sent to this Court. The appellant has approached this Court by filing **Criminal Appeal No.48 of 2012** against his conviction and sentence passed by the learned trial court. On the other hand, Asad Ullah-complainant preferred **Criminal Revision No.35 of 2012** for imposition of fine upon respondent No.1 under Section 295-A P.P.C. and enhancement of fine awarded to him under Section 295-C P.P.C. All these matters are being disposed of together through this single judgment.

3. The facts of this case as contained in First Information Report (Exh.PA/1), registered on the written application (Exh.PA) of Asad Ullah Khan-complainant (P.W.2) are that on 07.07.2009, at night time, one Mehfil was held at Darbar Qalandaria Qatlia, Sultan Road near Farooq-e-Azam Masjid, Talagang, where Muhammad Ishaq-appellant introduced himself as Peer/Sufi and in the said Mehfil, beating of drums, dance and singing songs as well as acts against Sharia were done, which outraged feelings of Muslims. A meeting of Ulema and people was convened on 08.07.2009, at 8:00 a.m. in the premises of Eidgah, in which, it was decided that Muhammad Ishaq-appellant be conveyed the feelings of Muslims and for that purpose, he (complainant) alongwith Moulvi Ubaid-ur-Rehman, Moulvi Abdul Rehman Usmani, Moulvi Shahid Kaleem, Moulvi Sabir Ayub, Sana Ullah Khan, Muhammad Hammad, Asad Ullah Khan son of Ata Ullah Khan, Waheed Ullah, Muhammad Farooq and others met the appellant in Bethik of Malik Saleem Iqbal and he was appraised about the facts, whereupon he allegedly said that the people, who prostrated him, might see God in him and if people called him Ya Rasool Ullah, it is their belief. He further stated that every person can prostrate anywhere including toilet and Qadianies to whom you considered Kafir, are not Kafir in his view. Appellant allegedly further stated that God is on both sides i.e. east and west and he was present in America and at the same is present here. Asad Ullah Khan-complainant alleged in Exh.PA that appellant denied the existence of Khuda and committed contempt of Holy Prophet (Peace Be Upon Him), as a result of which, religious feelings of Muslims were outraged.

4. After registration of case, the case was mainly investigated by a Sub-Inspector of Police, who is P.W.6 Muhammad Ashraf Gondal. However, after completion of all formal investigation, Muhammad Zulfiqar, Superintendent of Police has also been shown to have partially investigated the case. After due investigation, the appellant was challaned to face trial.

On receipt of challan, the learned trial court summoned the accused and a formal charge under Sections 295-A and 295-C P.P.C. was framed, to which, he pleaded not guilty and claimed trial. For ready reference, charge as was framed on 28.08.2010, is reproduced herein below:-

"Firstly: That on 8.7.2009, at night time, in the Baithak of Malik Saleem Iqbal situated in the area of Talagang, within the jurisdiction of P.S. City, Talagang, District Chakwal, you, the above said accused, arranged a gathering and in the said gathering, you uttered that:-

"ہر بندہ ہر جگہ سجدہ کر سکتا ہے حتیٰ کہ بیت الخلا میں بھی سجدہ ہو سکتا ہے۔ نیز یہ کہ تم لوگ قادیانیوں کو کافر کہتے ہو جبکہ میری نظر میں قادیانی کافر نہ ہیں۔ نیز یہ کہ رب مشرق مغرب دونوں طرف ہے اور میں امریکہ میں بھی ہوتا ہوں اور یہاں بھی ہوں۔ جو لوگ مجھے سجدہ کرتے ہیں انکو میرے اندر خدا نظر آتا ہے۔"

with the deliberate and malicious intention and in this way, you outraged the religious feelings of people, and thus, you committed an offence punishable under Section 295-A of the Pakistan Penal Code and within my cognizance.

Secondly: That on 8.7.2009 at about 10.30 a.m, in the Baithak of Malik Saleem Iqbal situated in the area of Talagang, within the jurisdiction of P.S. City, Talagang, District Chakwal, you, the above said accused, in presence of the people, uttered the following derogatory words:-

"اگر لوگ مجھے یا رسول اللہ کہتے ہیں تو یہ ان کا عقیدہ ہے۔ یہ کہ تم لوگ قادیانیوں کو کافر کہتے ہو جبکہ میری نظر میں قادیانی کافر نہ ہیں۔"

and defiled the sacred name of Holy Prophet Muhammad (Peace Be Upon Him) with the deliberate and malicious intention, and thus, you committed an offence punishable under Section 295-C, P.P.C. and within my cognizance.

5. In order to prove its case, the prosecution examined as many as seven witnesses. Ijaz Hussain Shah, Inspector (P.W.1) is the formal witness, who chalked out formal F.I.R. Exh.PA/1. Asad Ullah Khan, a private person is the complainant of this case,

who also appeared as P.W.2 during trial. In order to provide strength to complainant's case, P.W.3 Ubaid-ur-Rehman and P.W.4 Sabir Ayub were produced by the prosecution, who stated to have participated in a meeting arranged in the house of Malik Saleem Iqbal on 08.07.2009 in order to confront the appellant with alleged obnoxious conduct adopted by him in a Mehfil held in his Aastana on 07.07.2009 and in the said house, the appellant uttered some derogatory remarks not only in respect of Allah Almighty, but also some outrageous remarks as against Holy Prophet Hazrat Muhammad (Peace Be Upon Him). Asad Ullah Khan-complainant also produced two compact discs (CDs) allegedly containing remarks uttered by the appellant in the stated meeting held on 08.07.2009 before the Investigating Officer in presence of P.W.5 Zaka Ullah, who attested the recovery memo Exh.PC. Muhammad Ashraf Gondal, SI (P.W.6) and Muhammad Zulfiqar, retired Superintendent of Police (P.W.7) are the Investigating Officers of this case. The prosecution has closed its evidence after tendering certain documents and giving up certain P.Ws.

6. After recording of prosecution evidence, the appellant was examined under Section 342 Cr.P.C. In reply to question "why this case against you and why the PWs have deposed against you", he made the following statement:--

> "I believe in one Almighty Allah. Hazrat Muhammad (Peace Be Upon Him) is the last Holy Prophet of Almighty Allah. By the grace of Almighty Allah, I am Muslim having Sunni Brailvies faith. I am follower of late Peer Fazal Shah alias Afzal Shah whose shrine is situated in Talagant City. After the death of said Peer Fazal Shah, I was appointed as "Sajjada Nashin". Peer Fazal shah belonged to Awan Caste and was from Dhola clan. Some years ago, a dispute arose between grandsons of Peer Fazal Shah namely Pirzada Jawwad, Jameel and myself. To avoid any controversy, I and my followers separately built Aastana Qadria Chistia Qalandria at Sultan Road Talagang City and started arranging Mahfil-e-Melad and Mahfil-e- Naat in respect of Hazrat Muhammad (Peace Be Upon Him) and annual Urs in respect of Peer Fazal Shah alias Afzal Shah. Myself and my followers were also arranging Mahfl-e-Samah/Qawalies on the said Aastana. Complainant and other PWs and Molvies belong to Dewband Maslak except namely Ayyub Sabir, who is Brailvi Naqashbandi. The sect of Brailvi Naqashbandi do not believe in reciting and arranging Mahfil-e-Samah in respect of Hazrat Muhammad (Peace Be Upon Him). As people of the City and from all over Pakistan started gathering around us due to our preach according to true spirits of Islam, therefore, Molvies of Dewband Maslak joined hands with the complainant and his family. I am settled in America. I have to come in Talagang City on 07.07.2009 to celebrate Mahfil- e-Naat in respect of Hazrat Muhammad (Peace Be Upon Him) and my said programme was announced much earlier. Even before that date, Molvies of Dewband Maslak and the complainant chalked out a programme to oust me from the City and to forbid me from arranging such like religious ceremony, they spread a message on Mobile sets

in this regard. Permission was sought from the District Authorities to arrange religious ceremony i.e. Mahfil-e-Naat at Aastana Aalia Chistia Qadria. On 07.07.2009 my followers received and took me in a religious procession to said Aastana. During the journey from Bus stop to Aastana Naatia Qawalies were recited in respect of Hazrat Muhammad (Peace Be Upon Him). After reaching at Aastana first of all, verses from Holy Quran were recited, then Mahfil-e-Naat was arranged in which various Naat Khans participated and recited Naats in respect of Holy Prophet Hazrat Muhammad (Peace Be Upon Him) and at the end we all combined paid Darood-o-Salam in respect of Holy Prophet Hazrat Muhammad (Peace Be Upon Him). My followers met me in respectable manners. According to their belief, they use to kiss my hands and feet and they never think it that they are adoring me. "Sijda" is for Almighty Allah. I am living in America since 1979 and I am holding green card. To preach Islamic ideology, I established a registered institution over there in the name of "International Islamic Markaz Tareeqat, INC, 323 Etna Street, Brooklyn, New York, N.Y. 11208". Mahfil-e-Melad and Mahfil-e-Naat are arranged under the management of above said institution in America. We also use to publish articles, pamphlets etc. for the purpose of awareness and education about Islam even in non-Muslims community."

The appellant, while appearing in the witness-box, also got recorded his statement on oath as required under Section 340(2) Cr.P.C. in disproof of allegations levelled against him and produced certain documents in his defence evidence.

7. After evaluating evidence on record and hearing the arguments, the appellant was convicted and sentenced as detailed hereinabove by means of impugned judgment dated 30.01.2012 passed by the learned Additional Sessions Judge, Jhelum, who conducted trial in Central Jail, Adiala, Rawalpindi.

8. We have heard learned counsel for the appellant, learned Deputy Prosecutor-General representing the State and learned counsel for the complainant at length and have gone through the record with their assistance.

9. Before analysis of quality and standard of evidence, which was produced by the prosecution, in an attempt to bring home guilt with the appellant in a case involving capital sentence, the brief resume of the evidence would be appropriate.

The charge has been reproduced hereinabove, which the appellant denied. Asad Ullah Khan-complainant of this case appeared in the witness box as P.W.2. The crux of his statement by reproducing some relevant extracts from his deposition is as under:--

"No body disclosed before me that Sufi Muhammad Ishaq accused delivered any speech on 07.07.2009 during the whole time of the Mehfal- e-Milad conducted within the said Aastana. I have no record that Sufi Muhammad Ishaq accused uttered

any words regarding the allegations levelled in my examination-in-chief due to which the feelings of the Muslims were outraged before 07.07.2009…."

"I do not know if any person on behalf of accused Sufi Muhammad Ishaq was present for the purpose of investigation on 12.07.2009 or 14.07.2009. In my presence, no one appeared before Muhammad Ashraf SI or SP Zulfiqar who had claimed that he was asked by Sufi Muhammad Ishaq accused to believe him God or Prophet or to pay Sajjada to him. Volunteered, directly he did not ask any one in this regard."

Ubaid-ur-Rehman is P.W.3, who introduced himself as a Khateeb of Markazi Jamia Masjid Eidgah in the age of 38 years only. The relevant extracts from his deposition are reproduced herein below:--

"There was no written or oral material against Sufi Muhammad Ishaq accused present in the court which may be declared to be objectionable in respect of Almighty Allah, Holy Prophet (PBUH) or any other religious feelings of any sect of the Muslims. I do not remember all the conversation between accused and us except the portions which were objectionable. No body told me or any body else in my presence that Sufi Muhammad Ishaq accused present in the court delivered any speech having objectionable material on 07.07.2009 at the occasion of his reception and in the Mehfil-e-Milad celebrated at Aastana-e-Aalia Qatlia Qalandaria Chishtia, situated at Sultan Road, Talagang…. "

"Four investigations of this case were conducted by the police and I remained present in all. It is correct that in all the above said investigations, no one appeared with the assertion that he adored before Sufi Muhammad Ishaq accused claiming him as Almighty Allah or Sufi Muhammad Ishaq accused preached him or asked to adore before him claiming himself (accused) as Almighty Allah…."

"No one appeared before me till today who claims that he was adoring before Sufi Muhammad Ishaq accused believing the accused Almighty Allah or Sufi Muhammad Ishaq accused asked him to adore before him (the accused) and that he felt repentance upon it. Volunteered, some persons confessed before me in the Baithak that they remained adoring before Sufi Muhammad Ishaq accused. I neither remember their names nor their descriptions…."

Sabir Ayub of 35 years of age claiming himself a Khateeb of Jamia Masjid Ibrahim Khalil Ullah, Talagang appeared as P.W.4 and what he deposed, while recording his statement, is reproduced herein below:--

"It is correct that in my presence, Sufi Muhammad Ishaq accused did not ask any one to adore him considering him Almighty Allah or consider him as Holy Prophet…. "

"No one appeared before the I.Os. in my presence who claimed that accused present in the court asked him to believe him Almighty Allah, Holy Prophet or that Qadianies are not Kaafirs…"

P.W.5 Zaka Ullah is a person, who is a witness of recovery memo of two CDs i.e. P1/1 and P1/2 produced before the Investigating Officer by Asad Ullah Khan complainant. The effect and contents of CDs will be discussed later on.

Muhammad Ashraf Gondal, Sub-Inspector of Police has mainly investigated the present criminal case and appeared during the trial as P.W.6. Some relevant extracts from his deposition are reproduced as under:--

"It is correct that u/s 156-A of Cr.P.C., Sub Inspector is not authorized to investigate the cases registered u/s 295-C PPC. Volunteered, investigation of this case was handed over to me by the SHO/Inspector…. "

"It is correct that there is no name or any signature written on the CDs P1/1-2, to show that these CDs are of the said Mehfal-i-Milad, which was held on 07.07.2009 or the meeting held on 08.07.2009, in the Baithak of Malik Saleem Iqbal, with Sufi Muhammad Ishaq accused present in the court. The said CDs and the contents thereof were seen by me after playing before taking them into possession but I have not mentioned this fact in police diary. I have also not written in police diary that what was seen by me in the CDs. I have also not written in the police diary that in the said CDs, which question was putting by whom and who is answering the same. It is incorrect to suggest that I am deposing falsely in this regard. It was not brought into my knowledge during the investigation that where and who prepared the CDs. CDs were not sealed but I prepared a parcel of the same in a Khaki envelop while putting the CDs therein and handed over to the Moharrir. I am wearing pent of Khaki colour. It is correct that the envelop present in the court is of white colour and it is also correct that I have not put the CDs in this envelop (i.e. present in the court). However, Moharrir might have put the CDs in envelop Exh.PC. The writing on Exh.PC is not written by me, rather it was written by the Moharrir. Moharrir did not make any writing on Exh.PC in my presence. I inspected the Baithak of Saleem Iqbal but I did not inspect Aastana-e-Aalia Qatalia Qalandaria Chishtia, situated at Sultan Road, Talagang. Except Zaka Ullah and Masood PWs none else appeared before me in the P.S. PWs were already present there and I recorded their statements. Malik Saleem Iqbal also came there. It is correct that Saleem Iqbal is the person who is Ex-MPA and he was sitting Tehsil Nazim at that time. Whatever I had seen in the CDs, the PWs got recorded their statements confirming the contents of the CDs in all. I neither added nor omitted anything in their statements. It is incorrect to suggest that I have recorded the statements of the PWs of my own and not in the light of the CDs. I had joined Malik Saleem Iqbal during the investigation.…"

Muhammad Zulfiqar was Superintendent of Police at the relevant time, who appeared as P.W.7 and partial investigation of this case was conducted by him and his relevant deposition is as under:--

> "It is correct if the complaint is received u/s 108-A, 153-A, 294-A, 295-A and 505 PPC, the F.I.R. cannot be registered without the prior permission of Provincial or Federation Government. When I received the file, there was no letter attached with the file which could show that any such permission was obtained from the Federal or Provincial Government. Volunteered, in such like case, SHO concerned obtains permission after having contacts with the DPO and DIG and after such SHO registers the case. My volunteered portion of the statement is not incorporated in police „Karwai; in the F.I.R. Exh.PA/1. According to column No.2 of the F.I.R., Exh.PA/1, Asad ullah was a private person who was the complainant of this case. It is correct that except the endorsement 'A' to 'A' on Exh.PA, there no mentioning of permission from DPO or high ups by the SHO. According to section 156-A Cr.P.C., the cases u/s 295-C PPC cannot be investigated by the officer below the rank of SP. It is not mentioned in the police diary that Muhammad Ashraf S.I contacted me or the DPO that he cannot investigate this case being unauthorized officer. I have not written the inspection notes of my visit of the place of occurrence. Neither I prepared site plan nor the inspection notes. Volunteered, I only verified the inspection notes and rough site plan which were prepared by Muhammad Ashraf S.I. I had inspected Aastana-e-Aalia, Qatalia Qalandaria Chistia Sultan Road, Talagang where the occurrence took place and where the meeting was held. The site plan of the above said place of occurrence i.e. Astana-e-Alia Qatalia Qalandria, Chistia, Talagang was prepared by the I.O. The place which was inspected by me, the names Ya Allah, Ya Muhammad (PBUH) and Ahle Bait (As) were written. On 10.07.2009, I directed the SHO and the I.O to produce the complainant party before me in my office. I myself did not record the statement of any PW U/S 161 Cr.P.C. on 12-07-2009 or even on 14.07.2009. Neither myself nor the SHO issued any notice to the PWs to appear for making their statements in my office. For 12.07.2009 and 14.07.2009, I had seen the CDs but I have not mentioned this fact in my case diaries. I have not written the contents of the CDs in my case diaries. I have also not written in case diary that in whose presence, I had seen the CDs. I had seen two CDs. The time period of one CD was 15 minutes. Again said, the duration of CDs was 30 to 45 minutes. Again said, 30 minutes; again said 15 minutes. It is incorrect to suggest that neither I had seen the contents of the CDs nor I arrived at any conclusion. It is incorrect to suggest that I have deliberately wrongly replied this question….. "

> "I have not confronted the accused present in the court with the PWs to unearth the truth. The version of the accused before me was that he believes in the oneness of Almighty Allah and His last Holy Prophet MUHAMMAD (Peace Be

Upon Him). It is correct that I asked the question to the accused present in the court that adore can be submitted in the latrine upon which, he replied that he did not say so and that the adore can only be submitted on the pious place…."

On the conclusion of prosecution evidence, the statement of the appellant was recorded under Section 342 Cr.P.C. In answer to question No.16, the appellant responded in the following manner:-

"I believe in one Almighty Allah. Hazrat Muhammad (Peace Be Upon Him) is the last Holy Prophet of Almighty Allah. By the grace of Almighty Allah, I am Muslim having Sunni Brailvies faith."

The appellant even appeared as his own witness and deposed on oath under Section 340(2) Cr.P.C. and denied all the allegations levelled against him by the prosecution and remained firm during the test of cross-examination.

10. Although learned Additional Sessions Judge, who conducted the trial and sentenced the appellant, has noted in the impugned judgment that he has seen the CDs P1/1 and P1/2 repeatedly, but he has failed to reproduce the contents of said CDs and even the prosecution during investigation has not provided any transcript of such CDs. In order to overcome such deficiency, this Court has arranged the playing of CDs in open Court and I.T. Department of this Court has arranged the playing of both the CDs in open Court in presence of both the sides.

A banner stated to have been displayed on the Aastana of appellant has been shown in Exh.P1/1, which displayed the following wording:-

"شہنشاہ قلندر زمان پیرِطریقت صاحبِ حقیقت اعلیٰ حضرت صوفی
محمد اسحاق شاہ مدظلہ تعالی کی آمد پاک پر سرکارپاک کی خدمت
میں پُر شکر خوش آمدید کہتے ہیں اور تمام اہلیانِ نلہ گنگ اور
غلامانِ سرکارِ پاک کو کروڑوں مبارکباد"

The other CD P1/2 is damaged one and not playable. Nothing comes out, as to what material the said CD contained. As such, nothing can be said in certainty, as to whether any culpable material was available in P1/2 as against the appellant or not.

11. Malik Saleem Iqbal, who stated to be an Ex-MPA and sitting Nazim of the area and whose house was selected for a meeting, wherein the appellant was stated to have been confronted with the allegations, was never cited as a witness in the calendar of witnesses for the prosecution and what happened in his Baithik has not been brought on record from the owners of the house shown to be a responsible representative of the locality.

12. Keeping in view the sensitive nature of offence under Section 295-A PPC, the legislature has promulgated **Section 196 in Cr.P.C.** providing that no Court shall take cognizance of any offence punishable under Section 295-A P.P.C., unless upon complaint made by order of, or under authority from, the Federal Government, or the Provincial Government concerned, or some officer empowered in this behalf by either of the two Governments, whereas Section **156-A Cr.P.C.** provides that notwithstanding anything contained in this Code, no Police Officer below the rank of a Superintendent of Police shall investigate the offence against any person alleged to have been committed by him under section 295-C of the Pakistan Penal Code, 1860, (Act XLV of 1860).

Both such procedural mandates have been violated in the present case with reference to both the alleged offences for which the appellant was charged. The basic step by means of which, the Investigating Agency was put to motion by a private person is violative to the provision of Section 196 Cr.P.C., whereas the investigation of the offence under Section 295-C Cr.P.C. by a Sub-Inspector of Police is again violative to mandatory provision of Section 156-A Cr.P.C.

This Court in a case registered under Section 295-A P.P.C. titled "BASHIR AHMED versus THE STATE" **(2000 P Cr. L J 902)** has held that violation of Section 196 Cr.P.C. is not a curable irregularity, as the provision of Section 196 Cr.P.C. was couched in the negative language which, unless the context otherwise required, was to be considered to be mandatory in nature and not a directory one and where a mandatory condition for the exercise of jurisdiction was not fulfilled, then the entire proceedings would become coram non judice, illegal and without jurisdiction. Non-compliance of provisions of Section 196 Cr.P.C., therefore, cannot be construed to be a curable irregularity within the meaning of Section 537 Cr.P.C.

This Court in Criminal Appeal No.29 of 2013 titled "Ghulam Ali Asghar versus The State & another" vide judgment dated 09.12.2015 has placed reliance on a Division Bench view of this Court in similar circumstances reported as "Muhammad Mahboob alias Booba vs. The State" **(PLD 2002 Lahore 587)** and taking benefit of the authoritative view of learned Division Bench of this Court particularly by means of the following findings in Muhammad Mahboob's case, proceeded to acquit the accused of an offence under Section 295-A P.P.C.:-

> "Such quality of evidence could not be relied in a case as serious as the present one and reflected inefficiency, inaptitude, apathy and perfunctory working on the part of Police Officials and the way they collect evidence. If the case of the prosecution was per se infirm, then going into a debate pertaining to Fiqah at the end of the Trial by Court was totally unnecessary, particularly when the Trial Court had taken no help from any juris consult or any Islamic Scholar having known credentials. Nature of the accusations overwhelmed the Trial Court to such an extent

that the Court became oblivious of the fact that the standard of proof for establishing such accusation and as required, was missing.

Mere accusation should not have created a prejudice or a bias and the duty of the Court as ordained by the Holy Prophet was to ascertain the facts and the circumstances and look for the truth will all the perseverance at its command. Accused had not confessed and had stated that he had not committed any offence and through his affidavit he had expressed his profound respect for the Holy Prophet in his own words.

Increase in the number of registration of blasphemy cases and element of mischief involved therein calls for extra care at the end of the Prosecuting Officers. Failure, inefficiency and incompetence of the Investigation in handling the case of blasphemy. Directions by High Court with regard to investigation and trial of cases of blasphemy.

High Court, in circumstances, directed the Inspector-General of Police of the Province to ensure that whenever such a case is registered, the same may be entrusted for purposes of investigation to a team of at least two Gazetted Investigating Officers preferably those conversant with the Islamic Jurisprudence and in case they themselves are not conversant with Islamic law, a scholar of known reputation and integrity may be added to the team and the team should then investigate as to whether an offence is committed or not and if the team comes to the conclusion that the offence is committed, the police may only then proceed further in the matter. Trial in such a case be held by a Court presided over by a Judicial Officer who himself is not less than the rank of District and Sessions Judge.

Ever since the law became more stringent, there has been an increase in the number of registration of the blasphemy cases. A report from a leading newspaper of Pakistan says that between 1948 and 1979, 11 cases of blasphemy were registered. Three cases were reported between the period 1979 to 1986. Forty four cases were registered between 1987 to 1999. In 2000, fifty two cases were registered and strangely 43 cases had been registered against the Muslims while 9 cases were registered against the non-Muslims. The report further states that this shows that the law was being abused more blatantly by Muslim against the Muslims to settle their scores. This was because the police would readily register such a case without checking the veracity of the facts and without taking proper guidance from any well-known and unbiased religious scholar, would proceed to arrest an accused. That an Assistant Sub-Inspector or a Moharrir was academically not competent to adjudge whether or not the circumstances constitute an act of blasphemy.

The subject blasphemy is under a lot of focus and people are expressing their opinions on the subject particularly with respect to the accusations which can readily

be made and the sentence which is prescribed in the offence. In another of its articles published in the said daily on the subject of blasphemy, the following are the remarks of the correspondent and are relevant:-

> "The trouble is that over the years bigotry and intolerance have made such deep inroads into our society that all three parties in the blasphemy cycle- complainant, police officer, Judge—think that they are doing the right thing and also earning divine favour into the bargain, when they are pressing charges under this law, this is zeal sanctioned by law and clothed in self-righteousness."
>
> "But coming back to blasphemy, to seek it in acts of obvious insanity is to devalue both Islam and the notion of blasphemy."

The greatest blasphemy of all is a child going hungry, a child condemned to the slow death of starvation. The miscarriage of justice is blasphemy. Misgovernment is blasphemy. An unconscionable gap between rich and poor is blasphemy. Denial of treatment to the sick, denial of education to the child, are alike examples of blasphemy."

The above directions were passed by this Court in the year 2002, but it has been noted with great pain that even in the case registered in the year 2009, the Investigating Agency has not bothered to take any guidance from the principles laid down therein and for that reason, the investigation in this case was not conducted in efficient and perfect manner.

The figures so provided in Muhammad Mehboob's case were further advanced with the passage of time and the Hon'ble Supreme Court of Pakistan in case titled "Malik MUHAMMAD MUMTAZ QADRI versus THE STATE and others" **(PLD 2016 Supreme Court 17)** has further elaborated the position of blasphemy cases in Pakistan. The Hon'ble Supreme Court of Pakistan by reproducing some extracts from the Judicial Training Toolkits prepared by the Legal Aid Society, Karachi, recorded the following statistics:-

> "The known blasphemy cases in Pakistan show that from 1953 to July 2012, there were 434 offenders of blasphemy laws in Pakistan and among them were, 258 Muslims (Sunni/Shia), 114 Christians, 57 Ahmadis, and 4 Hindus. Since 1990, 52 people have been extra-judicially murdered, for being implicated in blasphemy charges. Among these were 25 Muslims, 15 Christians, 5 Ahmadis, 1 Buddhist and a Hindu.
>
> During 2013, 34 new cases were registered under the blasphemy laws. While at least one death sentence for blasphemy was overturned during the year, at least another 17 people were awaiting execution for blasphemy and at least 20 others were serving life sentences. Although the government has never carried out a death sentence for blasphemy, NGOs reported that at least five persons accused of blasphemy had died in police custody in recent years.

The majority of blasphemy cases are based on false accusations stemming from property issues or other personal or family vendettas rather than genuine instances of blasphemy and they inevitably lead to mob violence against the entire community."

Increase in the number of registration of blasphemy cases and element of mischief involved therein calls for extra care at the end of the prosecution. Registration of such like cases cannot be allowed in a free and careless manner and ordinary citizens, who have not much knowledge of religion, must not be allowed to use the law in question to settle their scores. All this we are doing in the name of our Holy Prophet Hazrat Muhammad (Peace Be Upon Him), who is "Rehmatu-lil- Aalmeen" and being "Bashir" has given assurance that even if whole of life one spent in sins, but before a person breathes his last, has recited "Kalma Pak", is entitled to be relieved from all his sins by Allah Almighty on the day of judgment.

13. Here in the present case, a person, who from the very initial stages, is denying all the allegations levelled against him by making statement that he is a believer of oneness of Allah Almighty and the concept of "Khatam-e-Nabuwat" has not only been tried on the strength of mere verbal allegations, but has been ordered to be sent to gallows by a learned Judge, who was even not competent to frame a charge against the appellant in absence of the compliance of mandatory provisions of procedural law.

14. On account of what has been discussed above, it is irresistible conclusion of this Court that the prosecution has miserably failed to bring home guilt with the appellant of any crime of outraging the religious feelings, of any class of the citizens of Pakistan, by words, either spoken or written or by visible representation resulting into insults of religion or religious beliefs of any particular class and also the crime of defiling the sacred name of the Holy Prophet Muhammad (Peace Be Upon Him) by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly. Resultantly, we **allow** this appeal, set aside appellant's conviction and sentence and acquit him of the charge. He is ordered to be released forthwith if not legally required in any other case.

15. Death sentence awarded to the appellant by the learned trial court is **NOT** confirmed and Capital Sentence Reference is answered in **NEGATIVE**.

16. Criminal Revision No.35 of 2012 filed by the complainant is **dismissed**.

Appeal allowed.

2018 C L C Note 7
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
SHEHZAD AKHTAR---Appellant
Versus
MUHAMMAD SALEEM SHAD QURESHI and another---Respondents

Regular First Appeal No. 1598 of 2015, heard on 12th September, 2017.

Civil Procedure Code (V of 1908)---
----O. XXXVII---Negotiable Instruments Act (XXVI of 1881), S. 4---Suit for recovery of amount on the basis of "two distinct pronotes"---Scope---"Pronote"---Essentials---Trial Court declined grant of leave to defend because defendant had failed to file affidavit along with his petition---Trial Court decreed the original amount only and not the profit as mentioned in the pro-notes---Powers of the Court to grant leave to defend---Scope---Defendant contended that he could not attach the affidavit as he was in jail at that time---Validity---Perusal of O.XXXVII, R. 3, C.P.C. showed that it consisted of two distinct parts: First, required the filing of application for leave to appear and defend the suit on affidavit, whereas the second part gave power to the Court to grant leave to appear and defend the suit on such other facts as the Court deemed sufficient to support the application---Word 'or' after comma (,) occurring after the word "consideration" in O. XXXVII, R. 3, C.P.C. indicated the intention of Legislature that word 'or' was used in disjunctive sense---Legislation could not be alleged to have a careless attitude in use of word 'or' therein---Trial Court, in the present case, had failed to interpret the provision of O. XXXVII, R. 3(1), C.P.C. and had non-suited the defendant only on account of non-submission of the affidavit in support of the petition for leave to appear and defend, without determining other facts, which were placed before Trial Court explaining the reasons for non-submission of the affidavit, thus, a jurisdiction clearly vested in the Trial Court in view of the second part of O.XXXVII, R. 3, C.P.C. had not been exercised---Perusal of both the pro-notes exhibited by the plaintiffs created impression that the same were not "negotiable instruments" and could not be termed "pronotes" for the reason that the stated transaction through such documents was shown as a loan which was settled to be returnable with a certain amount of profit---Section 4 of the Negotiable Instruments Act, 1881 stipulated essentials of "promissory note" as an "unconditional undertaking to pay"---Pro-notes, in the present case, had been entered into on two separate dates but the plaintiffs had claimed decree on the strength of two distinct documents by filing one and the same suit---Execution of two distinct documents on two different dates gave rise to two separate causes of action to claim amount separately on different dates and both the claims could not be made by filing a joint suit---Trial Court, while refusing leave to appear and defend the suit to the defendant had, thus, committed an illegality by not attending to the "other facts", which provided a power to such Court to grant leave even in absence of an affidavit of the defendant supporting the application for leave to appear and defend the suit and therefore, the case of the defendant had been prejudiced and miscarriage of justice had been caused to the defendant---High Court remanded the case to the Trial Court and appeal was allowed accordingly. [Paras. 3, 4, 5, 6, 7 & 8 of the judgment]

Salehon and others v. The State PLD 1969 SC 267; Ebrahim Brothers Ltd. v. Wealth Tax Officer, Circle III, Karachi and another PLD 1985 Kar. 407; Muhammad Sanaullah v. Allah Din 1993 MLD 399; Bayindir Construction Inc. v. Messrs Haroon Brothers through Proprietor 2002 YLR 3349; A. Rangaswamy v. K. Govindaswamy Nadi and another AIR 1961 Madras 434; Sarju Sahu and others v. Sukhi Lal and others AIR 1924 Patna 96 and Messrs Hoosen Brothers Ltd. Karachi v. Messrs S. Abdullah & Co. Karachi PLD 1971 Kar. 729 ref.

Ch. Muhammad Rafique Warraich for Appellant.
Ahmad Waheed Khan for Respondents.
Date of hearing: 12th September, 2017.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The present respondents filed a suit for recovery of Rs.3,84,00,000/- (three crore and eighty four lacs) in total under the provisions of Order XXXVII, Rule 2, C.P.C. on the basis of two separate stated pronotes.

On receipt of notice in the said suit, the present appellant, who was defendant in the suit, moved the learned trial court for grant of leave to appear and defend the suit by filing a petition in this regard showing that at the time of filing of such petition, he was confined in Camp Jail, Lahore and thus, was not a free agent. The learned Additional District Judge, Lahore seized of the matter by means of order dated 08.10.2015 refused to grant leave to the present appellant to appear and defend such suit and as a consequence thereof, the suit of the respondents was decreed for original amount of Exh.P-2 Rs.1,00,00,000/- and Rs.50,00,000/- with reference to Exh.P-3. Such order and decree has been called in question by the appellant in this appeal.

On the other hand, the plaintiffs by jointly signing the memo of cross objections have filed the same within the meaning of Order XLI, Rule 22, C.P.C. Through the cross objections, the relief of profits on the decreed amount is claimed, which are being disposed of with this appeal.

2. I have heard learned counsel for the parties and gone through the record.

3. For disposal of this appeal as well as cross objections, the provisions of Order XXXVII, Rule 3, C.P.C., which are of much significance, are reproduced herein below for convenience:-

> **"3(1).** The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such filets as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application."

The careful perusal of above provision of law denotes to the position that it consists of two distinct parts. The first one requires the filing of application for leave to appear and defend the suit upon affidavits, whereas the second part gives power to the Court to grant leave to appear and defend the suit on such other facts as the Court may deem sufficient to support the application.

By use of word 'or' after comma (,) occurring after the word "consideration" in Order XXXVII, Rule 3, C.P.C. clearly indicates the intention of legislature to the effect that the word 'or' is used in the said provision of law in a disjunctive sense. Legislation cannot be alleged having a careless attitude in use of word 'or' herein] The use of word 'or' after comma (,) in a statutory provision has been interpreted previously and cases title "Salehon and others v. The State" (PLD 1969 SC 267), "Ebrahim Brothers Ltd. v. Wealth Tax Officer, Circle III, Karachi and another" (PLD 1985 Karachi 407), "Muhammad Sanaullah v. Allah Din" (1993 MLD 399), "Bayindir Construction Inc. v. Messrs Haroon Brothers through Proprietor" (2002 YLR 1349) are referred in this regard, which provide guideline in the manner that ordinarily 'or' is used in disjunctive sense, which generally corresponds to word 'either' and that use of a comma (,) and word 'or' between the words and term is not without significance but are employed to manifest that same are to be read disjunctively. It was further held that the use of word 'or' signifies a disjunctive sense and it cannot be read as 'and' unless of course the context provides so.

The Concise Oxford Dictionary can also be referred in this regard, which provides the definition of 'or' in the manner that introducing the second of two alternatives (white or black) or introducing all but the first, or only the last, of any number of alternatives.

4. In the case in hand, the learned trial court has failed to liberally interpret the provisions of Order XXXVII, Rule 3(1), C.P.C. and only on account of non-submission of affidavit in support of the petition for leave to appear and defend the suit, non-suited the defendant without determining other facts, which were placed before the Court explaining the reasons for non-submission of the affidavit in support of the petition for leave to appear and defend the suit and thus, a jurisdiction clearly vested in the learned trial court in view of the second disjunctive part of the referred provision of law has not been exercised.

5. Irrespective of the position as to whether a defendant in such summary suit appeared and applied for leave to appear and defend the suit, it was the bounden duty of the Court to examine as to whether the suit filed before it in fact based on a negotiable instrument within the meaning of The Negotiable Instruments Act, 1881.

Both the pronotes relied upon by the plaintiffs were entertained by the learned trial court in evidence as Exh.P-2 and Exh.P-3 and perusal of the same do create a clear impression that the same were not negotiable instruments and cannot be termed pronotes for the reason that in clear terms, the stated transaction through such documents was shown as a loan , which was settled to be returnable with a certain amount of profit i.e. 4% in Exh.P-2 and 5% in Exh.P-3.

Promissory note is defined in section 4 of The Negotiable Instruments Act, 1881, which reads as under:-

> "A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay (on demand or at a fixed or determinable future time) a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

In case titled "A Rangeswamy v. K. Govindaswamy Naidi and another" (AIR 1961 Madras 434), it was concluded that the essential of a promissory note is an unconditional undertaking to pay and in the similar manner, in case titled "Sarju Sahu and others v. Sukhi Lal and others" (AIR 1924 Patna 96), it was held that document binding a person to return a certain amount with the settled interest was not treated as a negotiable instrument/pronote.

The plaintiffs in their plaint not only claimed the actual amount mentioned in the stated pronotes but the amount of profit at the rated mentioned in each of the pronote was also claimed. The learned trial court although passed a decree in favour of the plaintiffs with regard to the principle amount of Exh.P-2 and EXh.P-3 and no profit was awarded to the plaintiffs, but the plaintiffs seem not to be contented to such decree and their claim for receipt of profits upon such amount of Exh.P-2 and Exh.P-3 continued and in order to get such profits, they filed cross objections in the present appeal. The manner in which two pronotes were prepared and the insistence of the plaintiffs to get profits upon amount mentioned in such two documents certainly bring out such documents from the definition of a negotiable instrument/pronote.

6. Exh.P-2 and Exh.P-3 were stated to have been entered into, of two separate dates i.e. 01.11.2011 and 19.11.2011 respectively, but the plaintiffs claimed decree on the strength of two distinct documents by filing one and same suit. No doubt, the stated execution of two distinct documents on two different dates gave arise to two separate causes of action to claim amount separately on different dates and both the claims cannot be claimed by filing a joint suit. Learned counsel for the appellant in this regard has placed reliance on case titled "Messrs Hoosen Brothers Ltd. Karachi v. Messrs S. Abdullah & Co. Karachi" (PLD 1971 Karachi 729).

7. The learned trial court, while refusing leave to appear and defend the suit to the present appellant has, thus; committed an illegality by no attending to the "other facts", as have been highlighted hereinabove and were also before the learned trial court at the time, when matter for grant of leave was being considered by it, which provides a power to such Court to grant leave even in absence of an affidavit of the defendant in support of the application for leave to appear and defend the suit and therefore, the case of the present appellant had been prejudiced and miscarriage of justice has been caused to the appellant.

8. In view of what has been discussed above, this appeal is allowed and while setting aside impugned order and decree dated 08.10.2015 the matter is remitted back to the learned District Judge, Lahore, while the suit No.1338/2014 titled "Muhammad Saleem Shad Qureshi and another v. Shehzad Akhtar" will be deemed pending and the learned District Judge, Lahore, after requisitioning the record from the concerned quarters would proceed to frame issues and grant ample opportunities to both the sides to produce their respective evidence and then to decide the suit on merits.

9. The cross-objections having no substance are dismissed.

MQ/S-73/L Case remanded.

2018 C L C Note 30
[Lahore]
Before Ibad-ur-Rehman Lodhi, J
INDO PAKISTAN CORPORATION LIMITED through Manager and another---Appellants
Versus
MANZOOR-UL-HAQ PANDIT and others---Respondents

S.A.O. No. 21 of 2015, heard on 10th May, 2017.

Punjab Rented Premises Act (VII of 2009)---
----S. 15---Ejectment of tenant---Taking-over demised premises by the Appellant Corporation from a tenant company---Effect on rented property---Default in payment of rent---Scope---Demised premises was never declared as Enemy Property nor such plea was taken in written statement---Only lockers and fixtures were declared as Enemy Property---Such declaration would not change the nature of demised premises---Appellant Corporation had committed willful default in payment of rent---Tenant had stopped payment of rent due to alleged non-settlement of rate of rent which earlier was being paid as allegedly it was not being accepted by the landlord---No effort was made to tender the refused rent to the landlord through money order or any other permissible mode---Tenant had rightly been declared as "willful defaulter" in payment of rent---Tenant had no right to remain in possession of rented premises without payment of rent---Appeal was dismissed in circumstances. [Paras. 5, 6 & 7 of the judgment]
Indo-Pakistan Corporation Limited and another v. Mansoor Iqbal Butt and 6 others 1989 SCMR 905; Messrs Maqbool Company Limited v. Abdul Ghaffar and others 1985 CLC 2635 and Deputy Director (Nationalisation), Hyderabad v. Syed Zahoorul Hassan 1982 CLC 1640 rel.

Tahir Mehmood Khokhar for Appellants.
Ch. Manzoor Hussain for Respondents.
Date of hearing: 10th May, 2017.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---Naturally when ejectment petition filed on 28.06.1977 is before this Court in present S.A.O. relating to year 2015, the same must have some checkered history which now need not to be repeated as the remand orders which were passed in the earlier rounds of litigation were finally have been answered in detail by means of impugned appellate judgment passed by the learned District Judge, Lahore, as Appellate Rent Authority on 22.06.2015. The sole ground, on which the ejectment of appellant No.1 was sought for from the rented property i.e. S-31-R-151 Mcleod Road, Lahore, was wilful default in payment of rent for preceding 44-months from the date of filing of ejectment petition.

2. However, when during pendency of the rent proceedings, appellant No.1 was declared as Enemy property and thus the Hon'ble Supreme Court of Pakistan directed, through reported judgment as Indo-Pakistan Corporation Limited and another v. Mansoor Iqbal Butt and 6 others (1989 SCMR 905) to implead the Custodian of Enemy Property in Ministry of

Government of Pakistan as a necessary party. Notwithstanding such impleadment, the respondents in ejectment petition never filed any amended written reply to the ejectment petition in order to incorporate the role of Custodian or effect of the impleadment of Custodian upon the rent proceedings, however the learned counsel for the appellant has argued with reference to section 5 of the Enemy Property (Custody and Registration) Order, 1978 that all enemy property vesting in the Custodian shall be exempt from attachment, seizure or sale in execution of a civil Court decree or orders of any other authority. But at the same time on query of the Court candidly admitted that even after the impleadment of Custodian of Enemy Property in the ejectment petition, no such ground was added in the written reply to the ejectment petition. Despite the lapse on the part of the respondents in not pleading such plea still it is admitted that the rented premises with reference to which ejectment petition was filed, the predecessor in interest of the respondents herein was never declared as Enemy Property and it is in fact the lockers, fixtures or belonging in shape of paraphernalia of appellant No.1 which was declared as Enemy Property but such declaration would not change the nature of rented property which remain the ownership of private persons viz. the respondents herein. It is also an admitted position that despite having been impleaded as respondent No.2 in the ejectment petition, no further evidence was produced on behalf of the Custodian. As such the findings arrived at by the forum bellows on additionally framed issues viz. 3-a to 3-c do not require any interference.

3. In a case of similar nature, when a tenant company was taken over by the Government and in the ejectment proceedings, such company came forward with a plea that since the Government has taken over the company, it was the Federal Government, which could only discharge the rights and liabilities of the tenant, Karachi High Court in case titled "Messrs Maqbool Company Limited v. Abdul Ghaffar and others" (1985 CLC 2635), while hearing first Rent Appeal has held that taking over of company by the Government would cast no effect on rented property, as by taking over the company by the Government, property in possession of the company as a tenant, would not vest in Government. The Federal Government after taking over could only discharge rights and liabilities of tenant's company, but rented property could not be deemed to have vested in it. It was further held that even after taking over the administration of a company, the status of the Federal Government even with regard to the rented property where prior to the step of taking over by the Government, the company was a tenant, would not absolve in stopping payment of rent and in case, where a tenant company is taken over by the Government and thereafter neither the company nor Government makes the payment of rent to the landlord, it was held that wilful default was established as after taking over the company by the Government, such step did not absolve the tenant to pay rent to the landlord and if tenant company claims some protection in changed circumstances, when the affairs of the company was taken over by the Government, even then in such case, the Government was bound to discharge obligation under law as a tenant.

4. In a case of nationalized school, where the property was rented out by the owner to former Headmaster of private school, which was subsequently nationalized, Karachi High Court in case titled "Deputy Director (Nationalisation), Hyderabad v. Syed Zahoorul Hassan" (1982 CLC 1640) has held that only school and its management vested in Government and not building of school, which belongs to the landlord and the process of nationalization of the

management of school cannot be treated as a step providing exemption under Rent Laws, which is available only for the property vests in Government.

5. So far as the crucial issue i.e. issue No.2 regarding wilful default on the part of the appellant-Corporation is concerned it has been answered in detail by the learned courts below by rightly concluding that appellant No.1/Corporation is wilful rent defaulter in the background that in a way the tenant has admitted the default in payment of rent by taking a plea which was having no basis to the effect that despite demand the original owner of the rented premises was not agreeable to settle the revised rate of rent and thus on account of such non-settlement of rate of rent, the tenant stopped the payment of even that rent which earlier was being paid to the landlord as allegedly it was not being accepted by the landlord. The tenant has further admitted that no effort was made to tender such stated refused rent to the landlord through money order or any other permissible mode and also that the forum of Rent Controller was never approached with a request to allow the tenant to deposit the rent which statedly was refused to be accepted by the landlord.

6. Appellant No.1 has rightly been declared as wilful defaulter in payment of rent and thus has no right to remain in possession of the rented premises without payment of the rent in view of the enjoyment of use and occupation of rented premises.

7. Resultantly, finding no force in this appeal, the same is dismissed.

ZC/I-25/L Appeal dismissed.

2018 C L C 641
[Lahore]
Before Ibad ur Rehman Lodhi, J
SHAHZADI UMERZADI TIWANA----Petitioner
Versus
PROVINCE OF PUNJAB and others----Respondents

W.P. No.7699 of 2013, decided on 15th December, 2017.

(a) Jurisdiction ---
----Consent of the parties could not confer jurisdiction (on any forum which otherwise did not have jurisdiction).
Shahul Hamid v. Tahir Ali 1980 SCMR 469; Sultan Ali v. Khushi Muhammad PLD 1983 SC 243 and Administrator, Thal Development through EACO Bhakkar and others v. Ali Muhammad 2012 SCMR 730 ref.

(b) Administration of justice---
----What was not permitted to be done directly could not be achieved through circumvention of law by indirect means.
Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others PLD 2003 SC 979 ref.

(c) Constitution of Pakistan---

----Art. 199---Constitutional petition---Competency---Past and closed transaction---Acquisition of private water canal by the Provincial Government---Compensatory award---Decree was passed in favour of predecessor-in-interest of the petitioner by the High Court, but on account of amendments in the relevant Law, the Federal Court (former apex Court in Pakistan) proceeded to set-aside the said decree and held the predecessor-in-interest not entitled to any compensation---Relief which had been prayed for by the petitioner in the present constitutional petition, was in fact a closed and past transaction and the entitlement, which was being claimed by the petitioner, had already been refused to her forefathers on the same issue---Present constitutional petition was, thus, not competent and the same was dismissed.

Malik Noor Muhammad Awan for Petitioner.

Muhammad Hameed Khan Rai, Assistant Advocate-General Punjab for Respondents Nos.1 and 2.

Rana Muzaffar Hussain for Respondents Nos.3 to 8.
Date of hearing: 22nd November, 2017.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.--- With the consent of learned counsel for the parties, the hearing of this petition is being treated as pacca one.

2. The petitioner is representative of fourth generation of Tiwana Family. Between 1860 and 1871, great grandfather of petitioner Malik Sahib Khan Tiwana had constructed some inundation canals subject matter of the dispute, known as Malik Sahibkhanwala, also known as great Kalra canal, Piranwala canal, Chaharmiwala canal and Tootanwala canal in the District of Shahpur. With the exception of Tootanwala canal, the other three canals were mentioned in Schedule-II of The Punjab Minor Canals Act (Act III of 1905). By means of notification dated 19.04.1952 issued under Section 48 of The Punjab Minor Canals Act, 1905, two private canals known as Malik Sahibkhanwala and Piranwala were acquired by the Government of Punjab. In the same year, a new canal called Shahpur Branch was constructed by Government of Punjab, which cut across the Chaharmiwala and Tootanwala Canals and thus stopped the flow of water to latter two canals from the river. Malik Khizar Hayat Khan Tiwana predecessor-in-interest of the present petitioner moved the Collector seeking compensation with regard to three canals namely Sahibkhanwala, Piranwala and Chaharmiwala. The Collector, Shahpur District made his award on 18.12.1954, whereby he determined the entitlement of the petitioner to receive the following amounts:-

Sahibkhanwala Canal Rs.2,01,18,035 -

Piranwala Canal Rs.37,37,470/-

Chaharmiwala Canal Rs.11,28,432/-

In 1952, the Provincial Legislature amended the Canal and Drainage Act by promulgation of Canal and Drainage Amendment Act (Act XIV of 1952), The Punjab Minor Canals Amendment Act (Act XVII of 1952) and the Punjab Minor Canals Amendment (Ordinance I of 1952). The effect of these amendments was that no compensation was payable by the Government either for acquisition of the canals or for stoppage of water to the other canals.

Furthermore, against the award made by the Collector, the only remedy provided was to file an appeal.

Such amendments were challenged by Malik Khizar Hayat Khan Tiwana predecessor-in-interest of present petitioner by filing a suit before the learned Senior Civil Judge, Sargodha, however, it was transferred to the High Court on account of involvement of important Constitutional question in it. The Civil Original Case No.09 of 1954 was decreed by this Court vide judgment and decree dated 22.07.1954 (reported in PLD 1955 Lahore 88).

The province was not satisfied with such decree granted by the High Court and thus, it was appealed against through Constitutional Civil Appeal No.01 of 1954 before the Hon'ble Federal Court. The Hon'ble Federal Court accepted the referred appeal on 14.03.1956 and set aside the judgment and decree passed by the High Court. This judgment is reported as "The Punjab Province v. Malik Khizar Hayat Khan Tiwana" (PLD 1956 Federal Court 200).

The conclusion arrived at by the Hon'ble Federal Court for ready reference and in order to understand the proposition is reproduced herein below:-

> "The true position, however, is that both these sections are valid. Section 4 is valid for the reason that it seeks to make unconstitutional legislation constitutional, and this is essentially a constitutional matter. Where a law is invalid on the ground that it is in excess of the powers of the legislature passing it, its validation by a constituent authority must ex-hypothesis be deemed to be constitutional legislation, and any objection to the manner in which such validation is affected is an objection to the form of that legislation and not to the power of the validating authority. In the present case, the laws in question could be validated by the Constituent Assembly by so amending sections 88 and 299 of the Constitution Act as to bring the objected legislation retrospectively within the competency of the Provincial Legislature or by the Assembly's itself enacting that legislation retrospectively. The Assembly having done both, no objection can consequently be taken to the manner in which it has chosen to proceed. It is true that having retrospectively amended sections 88 and 299 the subject-matter of section 4 and partly of section 5 of the Validation of Laws Act fell within the Provincial List, but this does not mean that for that reason it went out of the legislative authority of the Constituent Assembly. A constituent authority, like the Constituent Assembly, with no limitations on its powers may at any time encroach upon the sphere of a legislature which is subject to its constituent authority, and all such encroachments, whether they take the form of validation of the laws of or the making of laws for that legislature are in substance provisions as to the constitution of the State and properly fall within subsection (1) of section 8 of the Indian Independence Act. Similarly, section 5 is a provision as to constitution because it (1) bars objections to legislation on the ground of ultra vires, and (2) ousts the jurisdiction of all Courts, including the Federal Court whose jurisdiction in certain matters is guaranteed by the Constitution Act. I have, therefore, no doubt in my mind that both under subsection (1) of section 8 of the Indian Independence Act and section 5 of the Validation of Laws Act, we cannot entertain any objection to the validity of the laws which have deprived the respondent of the right of compensation to which he was entitled under the unamended laws and which was recognized by the decree of the High Court. In such

matters the Courts are not to question the motives of policy of the legislature or to refuse to give effect to legislation merely because it appears to be harsh or unreasonable or vindictive. Their plain duty is to ascertain the intention of the legislature and to carry it out irrespective of the consequences that may ensue to a particular party. I, therefore, hold that the Validation of Laws Act, 1956, has the effect of rendering the decree of the High Court ineffective and that it is the duty of this Court not only to so declare but also to vacate the decree. I would, therefore, accept the appeal of the Government, reverse the decree of the High Court, and dismiss the respondent's suit. I would, however, allow to the respondent his costs throughout because after a strenuous battle he won in the High Court and he is defeated here, not because the judgment of the High Court was wrong on the date that it was delivered, but because the Legislature without waiting for this Court's decision on the merits of the appeal came to the rescue of the Punjab Government and deprived the respondent of the benefit of a decree."

On the other side, some references under Section 18(3) of The Land Acquisition Act, 1894 were pending before the learned District Judge, Sargodha. The learned District Judge, Sargodha vide judgment dated 11.07.1957 in such references has held that with regard to Chaharmiwala Canal, the Collector had no authority to award compensation for stoppage of water in view of the amended law, whereas with regard to three other canals, it was observed that an appeal was available with the Commissioner, Rawalpindi Division, who was competent to deal with the matter.

Such findings of the learned District Judge were challenged by Malik Khizar Hayat Khan Tiwana before this Court by means of Writ Petition No.1282 of 1957, which finally was taken up and decided by this Court on 13.10.2000, when the same was dismissed.

In order to understand the prayer made in the present writ petition, it would be in the fitness of thing that the prayer made by late procedure -in-interest of present petitioner Malik Khizar Hayat Khan Tiwana made in the referred writ petition be reproduced as under:-

> "It is therefore respectfully prayed that this Hon'ble Court in the exercise of its jurisdiction under Article 170 may be pleased to quash the order of the learned District Judge, and direct that the compensation already assessed be paid to the petitioner, in respect of all the three canals."

It is an admitted fact that such findings arrived at by this Court on 13.10.2000 were never further challenged.

3. The present petitioner with the claim that late Malik Khizar Hayat Khan Tiwana was her great grandfather, by impugning order dated 16.12.2012 passed by a Committee constituted for such specific purpose in the Government of Punjab conveyed through letter dated 22.02.2013 having the prior approval of the competent authority, whereby in view of the decision of the Hon'ble Federal Court arrived at in Constitutional Civil Appeal No.01 of 1954 on 14.03.1956 and the judgment passed by this Court in Writ Petition No.1282 of 1957 on 13.10.2000, again attempted to reopen the past and closed transaction.

Learned counsel for the petitioner instead of putting a challenge straightway to the impugned order has now made basis of his arguments an interim order dated 03.07.2014 passed by this Court in the present writ petition.

In order to better appreciate the contentions of learned counsel for the petitioner, referred interim order has been gone through with care, wherein although not only the earlier decision of the Federal Court, but also of this Court passed in Writ Petition No.1282 of 1957 were referred, however, in view of some concession seemingly extended by the departmental representative appearing for Irrigation Department, the matter was again referred to the Collector, Sargodha for determining afresh the entitlement of the present petitioner of having compensation as against the acquisition of canals or stoppage of water from the river by means of award dated 18.12.1954.

The status of the concession extended by the departmental representative, as shown to have been extended in favour of the petitioner on 03.07.2014 reflected in the interim order passed by this Court on the said date in the present writ petition, will be dealt with later on, however, on the reference made by this Court, District Collector, Sargodha, who was designated to proceed under the direction of this Court with reference to claim of the petitioner has finally decided the matter placed before him on 30.10.2014 and held the petitioner not entitled to any compensation as is being claimed by her.

Although a decree was passed in favour of Malik Khizar Hayat Khan Tiwana by this Court in Civil Original No.09 of 1954, but on account of amendments in the relevant Law, the Hon'ble Federal Court proceeded to set aside the said decree and held not entitled Malik Khizar Hayat Khan Tiwana to have any compensation in the light of award dated 18.12.1954. In view of legal position, when the judgment of the High Court is set aside by the Hon'ble Federal Court, the entire superstructure built thereon is bound to fall on the ground and the parties are restored to the same position as if no judgment and decree had been passed by the High Court. In this regard, reference can be made to case titled "Aasia Jabeen and 3 others v. Liaqat Ali and others" (2016 SCMR 1773).

So far as the concession extended by the representative of Irrigation Department on 03.07.2014 before this Court, while agreeing that the matter can again be referred to the Collector for evaluating the entitlement of the petitioner for compensation as against the acquisition of referred canals is concerned, it is a settled position of law that the consent of the parties cannot confer the jurisdiction.

In case titled "Shahul Hamid v. Tahir Ali" (1980 SCMR 469), the Hon'ble Supreme Court of Pakistan has held as under:-

> "8. ..... All this discussion will show that neither a Court can issue any order nor a party can agree that with regard to any particular operative judgment a plea of res judicata will not be raised in any future litigation. Such order or agreement as discussed above would be a nullity and inoperative."

In case titled "Sultan Ali v. Khushi Muhammad" (PLD 1983 Supreme Court 243), the Hon'ble Supreme Court of Pakistan has held that total absence of jurisdiction can never be waived by the parties nor can an illegality in an order be cured by the consent of the parties.
In another case titled "Administrator, Thal Development through EACO Bhakkar and others v. Ali Muhammad" (2012 SCMR 730), the Hon'ble Supreme Court of Pakistan has observed in the following manner:--

> "8. The two Courts below were, therefore, not justified in bypassing the issue of maintainability of the suit merely on the concession of appellants' counsel, who refrained to argue this legal point. Needless to mention here that it is the bounden

duty of every Court/Tribunal to examine the issue of bar of its jurisdiction at the earliest opportunity and decide it in accordance with law, instead of escaping to decide such important aspect of the case on the mere concession of one or the other party. Moreso, when consent of the parties can neither confer nor can take away the jurisdiction of a Court/Tribunal, unless so conferred or barred by law."

In case titled "Member, Board of Revenue, Punjab (Settlement and Rehabilitation Wing)/Chief Settlement Commission, Punjab, Lahore v. Muhammad Mustafa and 74 others" (1993 SCMR 732), the Apex Court provides a verdict that where the direction given by the High Court is manifestly against the law, it cannot be allowed to remain.

By getting a reference from this Court to the Collector on the basis of concession extended by the departmental representative, as is manifest from interim order passed by this Court on 03.07.2014, the petitioner in fact attempted to get a compensation, which earlier on number of occasions has been refused by the authorities having competent jurisdiction including the Apex Court at the relevant time i.e. Federal Court and in view of law laid down by the Hon'ble Supreme Court of Pakistan in case titled "Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others" (PLD 2003 Supreme Court 979), it is settled position of law that what is not permitted to be done directly cannot be achieved through circumvention of law by indirect means.

4. Learned counsel for the petitioner in the last limb of his arguments has referred Article 24 of The Constitution of Islamic Republic of Pakistan, 1973 with the contention that no one can be deprived of his property without due process of law and without payment of compensation thereto.

Even this was the plea inter alia raised in Writ Petition No.1282 of 1957, which was duly answered by this Court in judgment announced on 13.10.2000 in the following manner:-

"4. One of the contentions raised in this petition is that by the time, the matter was decided by the learned District Judge, the Constitution of Islamic Republic of Pakistan, 1956 had been promulgated and under the provisions contained therein, no property could be acquired without providing compensation.

5. That may so, but what is to be seen is that the acquisition in this case was complete is far back as 1952, much before coming into force of the Constitution. Consequently, the constitutional provisions have no application to the present case. If any authority is needed, reference may be made to Keshavan Madhava Menon v. The State of Bombay (AIR (38) 1951 S.C. 128), Habeeb Muhammad v. The State of Hyderabad (AIR 1953 S.C. 287) and Dilbar Husain v. Ch. Khurshid Ahmad (PLD 1956 (W.P.) Lahore 865)."

As such, the point lastly raised by learned counsel for the petitioner is not available to the petitioner in view of above unchallenged findings of this Court.

5. For what has been discussed above, it is the considered view of this Court that the relief, which has been prayed for by the petitioner in the present writ petition, is in fact a closed and past transaction and the entitlement, which is being claimed by the petitioner, has already been refused to her forefathers on the same issue. As such, the present Constitutional petition is not competent and the same is dismissed.

6. Before parting with the decision of this writ petition, it is appropriate to recognize the able assistance provided by Mr. Muhammad Hammad Khan Rai, learned Assistant Advocate-General Punjab in this matter in arriving at a just decision.

MWA/S-87/L Petition dismissed.

P L D 2018 Lahore 19
Before Ibad-ur-Rehman Lodhi, J
Malik ZAHEER ARSHAD---Petitioner
Versus
FEDERATION OF PAKISTAN and others---Respondents

Writ Petition No.1080 of 2013, heard on 29th August, 2017.

Cantonments Act (II of 1924)---

----S. 6---Cantonment Rent Restriction Act (XI of 1963), S.6--- Constitution of Pakistan, Arts. 175(3) & 199---Constitutional petition---Rent Controller---Appointment--- Petitioners assailed jurisdiction of Rent Controller exercised by Cantonment Executive while deciding ejectment applications---Validity---Representatives from executive were performing judicial functions in courts of Controller of Rents constituted under provisions of Cantonments Act, 1924, which was in negation of Art.175(3) of the Constitution providing complete separation of Judiciary from the Executive--- High Court declared enabling provision of appointment of Controller of Rents, i.e., S. 6 of Cantonments Act, 1924, as violative of Art.175(3) of the Constitution and concept of independence of Judiciary from the Executive---High Court directed Federal Government to take appropriate measures to bring provisions of Cantonments Act, 1924 in conformity with the Constitution and findings already arrived at by superior courts---High Court further directed that either appointment as Controller of Rents in view of S. 6 of Cantonments Act, 1924 was to be made from amongst persons having legal knowledge and skill with consultation of concerned Chief Justice of High Court or such judicial powers within meaning of S. 6 of Cantonments Act, 1924 be directed to be performed by civil judges already performing their duties as Special Judges (Rent in Punjab) and Rent Controllers in other provinces under Urban Rent Laws---Petition was allowed accordingly.

Accountant General Sindh and others v. Ahmed Ali U. Qureshi and others PLD 2008 SC 522; Province of Sindh through Chief Secretary and another v. Rasheed A. Rizvi and others PLD 2012 SC 649; Muhammad Ali Satakzai and others v. Appointing Authority of the Additional District and Sessions Judges through Registrar Balochistan High Court and others 2012 PLC (C.S.) 1216; Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others PLD 2013 SC 501; Younas Abbas and others v. Additioal Sessions Judge Chakwal and others PLD 2016 SC 581; Amanullah Khan Yousufzai and others v. Federation of Pakistan through Law Secretary and others PLD 2011 Kar. 451; Yousaf Ayub Khan v. Government through Chief Secretary, Peshawar and 2 others PLD 2016 Pesh. 57 and Ghulam Mustafa Bughio v. Additional Controller of Rents, Clifton and others 2006 SCMR 145 rel.

Amjad Afsar Ghakhar and Malik Shaukat Hayat for Petitioner.
Muhammad Ilyas Sheikh and Muhammad Taimoor Malik, Amici Curiae appointed by the Court.
Malik Ahmad Jalil, Assistant Attorney-General for Federation.
Rashid Hafeez, Additional Advocate-General, Punjab for Province.
Date of hearing: 29th August, 2017.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---With the consent of learned counsel for the parties, the hearing of this petition is being treated as pacca one.

2. On 27.04.1963, Act No.XI of 1963 namely The Cantonments Rent Restriction Act, 1963 (hereinafter to be referred as Act) was promulgated making provision for the control of rents of certain class of buildings within the limits of the cantonment areas and for the eviction of tenants therefrom and for matters connected therewith. For the purposes of the said Act, the Federal Government was authorized by virtue of Section 6 thereof to appoint a person to be the Controller of rents for one or more cantonments.

The "Controller" is defined in Section 2(d) of the Act in the manner, which means a Controller of Rents appointed by the Federal Government under subsection (1) of section 6 and includes an Additional Controller.

In all the cantonment areas, the Executive Officers in the cantonments were given additional powers to act as Controller for the purposes of the Act.

To make appointments of the cantonment servants from BPS-1 to above, the authorities nominated in Rule 7(1) of The Pakistan Cantonment Servants Rules, 1954 were made competent. In view of serial No.4 of the table provided under Rule 7(1) of the referred Rules for appointment of cantonment servants from BPS-16 and above, the Director General has been nominated as Appointing Authority. The Executive Officers in cantonments fall in the said category.

"Director General" is defined in Rule 2(eee) of The Pakistan Cantonment Servants Rules, 1954 in the following manner:--

> ""Director-General" means the Director-General, Military Lands and Cantonments Department, and includes such other officer as the Government may appoint to exercise all or any of the powers of the Director-General under these rules."

In view of Rule 7(4) of the Rules, the appointing authorities under sub-rule (1) were required only to appoint fit and proper persons and to comply with the executive instructions issued by Government, from time to time, on the subject of recruitment of Government servants of the class and status concerned.

2. On 12th of April, 1973, the people of Pakistan through their representatives in National Assembly adopted, enacted and gave to themselves the "Constitution".

Part VII of the Constitution deals with the judicature and Article 175(3) of The Constitution of the Islamic Republic of Pakistan, 1973 provides that the Judiciary shall be separated progressively from the Executive and originally a period of three years was fixed from the commencing day to achieve such goal, which was subsequently extended to 14-years by Presidential Order No.14 of 1985. This period of 14-years even elapsed in 1987.

The Tribunals or Quasi Judicial Courts constituted, before the Constitution was promulgated, continued working in the same manner and with the same Presiding Officers, who were mainly appointed from executive side, to act as head of such Courts or Tribunals. In some cases, the appointment of the Presiding Officers of such forums was made subject to the supervision of Public Service Commission. The matters of violation of the mandate of Article 175 of the Constitution after elapse of the provided period were started bringing in the notice of the Superior Courts of the country and consistently the concept of independence of Judiciary and its complete separation from the executive was being safeguarded by the Superior Courts.

In case titled "ACCOUNTANT-GENERAL, SINDH and others v. AHMED Ali U. QURESHI and others" (PLD 2008 Supreme Court 522), the apex Court has authoritatively held in the following manner:-

> "24. In the broader sense, the concept of independence of judiciary is not confined to the extent of disposal of cases by the Judges and discharging of the judicial functions rather in the extended meaning, the concept of independence of judiciary is complete separation from executive authorities of the State in all matters including pay and pension which is an essential component of independence of judiciary but unfortunately as is evident from judicial history of Pakistan Executive Authorities instead of acting in aid of judicial independence and taking remedial steps for judicial reforms have always behaved with step-motherly attitude towards judiciary and its independence of obvious reasons of maintaining their will and supremacy through administrative devices even at the cost of damaging the judicial system. This may be pointed out that all financial matters concerning with the judiciary including the pay and pension as well as other privileges of Judges are under the direct control of the Executive Authorities and it has been observed that the Executive Authorities, without recognizing the independent status of judiciary as an important Organ of State, treat it as their subordinate department in such matters .. In nutshell, the Executive is not supposed to interfere in the affairs of judiciary in any manner."

In case titled "PROVINCE OF SINDH through Chief Secretary and another v. RASHEED A. RIZVI and others" (PLD 2012 Supreme Court 649), the Hon'ble Supreme Court of Pakistan has held as under:-

> "9. Our constitutional courts have consistently held that the process of appointments to the judiciary must be carefully scrutinized through the lens of constitutional principles such as the principle of separation of powers. In the Al-Jehad Trust case, this Court stated with reference to appointment of judges of the superior judiciary "...that the independence of the judiciary is inextricably linked and connected with the process of appointment of judges and the security of their tenure and other terms and conditions. "(PLD 1996 SC 324, 429) Although this was said in the context of appointment to the High Court, the principle applies with equal force to all judicial appointments, including those in the District Judiciary. Accordingly, the dictum laid down in the Al-Jehad case was soon reaffirmed by this Court in the case of Mehram Ali and others v. Federation of Pakistan (PLD 1998 SC 1445, 1474) and Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504, 658), both cases which

concerned the District Judiciary. The aforesaid dictum has also been recently reiterated in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2010 SC 879, 1182) and Munir Hussain Bhatti v. Federation of Pakistan (PLD 2011 SC 407). In the latter case, the Court, after examining the case-law, concluded that "it is an undisputed tenet of our Constitutional scheme that in matters of appointment, security of tenure and removal of Judges the independence of the Judiciary should remain fully secured." (PLD 2011 SC 407, 467).

20. The SPSC, to which certain functions of the Provincial Government of Sindh have by law been delegated under Article 138 of the Constitution, has correctly been deemed by the High Court as an executive authority. It is clearly performing an executive function and for this very reason, it cannot be given the task of making appointments to the Judicature. It may, however, be noted that while it remains a part of the Executive branch, for the effective discharge of its duties, it has been provided a certain degree of autonomy from the political executive. Where such autonomy is unlawfully impinged upon by the Executive in a given situation, the remedy lies in rectifying the specific situation under Article 199 of the Constitution, rather than declaring an Executive body to be incompetent or to be acting mala fide."

In case titled "MUHAMMAD ALI SATAKZAI and others v. APPOINTING AUTHORITY OF THE ADDITIONAL DISTRICT AND SESSIONS JUDGES through Registrar Balochistan High Court and others" (2012 PLC (C.S.) 1216), the Hon'ble Supreme Court of Pakistan has held that introduction of Public Service Commission in process of selection of such Judicial Officers was offensive of concept of independence of judiciary and separation of judiciary from executive.

In case titled "Sh. RIAZ-UL-HAQ and another v. FEDERATION OF PAKISTAN through Ministry of Law and others" (PLD 2013 Supreme Court 501), the apex Court has held as under:-

"41. It is pertinent to mention here that as the Service Tribunals are not only deemed to be a civil Court but also exercise judicial powers, therefore, they are included in the term 'Court' mentioned in Article 175 of the Constitution. As such, these Tribunals are to be manned, controlled and regulated in accordance with the law relating to management, regulation and control of Courts in Pakistan.

42. It is to be noted that independence of judiciary has been recognized as a universal human right. In terms of Article 10 of the Universal Declaration of Human Rights, G.A, 1948, everyone is entitled to full equality to a fair and public hearing by an independent and impartial Tribunal. In Pakistan, the independence of judiciary is a basic principle of the constitutional system of governance. The Preamble and Article 2A state that "the independence of judiciary shall be fully secured". This Court while interpreting Article 175 has further strengthened the principle of the independence of judiciary, by emphasizing the separation of Judiciary from the Executive. The Constitution makes it the exclusive power/responsibility of the Judiciary to ensure the sustenance of the system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. To do so, the Judiciary has to be properly organized and effective and

efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially....

45. The Principle of separation and independence of judiciary as envisaged in Article 175 of the Constitution is also applicable to the lower judiciary as it is the part of the judicial hierarchy. Thus, its separation and independence has to be secured and preserved as that of superior judiciary. In terms of Article 175 read with Article 203 of the Constitution, the lower judiciary should be separated from the Executive and the High Court shall supervise and control all courts subordinate to it....As it has been held that Service Tribunal discharges judicial functions, thus falls within the definition of a "Court" in view of the above discussion, therefore, the Tribunals have to be separated from Executive following the principle of independence of judiciary in view of Article 175(3) of the Constitution."

In case titled "YOUNAS ABBAS and others v. ADDITIONAL SESSIONS JUDGE, CHAKWAL and others" (PLD 2016 Supreme Court 581), the apex Court has held that a provision of law can be declared ultra vires if it is violative of the provisions of the Constitution which guarantee fundamental rights, independence of judiciary or its separation from the executive.

In case titled "AMANULLAH KHAN YOUSUFZAI and others v. FEDERATION OF PAKISTAN through Law Secretary and others" (PLD 2011 Karachi 451), the Division Bench of Karachi High Court has held that judicial service is essentially and structurally distinct and separate service from the civil, executive and administrative services of Pakistan and Judicial service cannot be treated at parity with such services on any account nor can judicial service be combined, abolished, replaced, mixed up and or tied together with the civil executive and or administrative services. Judiciary as a whole is a separate and distinct class in itself. Further that supervision and control over the subordinate judiciary vested in the High Court under Article 203 of the Constitution, keeping in view Article 175 of the Constitution, is exclusive in nature, comprehensive in extent and effective in operation and such supervision comprehends the administrative power as to the working of the subordinate courts and disciplinary jurisdiction over the subordinate judicial officers and any provision in an Act or any rule or a notification empowering any executive functionary to have administrative supervision and control over the subordinate judiciary will be violative of Article 203 of the Constitution and militates against the concept of separation and independence of judiciary as envisaged by Article 175 of the Constitution and the Objectives Resolution. The Division Bench has further held that High Court is quite competent to direct the concerned quarters to implement Article 175(3) of the Constitution in its true sense by eliminating the intervention of executive into the affairs of judiciary from each and every angle, so that Pakistan as nation ranks and stands out amongst comity of nations having independent, impartial and competent judiciary for all times to come.

In another case titled "YOUSAF AYUB KHAN v. GOVERNMENT through Chief Secretary, Peshawar and 2 others" (PLD 2016 Peshawar 57), the Division Bench of Peshawar High Court has held as under:-

"33. It is settled that the mandate and commencement of Article 175 must be obeyed and implemented; any laxity in this regard will amount to violation of Constitutional

provisions. It is also admitted principle of law that a fair trial is deemed to be vitiated if judicial functions are given to the executive and its officer and the independence of the judiciary cannot be secured if the executive is made a part of judiciary."

3. Challenging the vires of Section 6 of the Act on the touchstone of Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973 and the subsequent examination of the said subject by the Superior Courts as highlighted above, the petitioner has prayed for issuance of a writ declaring the said provision of law as being violative to Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973, which provides complete separation of judiciary from executive.

This Court, while hearing F.A.O. No.123 of 2016, titled "Sohail Ahmed Qureshi and others v. Muhammad Rashid Farooqi" has taken notice of the novel way adopted by the Additional Rent Controller, Chaklala Cantonment, Rawalpindi, who has dealt with ejectment matter in the manner, which has no legal sanction at all and reading of the said order constitutes an impression that the Officer passed such order has no knowledge even of the basics of judicature. The said incumbent of Chaklala Cantonment/Controller of Rents was directed by this Court to furnish report and give proposals to improve the working in the Courts of Controller of Rents in cantonment areas. The report received on 04.04.2017 inter alia provides the following proposals:-

"2. As far as functions performed by the Controller of Rent/Additional Controller of Rent, are the same as performed by the civil judges. The only difference is that the Federal Government while appointing the Controller of Rent, preferred the Executive Officers/Additional Executive Officers as Controllers of Rent. The wisdom of legislature cannot be challenged because no qualification/experience has been prescribed for holding the post of Controller of Rent/Additional Rent Controller for Cantonments. As the Executive Officers have not much experience of writing judgments as such occasionally some judgments may be well worded.

3. To overcome this factor, it is suggested that the Executive Officers/Additional Executive Officers be given 3 months training in judicial Academy to get training in understanding the statutes and writing judgments in a logical and systematic manner.

4. The second suggestion is that the Federal Government may appoint independent Controllers of Rent from Executive Officers who must be law graduate and must have been practicing law for at-least 5 years.

5. The last but not the least suggestion is counseling of the Controllers of Rent by the Honourable Judges of the High Court. This practice can improve a lot the functions and process of Judicial work under the Cantonments Rent Restriction Act 1963."

The Hon'ble Supreme Court of Pakistan in case titled "GHULAM MUSTAFA BUGHIO v. ADDITIONAL CONTROLLER OF RENTS, CLIFTON and others" (2006 SCMR 145), while dealing with a matter relating to The Cantonments Rent Restriction Act, 1963 has concluded in the following manner:-

"It is high time that the Government should take steps for amendment in the provisions of Act, 1963 providing for appointment of Judicial Officers as Controller and Additional Controller of Rent under section 6 of the Act, 1963, instead of

conferring quasi-judicial powers on Executive Officer of the Cantonment, who is generally not fully well versed with the complexities of law but otherwise invested with the power to deal with very valuable property rights of the citizens owning properties in Cantonment areas throughout the country."

Almost a decade has gone, when the Hon'ble Supreme Court of Pakistan felt it appropriate to advise the Government to take steps for amendment in the provisions of Act, 1963, but it seems that the concerned quarters in the Government have not moved in spite of such clear directions of the apex Court.

4. In view of what has been discussed above, it is clear that representatives from executive are performing judicial functions in the Courts of Controller of Rents constituted under the provisions of the Act, which is in negation of Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973 providing complete separation of judiciary from executive. The enabling provision of appointment of Controller of Rents i.e. Section 6 of the Act, thus, is declared as violative to Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973 and the concept of independence of judiciary from executive.

5. The Federal Government is directed to take appropriate measures to bring the provisions of the Act in conformity with the Constitution and the findings already arrived at by the Superior Courts within a period of next six months and either the appointment as Controller of Rents in view of Section 6 of the Act be made from amongst the persons having legal knowledge and skill with the consultation of the concerned Chief Justices of the Provincial High Courts or such judicial powers within the meaning of Section 6 of the Act be directed to be performed by the Civil Judges already performing their duties as Special Judges Rent (in Punjab) and Rent Controllers in other Provinces under Urban Rent Laws.

6. With these observations, this Constitutional petition stands allowed.

7. Copy of this judgment be transmitted to the Secretaries, Government of Pakistan in Ministry of Law, Justice and Parliamentary Affairs and of National Assembly of Pakistan for information and necessary action at their end.

MH/Z-20/L Petition allowed.

P L D 2018 Lahore 122
Before Ibad-ur-Rehman Lodhi, J
JAVED BUTT---Petitioner
Versus
DISTRICT REGIONAL TRANSPORT AUTHORITY (DRTA) through Chairman and 2 others---Respondents

Writ Petition No.1769 of 2017, heard on 23rd August, 2017.

Provincial Motor Vehicles Ordinance (XIX of 1965)---

----Ss. 2(12), 45(2), 51 & 52---Provincial Motor Vehicles Rules, 1969, R.96---Constitution of Pakistan, Arts. 18 & 25---Lawful business---Cantonment area---Preferential treatment---Discrimination---Petitioner was distributor of motor-cab rickshaws and was also owner of

number of rickshaws being plyed by his drivers---Petitioner was aggrieved of restriction imposed by District Regional Transport authority in plying motor-cab rickshaw within cantonment area---Validity---Police report furnished by Chief Traffic Officer was made basis of decision in question---Such police report was not intended to be anything more than an expression of opinion by an Authority interested in maintenance of law and order---At the most, such report could be taken in nature of information supplied by police to the Authority in order to assist in making up their mind---Authority in fact believed recommendations of Chief Traffic Officer and same factually caused prejudice to a particular class by depriving them to enter into a lawful trade or business which otherwise granted under Art.18 of the Constitution---Problem of creating traffic congestion and apprehension of security hazards or threats for particular areas situated within cantonment limits indicated that one city was divided into different parts and inhabitants of one city were distributed into different classes---Residents of cantonment areas were given preferential consideration and what was not considered suitable for cantonment areas was permitted to prevail in municipal areas of same city---Such discriminatory attitude on part of public functionaries could not be given judicial sanction---Traffic police was supposed to maintain flow of traffic and not to allow traffic congestion but it did not mean that to facilitate traffic staff, by imposing reasonable restriction, public transport vehicles were stopped to be operational on roads---High Court directed respective quarters of administration to improve their skills and competence to deal with such issues---Imposing complete restrictions on lawful trade or business was not answer to such problems---High Court set aside order passed by the Authority as same suffered from serious defects and was result of an exercise of authority never vested in the Authority---Constitutional petition was allowed in circumstances.

Arshad Mehmood and others v. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others PLD 2005 SC 193 rel.

Muhammad Ilyas Sheikh and Muhammad Taimoor Malik for Petiitoner.

Khursheed Ahmad Satti, Assistant Advocate-General Punjab for Respondent.

Date of hearing: 23th August, 2017.

JUDGMENT

IBAD-UR-REHMAN LODHI J.--With the consent of learned counsel for the parties, the hearing of this petition is being treated as pacca one.

2. District Regional Transport Authority, Rawalpindi in its meeting held on 08.02.2017 decided to impose restriction on the movement of motor cab Rickshaws on Mall Road, Peshawar Road, Bank Road, Kashmir Road, Adam G Road, Mehfoz Road, Civil Lines, R.A. Bazar and Airport Road. It was further decided in the said meeting that the imposed restriction will be incorporated in the route permits of such vehicles as a condition of such permits.

The petitioner, who is not only a distributor of motor cab Rickshaws, but also owner of number of such Rickshaws being run by the drivers, has challenged such condition imposed by the authority.

3. Report and parawise comments were called and Deputy

Commissioner/Chairman District Regional Transport Authority, Rawalpindi-respondent No.1 by furnishing such report and parawise comments has taken a plea that on the recommendations of Chief Traffic Officer, Rawalpindi, such condition was imposed. Reportedly, the Chief Traffic Officer recommended such restriction upon motor cab Rickshaws in view of the stated traffic congestion in cantonments areas of Rawalpindi. Such Traffic Officer also apprehended the possibility of creation of some security hazards, if such Rickshaws are allowed to operate in the cantonment areas.

The maintainability of Constitutional petition without availing the right of appeal as provided under Rule 96 of Motor Vehicles Rules, 1969 was also questioned.

4. The minutes of meeting of the District Regional Transport Authority, Rawalpindi held on 08.02.2017 reveal that the meeting was chaired by the Deputy Commissioner, Rawalpindi and it was attended to by SP Saddar on behalf of City Police Officer, Rawalpindi, Chief Traffic Officer, Rawalpindi, SDO Highways on behalf of Executive Engineer (Highways), Rawalpindi and Secretary District Regional Transport Authority, Rawalpindi. None from public, owners or drivers of motor cab Rickshaws were either invited to participate in such meeting nor any such person attended such meeting. Although in the impugned order, no provision of law supporting such condition has been referred, however, while filing report and parawise comments, the provisions of Sections 51 and 52 of Provincial Motor Vehicles Ordinance, 1965 (hereinafter to be referred as Ordinance) are pleaded in support of the impugned restriction.

Section 45(2) of the Ordinance empowers the Government (Government of Punjab in this case as defined in Section 2(12) of the Ordinance) to cancel generally or in relation to a specified area any permit or class of permit granted under the Ordinance in respect of transport vehicles and such restriction would only be effective, when it is notified accordingly. Such proceedings are subject to provision of hearing to the representatives of interest affected persons and publication of notification in the official gazette.

5. The respondents have relied upon the provisions of Section 52 of the Ordinance, which too provide the authority to decide whether to grant or refuse a contract-carriage permit and while deciding such matter, the authority will have to keep regard into consideration to the extent to which additional contract-carriage may be necessary or desirable in the public interest.

The respondents have nowhere shown as to whether before imposing impugned restriction upon motor cab Rickshaws to move into the restricted areas, any objections or proposals were invited from the persons, who were possibly to be affected from such decision and thus, the impugned order is hit by the principle of natural justice.

The process of decision making by public functionaries must exhibit transparency and failure on the part of such authority to observe basic rules of natural justice or failure to act with procedural fairness towards persons, who would be affected by decision, would render such decision susceptible to judicial review and this Court, while exercising its Constitutional jurisdiction in such like cases, where the impugned decision suffers from

basic defects and lacks transparency, is competent to entertain such like Constitutional petitions ignoring the fact that any alternate remedy is provided to the affected persons.

The remedy of appeal as has been argued by the learned Assistant Advocate-General in view of Rule 96 of Motor Vehicles Rules, 1969 before the same Provincial Authorities in fact would be an exercise in futility. Since the authorities in such hierarchy are not likely to take a decision contrary to the policy of their regional chapter.

Even otherwise, mere availability of alternate remedy is not a ground for holding Constitutional petition as non-maintainable without applying judicial mind to the question as to whether in fact an effective and efficacious alternate remedy was available and even availability of alternate remedy is not a matter affecting jurisdiction of Court to entertain Constitutional petition.

6. It is established after perusal of record that only a police report furnished by the Chief Traffic Officer has been made basis of the impugned decision. Such police report is not intended to be anything more than an expression of opinion by an authority interested in the maintenance of law and order. At the most such report can be taken in the nature of information supplied by the Police in order to assist the authority in making up its mind. The authority in fact has believed the recommendations of Chief Traffic Officer, which factually caused prejudice to a particular class by depriving them to enter into a lawful trade or business, which otherwise is guaranteed under Article 18 of The Constitution of Islamic Republic of Pakistan, 1973.

The Hon'ble Supreme Court of Pakistan in case titled "ARSHAD MEHMOOD and others v. GOVERNMENT OF PUNJAB through Secretary, Transport Civil Secretariat, Lahore and others" PLD 2005 Supreme Court 193, while dealing with the subject of reasonable restriction within the meaning of Article 18 of The Constitution of Islamic Republic of Pakistan, 1973 has authoritatively held that the Government has the authority to regulate a lawful business or trade, but "reasonable restriction" does not mean "prohibition" or "prevention" completely, except under certain circumstances. The apex Court further held that within the meaning of proviso (b) of Article 18 of The Constitution of Islamic Republic of Pakistan, 1973, even the regulatory authority has to provide an atmosphere of free competition. Dealing with the franchise routes granted to a certain class, the apex Court has held in the referred report that if a right, which has accrued to a person or class of persons to carry on a lawful business, according to the Ordinance, the same would not be denied to them by introducing any franchise or imposing any unreasonable restriction. The report further goes on to hold that under licensing system, unless the business is unlawful or indecency is involved therein, the legislature can enact laws, which would effectively regulate the fields of trade, commerce and industry. At any rate, if restrictions are to be imposed to regulate such trade or business, those should not be arbitrary or excessive in nature, barring a majority of persons to enjoy such trade. While interpreting the Constitution, it was the guiding principle provided by the apex Court for the Courts expecting that judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid.

7. Having considered respective contentions of the parties, this Court reaches to the conclusion ,that the impugned decision suffers from number of defects. It lacks transparency and public functionary making such decision acted in complete oblivion to principles of natural justice. The affected persons were not afforded any opportunity to be heard or to place their respective stances before the authority at the time, when their lawful trade was under attack. A condition imposed on permit holders during the time, when their already issued permits were intact, is in fact an invasion by the Authority on their Constitutional right. The District Regional Transport Authority even was not competent to impose new conditions during valid existence of their already issued route permits and the same are not binding on the holders of route permit issued prior to the impugned decision.

The stated problem of creating traffic congestion and apprehension of security hazards or threats for particular areas situated within cantonment limits of Rawalpindi or Chaklala clearly indicates that one city has been divided into different parts and inhabitants of one city are distributed into different classes, resultantly, the residents of cantonment areas have been given a preferential consideration and which is not considered suitable for cantonment areas, is permitted to be prevailed in municipal areas of the same city. Such discriminatory attitude on the part of the public functionaries cannot be given judicial sanction.

Another reason for imposing such condition as has been referred by the respondents is stated substantial increase of motor cab Rickshaws. This aspect has to be kept in consideration while granting route permits and once a permit is issued, the permit holder has every right to operate in whole of the city. So far as, traffic congestion on account of large number of motor cab Rickshaws, as has been highlighted by the Chief Traffic Officer is concerned, in fact by raising such plea, the Chief Traffic Officer has admitted incapability of the traffic staff in regulating the traffic affairs. The Traffic Police is supposed to maintain the flow of traffic and not to allow traffic congestion, but it does not mean that to facilitate traffic staff by imposing unreasonable restriction, public transport vehicles are stopped to be operational on roads. The respective quarters of administration have to improve their skills and competence to deal with such issues. Imposing complete restrictions on lawful trade or business is not the answer to such problems.

8. The impugned order dated 08.02.2017 passed by the District Regional Transport Authority, Rawalpindi suffers from serious defects and is not sustainable. The same is result of an exercise of authority, which was never vested in respondents and thus, it is without, lawful authority. The same is set aside.

9. Resultantly, this Constitutional petition is allowed as prayed for.

MH/J-16/L Petition allowed.

P L D 2018 Lahore 752
Before Ibad-ur-Rehman Lodhi, J
MASOOD AHMAD ABBASI, ADVOCATE---Appellant
Versus
SHAHID KHAQAN and others---Respondents

Election Appeal No.09 of 2018, decided on 27th June, 2018.

Elections Act (XXXIII of 2017)--

----Ss. 62 & 63---Constitution of Pakistan, Art. 62(1)(f) ---Nomination for election---Scrutiny of nomination papers of a candidate---Disqualifications for membership of Majlis-e-Shoora (Parliament) on account of not being "honest" and "Ameen"---Election Appellate Tribunal constituted under Elections Act, 2017---Nature and jurisdiction---Scope---Appellant impugned order of Returning Officer, whereby nomination papers of respondent were accepted and contended that respondent had engaged, inter alia, in concealment of facts and be declared as not "Honest and Ameen"---Contention of respondent/candidate was that unless there was declaration of any court of law to such effect, a person could not be declared as disqualified on basis of not being "Honest and Ameen"---Held, that the "Election Tribunal" constituted under provisions of the Elections Act, 2017, which was a Federal statute, was a "court of law"---Election Tribunal had held that respondent candidate was guilty of concealing of facts and withholding of complete information, and not a "Honest and Ameen"---Candidate, in circumstances, was disqualified from being chosen a member of Majlis-e-Shoora (Parliament) within meaning of Art.62(1)(f) of Constitution---Appeal was allowed, accordingly.

Masood Ahmad Abbasi Appellant (in person) and on behalf of Appellant in Election Appeal No.23 of 2018.
Sheikh Zameere Hussain assisted by Tahir Mehmood Abbasi and Husnain Muzaffar for Respondent No.1.
Malik Amjad Ali along with Haider Ali Khan, R.O. with record for Election Commission of Pakistan.

Date of hearing: 25th June, 2018.

JUDGMENT

IBAD-UR-REHMAN LODHI J.---Through this common judgment, I intend to dispose of this appeal, as also Election Appeal No.23 of 2018. Although in both the appeals, the appellants are different, but both the appellants have impugned the same order dated 14.06.2018 passed by the learned Returning Officer for constituency of NA-57, Rawalpindi-I, whereby after rejection of their objection petitions against the candidature of respondent candidate, nomination papers filed by respondent No.1 were accepted.

2. The nomination of Shahid Khaqan Abbasi-respondent No.1 was mainly attacked by the appellants on the plea that the respondent has been guilty of concealment of actual facts and has not provided the correct details and description of the immoveable property held by him within Pakistan and cost of the assets has intentionally and knowingly been shown much

less than the actual cost of such assets and thus, he exposed himself to the disqualification clause as provided in Articles 62 and 63 of The Constitution of the Islamic Republic of Pakistan, 1973 and is not a qualified person to be elected or chosen as a Member of Majlis-e-Shoora (Parliament).

It is further added by the appellants that there is marked difference in between the contents of two affidavits separately filed by the respondent/candidate along with his two separate nomination papers i.e. one filed against Serial No.03 on 09.06.2018 and second filed against Serial No.12 on 11.06.2018 for constituency of NA-57 Rawalpindi-I. Clause 'E' of affidavit filed along with nomination papers No.03 contains the remarks as 'NONE', whereas clause 'E' of affidavit produced along with nomination papers No.12 was tampered with by first writing the words NONE in the same manner as was mentioned in the earlier affidavit, but after interpolation, shares in Air Blue and Blue Pines Inn Murree were noted down against such column.

When this defect was pointed out by the appellants on the first date of hearing, the Returning Officer was directed to appear along with record, who on production of the same could not justify such cutting and interpolation on the affidavit. However, when on the next date of hearing, he appeared, he was made presumably wiser and explained that he allowed the counsel for respondent No.1 to get such defect remedied in view of Section 62(9)(d)(ii) of The Elections Act, 2017, however, he has admitted that he has not recorded this fact in the order sheet maintained by him on the relevant file.

The stance so taken by the Returning Officer on his second appearance before this Tribunal has been negated by means of an affidavit executed by Mr. Asad Iqbal Abbasi, Advocate, who according to the contents of such affidavit, was representing the respondent/ candidate before the Returning Officer and on having realized that against column 'E' of the affidavit, the shares of the respondent/ candidate in Air Blue and Blue Pines Inn Murree were to be provided, Mr. Imtiaz Ahmad Abbasi, Advocate on his asking incorporated such words in column 'E' of the affidavit filed along with nomination papers No.12 before its presentation before the Returning Officer.

The stances taken by the Returning Officer and that of in the affidavit of Mr. Asad Iqbal Abbasi, Advocate are inter-contradictory and either one of such stances is false.

3. Although the respondent/candidate in FORM-B i.e. Statement of Assets and Liabilities has not provided the detailed description of any of his immoveable property, however, the cost of assets is provided in column 2 of said FORM-B. According to such details, House No.4, Street 17, Sector F-7/2, Islamabad has been shown of the value of Rs.3,00,000/-. A layman living in Islamabad can conveniently assess the cost of a house over a piece of land of Kanals, which is situated in the heart of Islamabad i.e. posh area of Sector F-7/2 in front of Jinnah Super Market, where only the open land is worth Rs.50 to 60 lacs per Marla. Even such stance with reference to cost of house situated in Sector F-7/2 Islamabad to the tune of Rs.3,00,000/- is itself negated from the fact that in the column of liabilities, the respondent/candidate has shown to have put the referred house under mortgage with MCB Bank against an amount of Rs.2,47,02,741/-. Either the cost of such house has incorrectly been shown as Rs.3,00,000/- or if the same is the actual cost of the house, then the

respondent/candidate must have obtained the mortgaged money more than 80-times of actual cost of mortgaged property from the Bank by using his influence of being a Member of Parliament or subsequent Prime Minister of Pakistan. Both the positions cannot be reconciled conveniently.

Similarly, without disclosing any details of the business under the name and style of Air Blue Limited and without showing the share of respondent/candidate in such business, simply his shares worth Rs.6 crore in such Airline has been mentioned.

The requirement of furnishing such details is in fact aimed to a position that the personality and pen picture of the candidate must be before the voters, but in the case in hand, the respondent/candidate has attempted to conceal all such material facts from the constituency and intention of Constitution, law and interim order passed by the Hon'ble Supreme Court of Pakistan on 06.06.2018 in Civil Appeal No.56-L of 2018 and others, whereby a detailed affidavit was directed to be executed by the candidates giving full particulars for the voters, is in fact attempted to be defeated by the respondent/candidate.

4. Learned counsel representing respondent No.1/candidate with some reservation has admitted that the affidavits furnished with two different nomination papers of same candidate i.e. respondent No.1, do carry different contents, but at the same time, he has stressed that even if such discrepancy is there, it is not to be taken into consideration at present pre-poll stage, rather according to his submission, the matter is to be left for adjudication in post-poll proceedings by the Election Tribunal to be constituted to adjudge the election disputes after conduct of elections. Learned counsel for the respondent/candidate has further stressed that in absence of any declaration from a Court of law, the provisions of Article 62(1)(f) of The Constitution of the Islamic Republic of Pakistan, 1973 are not to be attracted as against the candidate by declaring that he is not sagacious, righteous, honest and Ameen.

Asking to await a declaration of court of law before holding a person as not sagacious, righteous, honest and ameen is nothing, but a mockery of law and jugglery. Articles 62 and 63 of The Constitution of the Islamic Republic of Pakistan, 1973 became part of the Constitution in 1985 and after lapse of decades, I have never come across any declaration of any Court of law declaring a person particularly sitting in the corridors of power as having been hit by the disqualification clause under Articles 62 and 63 of The Constitution of the Islamic Republic of Pakistan, 1973 for obvious reasons that such persons having such disqualifications in their profile conveniently crossed the process of scrutiny at pre-poll stage by simply arguing that they cannot be held as not honest and ameen in absence of any declaration from a Court of law and once they succeeded in capturing an office in the power set up, they would never allow any Court of law to conclude any proceeding, which would culminate in any declaration so required under Articles 62 and 63 of the Constitution. After conduct of every election, the election process or notification of success of returned candidate is challenged through election petitions, but in most of cases, election petitions are not conclusively decided before the Assembly completed its age and such unwarranted elements succeed in enjoying a complete period of the membership in such Assemblies, either under some restraint order by any Court of law or merely on account of pendency of election dispute before the relevant Tribunal. At the end of the day, it is conveniently

pressed into that the pending lis becomes infructuous. Our system at the hands of such elements not only in legislatures, but also in other pillars of the State, has become rusty. It needs drastic remedial steps to be taken, which are not possible, if we allow the same MAAFIA to occupy their places in relevant houses of power.

The respondent/candidate has been a Leader of House and thus, as Prime Minister, was considered to be the face of the nation. The nation needs its face to be clean and clear in order to earn some respect from remaining world, which is not possible if such rusty faces are allowed to represent the nation. Nation expects high moral standards from their leaders by placing them at somewhat higher pedestal and giving a place of a role model to a leader, who even is not ready to share with his nation as to his actual belongings naturally earned from the piece of land, which requires to be ruled by such leadership.

I have almost concluded my tenure in judiciary and countdown of my judicial career has started and having in mind my experience in judicature, I with a heavy heart is going to express my hope from my learned brothers, who would further remain sometime in judicature and those who would be becoming a part of this sacred place of justice in future that if we owe something towards the nation, we have to come out from the shells of expedience. We have also to keep always before us the wording of our oath, which everyone before entering into this place of justice sworn in inter alia on the following lines:-

> "That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:
> And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will."

It also reminded me to a couplet.

Responding to the submissions of learned counsel for respondent No.1/candidate that unless there is a declaration of any court of law under which a person can be declared as not qualified or not honest and Ameen, I declare that this Tribunal constituted under the statutory provisions of a Federal Statute is a Court of law and after declaring that respondent No. 1/candidate being guilty of concealment of facts and withholding of the complete information from his voters, is not an honest and Ameen person and after such declaration, declare him as not a qualified person to be elected or chosen as a Member of Majlis-e-Shoora (Parliament) within the meaning of Article 62(1)(f) of The Constitution of the Islamic Republic of Pakistan, 1973.

5. Keeping in view the misconduct on the part of the Returning Officer, his powers to act as a Returning Officer were withdrawn vide order dated 23.06.2018. The same order would remain effective with a direction to the Election Commission of Pakistan to appoint a new Returning Officer for the constituency of NA-57 Rawalpindi-I and start proceedings against Haider Ali Khan, Returning Officer for his misconduct. Since the Returning Officer is also Member of our District Judiciary, the Registrar of this Court is also directed to initiate appropriate proceedings against Haider Ali Khan, Additional District and Sessions Judge for his stated misconduct. The concept of free, fair and transparent election is not likely to be achieved if such Returning Officers would remain part of our system.

6. As a result of above discussion, both the appeals are allowed and by accepting objection petitions filed by the appellants, the nomination papers filed by respondent No.1 for constituency of NA-57 Rawalpindi-I stand rejected.

KMZ/M-108/L Appeals allowed.

2018 Y L R 1503
[Lahore (Rawalpindi Bench)]
Before Ibad-ul-Rehman Lodhi, J
MUSJID HANFIA DEOBANDI MAJNOO WALI MUSJID through Mutwali and 6 others---Petitioners
Versus
AHMAD KHAN and 8 others---Respondents

Civil Revision No.998 of 2011, heard on 27th February, 2018.

Arbitration Act (X of 1940)---

----Ss. 14 & 16---Suit for declaration and injunction---Report of referee---Objections, filing of---Scope---Referee was appointed with consent of both the parties who agreed to his decision---Petitioners were aggrieved of order passed by Lower Appellate Court allowing respondents to file objections to the report filed by referee---Validity---Referee appointed with the consent of both the parties, had committed no wrong, if he associated some other persons in the process of search of truth---Statement made by such referee in shape of his report could not be termed as an award of arbitration and such statement was not open to objection by either side, as originally at the time of appointment of such referee, parties consented not only such appointment but also bound themselves not to raise any objection on final report / statement of such appointed referee---Report / statement placed / made by referee was not open to any objection---High Court set aside the order passed by Lower Appellate Court, as the Court had committed an illegality by treating statement / report of referee as award of arbitrator permitting parties to raise their objections on such award---Revision was allowed in circumstances.

Ghulam Farid Khan v. Muhammad Hanif Khan and others 1990 SCMR 763; Mst. Lalan v. Noor Muhammad and 12 others 1994 SCMR 1771; Barkat Masih v. Barkat Bibi and others 1999 YLR 1215; Mushtaq-ur-Rehman and 4 others v. Muhammad Akbar and 5 others PLD 1974 SC 139 and Haji Anwar Ali and others v. Bashir Ahmad 2002 CLC 421 ref.

Muhammad Saeed v. Mst. Shamim Akhtar and others 2010 YLR 2987 and Mst. Zanib Bibi through L.Rs. and others v. Province of Punjab through District Collector Lodhran and others 2011 CLC 1933 distinguished.
Haroon Irshad Janjua for Petitioners.
Muhammad Amir Butt for Respondents.
Date of hearing: 27th February, 2018.

JUDGMENT

IBAD-UR-REHMAN LODHI, J.---The petitioners have called in question the vires of order dated 21.11.2011 passed by the learned Additional District Judge, Chakwal, whereby the application of the respondents herein was allowed and the statement made by the referee was ordered to be treated as an award of an arbitrator by permitting the parties to file their objections on such award.

2. The background relevant for the purposes of disposal of this civil revision petition is that in the first instance, the parties to litigation on 03.12.2010 jointly made statement that in order to resolve their dispute, Ch. Dur Muhammad, Advocate be appointed as sole arbitrator. In such joint statement, it was agreed upon in between the parties that the award of the arbitrator would not be objected to by either of the parties. By the time, the arbitrator yet not started his proceedings, there was a turn, when on 11.01.2011, the learned trial court recorded joint statement of the parties to the effect that same person Ch. Dur Muhammad, Advocate be appointed as a referee, whose statement would be valid in its letter and spirit and will be accepted in whatever manner, it is to be concluded as to which school of thought either Deobandi or Brailvi, the mosque under litigation would belong and no objection whatsoever would be raised by either side to the statement of the referee.

The appointed referee before furnishing his statement in shape of report conducted somewhat factual inquiry and probed into the administrative and financial affairs of the mosque and in such process, recorded some statements of relevant persons and then concluded his proceedings, which resulted in filing of his report/statement before the learned trial court on 14.02.2011. The respondents herein prayed for giving them a chance to file objections over such statement of the referee with the contention that since the referee proceeded to inquire into the matter by associating other persons in such process, therefore, he lost his status of a referee and in fact his statement/report is an award furnished by an arbitrator and parties to the litigation have a right to file objections as against arbitration award and by means of impugned order, their such request has been acceded to in the manner as referred to hereinabove.

3. Learned counsel for the petitioners has submitted that irrespective of the position that the appointed referee associated other persons in the probe carried out by him in reaching a conclusion to be rendered as his statement before the Court, his status could have been treated as having been changed from that of referee to an arbitrator.

Contrary thereto, learned counsel for the respondents has supported the impugned order with the contention that in view of Article 33 of The Qanun-e-Shahadat Order, 1984, it is only the statement of a referee, which would be relevant and the moment, the appointed referee involved in some detailed inquiry on the issue referred to him, he ceases to be termed as a referee and the parties to litigation would have every right to raise objections upon his award furnished in his capacity of an arbitrator. In support of his contention, learned counsel for the respondents has placed reliance on cases titled "Ghulam Farid Khan v. Muhammad Hanif Khan and others" (1990 SCMR 763), "Muhammad Saeed v. Mst. Shamim Akhtar and others" (2010 YLR 2987) and "Mst. Zanib Bibi through L.Rs. and others v. Province of Punjab through District Collector Lodhran and others" (2011 CLC 1933).

4. Article 33 of The Qanun-e-Shahadat Order, 1984 provides that statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Such Statutory provision itself does not provide a bar upon such person to whom the matter has been referred before making a statement before the Court to collect further information

in order to reach a just conclusion, which finally would be rendered before the Court as a statement.

Such question was before the Hon'ble Supreme Court of Pakistan in case titled "Mst. Lalan v. Noor Muhammad and 12 others" (1994 SCMR 1771), wherein the findings arrived at by the courts below including High Court were maintained and the report of the referee was refused to be treated as an award by an arbitrator on the objection of one side of the litigation with the plea that since referee before making a statement before the Court had taken evidence for settling dispute between the parties which was necessary in resolving the dispute in question. When the referee was appointed by the parties themselves for resolving dispute between them and such referee entered into the process of taking evidence for settling dispute between the parties, it was held as a necessary step even for such referee in order to resolve the dispute in question.

At this stage, it is relevant to mention that the points settled in Mst. Lalan's case has been attempted to be differentiated by learned counsel for the respondents by maintaining that the view taken in Mst. Lalan's case was of three Hon'ble Judges of Supreme Court of Pakistan, whereas the earlier view was taken by five Hon'ble Judges in case titled "Ghulam Farid Khan v. Muhammad Hanif Khan and others" (1990 SCMR 763) and according to learned counsel for the respondents, the view taken by a Larger Bench consisting of five Hon'ble Judges must prevail.

The perusal of Ghulam Farid Khan's case reveals that in fact in reported matter, the person appointed to resolve the issue in between the parties in fact rendered a "faisla" and the same was placed before the Court, which was not treated as a statement furnishing information within the meaning of Article 33 of The Qariun-e-Shahadat Order, 1984, but an award within the meaning of Section 14 of The Arbitration Act, 1940 and thus, it was held that even if originally referee was appointed, but he quite clearly understood his role as that of arbitrator and proceeded accordingly even though while recording the statements made by the parties, he still described himself as a referee.

In the case in hand, the position is altogether different. The referee, who was appointed with mutual consent of both the parties, has never furnished to the Court his 'faisla', but a statement in shape of report was placed before the Court. Therefore, the findings arrived at in Mst. Lalan's case cannot be discarded merely on the plea that said view was taken by three Hon'ble Judges of Supreme Court of Pakistan.

This Court in case titled "Barkat Masih v. Barkat Bibi and others" 1999 YLR 1215 has proceeded a step further, when the report of a local commissioner, whose report was undertaken not to be challenged by the parties, was treated as a report of a referee by holding that as the parties had voluntarily agreed to be bound by the report of local commissioner, such commission was, in reality, a referee and not a local commissioner, as contemplated by Order XXVI of the Code of Civil Procedure.

To some extent, the same view has been taken by this Court in case of "Mushtaq-Ur-Rehman and 4 others v. Muhammad Akbar and 5 others" (PLD 1974 SC 139), wherein it has been settled that when parties undertook to be bound by the verdict of even local commission appointed at their request, then there will be no valid exception but to dispose off suit on the basis of report of such Local Commissioner.

Similarly, this Court in case titled "Haji Anwar Ali and others v. Bashir Ahmad" (2002 CLC 421), while interpreting Article 33 of The Qanun-e-Shahadat Order, 1984 has held that referee, who was appointed by the parties themselves, was competent to acquire further information. Although a referee had to decide according to his own personal knowledge yet his act of acquiring further information does not vitiate his statement. It was further held that in gathering of information by a referee through other sources is not violative to Article 33 of Qanun-e-Shahadat Order, 1984 and although a referee must have previous knowledge of dispute referred to him, yet there is nothing wrong if referee in order to supplement or augment his knowledge, chooses to affirm or re-affirm the same through other sources and as such, inquiry conducted by such referee, which is supplement to and in addition to his personal knowledge, is not violative to the provisions of Article 33 of The Qanun-e-Shahadat Order, 1984.

So far as the reliance on the cases of "Muhammad Saeed v. Mst. Shamim Akhtar and others" (2010 YLR 2987) and "Mst. Zanib Bibi through L.Rs. and others v. Province of Punjab through District Collector Lodhran and others" (2011 CLC 1933) placed by learned counsel for the respondents, the same are not directly applicable to the question involved in the present petition, as in Muhammad Saeed's case, this Court was of the view that the trial court, while appointing a person to resolve the dispute of the parties had used two distinct terms of referee and local commission at the same time and thus, such order was found by this Court as having been suffered from some irregularities, whereas in case of Mst. Zanib Bibi, the statement of referee was discarded for the simple reason that such referee had no personal knowledge about the matter, rather he got his statement recorded on the basis of hearsay evidence.

In the case in hand, the referee has not only made the basis of his statement the information collected from other sources, but he has also expressed his personal knowledge about the dispute referred to him for its resolution.

5. In view of what has been discussed above, it is, thus, clear that the referee appointed with the consent of both the parties, has committed no wrong, if he associated some other persons in the process of search of truth and statement made by such referee in shape of his report would not be termed as an award of arbitration and such statement was not open to objection by either side, as originally at the time of appointment of such referee, the parties consented not only such appointment, but also bound themselves not to raise any objection on final report/ statement of such appointed referee. The report/statement placed/ made by the referee is not open to any objection.

6. The learned Additional District Judge, while passing the impugned order has, thus, committed an illegality by treating the statement/report of referee as award of the arbitrator permitting the parties to raise their objections on such award. The impugned order is bad in law and is not sustainable, which is set aside.

7. Resultantly, by **allowing** this civil revision petition, the application moved by the respondents is dismissed.

MH/M-70/L Revision allowed.

PLJ 2018 Lahore 205

Present: **IBAD-UR-REHMAN LODHI, J.**

DILNAWAZ AHMAD BHATTI--Appellant

versus

IFTIKHAR AHMAD (deceased) through L.Rs and others--Respondents

R.S.A. No. 19153 of 2017, decided on 26.4.2017.

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

----S. 22--Contract Act, (IV of 1872), S. 2(a), 2(b), 2 (c) 2 (e)--Suit for Specific performance agreement to sell--Consideration amount was not paid--Concurrently dismissed--Challenge to--Plaintiffs in suit for specific performance have relied upon a document in writing, which was prayed for to be treated as an agreement to sell and since existence of such document was specifically denied by defendants, it was incumbent upon plaintiff to prove its valid execution within requirements of applicable laws--To grant a decree in a suit for specific performance is discretionary and even if agreement is proved, courts are not bound to pass a decree for specific performance keeping in view parameters laid down in Section 22 of Specific Relief Act, 1877--Both courts below have rightly appreciated evidence available on record in its true perspective and have rightly proceeded to dismiss suit of appellant *vide* impugned judgments and decrees dated 05.12.2012 and 09.03.2017--RSA was dismissed. [P. 209] A, B & C

Mr. Taki Ahmad Khan, Advocate for Appellant.

Date of hearing: 26.4.2017.

ORDER

The suit for specific performance of agreement to sell alongwith permanent injunction filed by the present appellant was concurrently dismissed by the courts below *vide* impugned judgments and decrees dated 05.12.2012 and 09.03.2017.

2. The agreement to sell (Exh.P-2) was written on stamp papers and it was established on record that TahirMehmood Khatana, who was the stamp vendor, was having no valid license of stamp vending at the time, when the relevant stamp papers were shown to have been purchased. PW-1 Syed Tanvir Urfi, Head Clerk of the office of D.O.R. has brought the register of stamp vending, who deposed that entry in the said register did not show the purpose of issuance of stamp paper and it also did not contain the signature of stamp vendor.

The part of consideration amount in the shape of earnest money was never paid to the relevant hands, rather admittedly it was stated to have been paid to one Malik Nasir Mehmood, who has no direct nexus with the deal stated to have been arrived at through agreement Exh.P-2. Even otherwise, said Malik Nasir Mehmood was not produced by the plaintiff in support of his contention.

PW-2 Muhammad Bashir Ghumman is the scribe of Exh.P-2 during cross-examination candidly admitted that plaintiff never put his hand on Exh.P-2 and an agreement, which is unilateral in nature is held not enforceable by the Hon'ble Supreme Court of Pakistan in case titled *"Farzand Ali and another versus Khuda Bakhsh and others"* (PLD 2015 Supreme Court 187).

3. Learned counsel for the appellant has contended that the view of the Hon'ble Supreme Court of Pakistan in Farzand Ali's case has been overruled by a Larger Bench of the Apex Court in case titled *"Muhammad Sattar and others versus Tariq Javaid and others"* (2017 SCMR 98).

4. In order to appreciate the respective contentions of learned counsel for the parties, I have minutely gone through both the esteemed views of the Hon'ble Supreme Court of Pakistan and as per my humble understanding, the view laid down in Farzand Ali's case was neither **overruled** nor even **distinguished** by means of the latter view in *Muhammad Sattar's case*, rather the view taken in *Farzand Ali's case* has further been elaborated in *Muhammad Sattar's case.* It is only on account of wrongheaded attitude of the editor giving head notes to the judgment in *Muhammad Sattar's case* that an impression has been given that perhaps the earlier view in *Farzand Ali's case* has been distinguished by the Apex Court in Muhammad Sattar's case.

Some extracts from *Farzand Ali's case,* which are relevant for the purposes of present case are reproduced herein below:--

> "9….It is an undisputed fact that appellants agreement has not been signed by them…."
>
> "10. Considering the proposition if the agreement of the appellants was required to be proved by the examination of two attesting witnesses, it is settled law that an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is *sine qua non* for the validity of the agreement. For the purposes of proof of such agreement it is mandatory that two attesting witnesses must be examined by the party to the lis as per Article 79 of the Order *ibid* ..."

And it was concluded by the Apex Court in *Farzand Ali's case* that where a contract was reduced into writing, not only should it be founded upon the imperative elements of offer and acceptance, but its proof was also dependent upon the execution of that contract by both the contracting parties i.e. by signing or affixing their thumb impression, so that it should reflect and establish their "consensus ad idem", which obviously was the inherent and basic element of the meeting of the minds, which connoted the mutuality of assent, and reflected and proved the intention of the parties thereto and non-execution (non-signing) of the agreement to sell by the vendee meant that in law and fact there was no contract (agreement).

Now, we have to see as to what has been held by the Apex Court in Muhammad Sattar's case, which is being taken in certain circles as an overruling or distinguishing view to the earlier view in *Farzand Ali's case.*

For ready reference, some extracts from the authoritative view in M*uhammad Sattar's case* are reproduced herein below:--

"7. The primary and basic law relating to the contracts is obviously the Contract Act, 1872. The essentials of a valid contract are an offer communicated, the unconditional acceptance of such offer and consideration. There is nothing in the Contract Act, 1872 which requires that such order and acceptance must necessarily be in writing or form a single document. The law i.e. the Contract Act, 1872 envisages a valid enforceable contract, which may even be oral. A perusal of the provisions of the said enactment also reveals that both the proposal and its acceptance may be expressed or implied, as is apparent from Section 9 thereof, which reads as under:

> **"9. Promise, express and implied.--**Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

"9. .... Be that as it may, there is nothing in the Transfer of Property Act, 1882 or any other law, which requires that an Agreement to Sell of immovable property must necessarily be reduced into writing or be signed by the parties thereto."

In *Muhammad Sattar's* case, by placing reliance on an earlier view of Hon'ble Supreme Court of Pakistan in case titled *"Messer 's Jamal Jute Baling and Co, Dacca v. Messrs M. Sarkies Sorts (Sons), Dacca"* (PLD 1971 SC 784), it was held that although there was no written agreement, but subsequent conduct of the parties suggest that they accepted such understanding as a contract by supplying 125 bales of jute.

By referring a judgment from the Supreme Court of India in case titled *"Aloka Bose v. Parmatma Devi and others"* **(AIR 2009 SC 1527),** it is held that in case, the contract (agreement) is signed by one side, it would be subsequent conduct of the parties, which would be relevant to give status of such understanding although oral as a contract/agreement.

In Para 19 of *Muhammad Sattar's case,* impact of *Farzand Ali's case* has been discussed in detail and while concluding, it was held that an Agreement to Sell even not signed by one of the parties "if proved to have been accepted and acted upon" would be a valid Agreement to Sell and finally it was held that the existence and validity of the Agreement and it being specifically enforceable or otherwise would depend upon the proof of its existence, validity and enforceability in accordance with the Qanun-e-Shahadat Order, 1984, the relevant provisions of the Contract Act, 1872, the Specific Relief Act, 1877 and any other law applicable thereto.

It is also to be kept in mind that in *Muhammad Sattar's case,* no appeal has finally been decided, rather in fact a preliminary question, which has arisen in all the civil appeals to the effect as to whether such agreements to sell not signed by the vendees were valid and enforceable in law, was answered and while such question was answered, it was directed that Civil Appeals be set down for hearing to be decided separately on the basis of the evidence available on the record in terms of the observations made by the Hon'ble Supreme Court of Pakistan, while dealing with such preliminary legal issue.

For the above reasons, this Court has reached to the conclusion that *Muhammad Sattar's case* is in fact an elaboration of the earlier view, as was laid down by the Apex Court in *Farzand Ali's case,* for, still the enforceability and validity of the agreement reduced into writing is held dependent upon the provisions of referred Statutory Laws.

5. In the case in hand, the plaintiffs in the suit for specific performance have relied upon a document in writing, which was prayed for to be treated as an agreement to sell and since existence of such document was specifically denied by the defendants, it was incumbent upon the plaintiff to prove its valid execution within the requirements of the applicable laws. The relevant provisions of The Contract Act, 1872 provided for an enforceable contract are detailed herein below:--

> **2(a) "Proposal".** When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.
>
> **2(b) "Promise".** When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.
>
> **2(c) "Promisor" and "promisee".** The person making the proposal is call the "promisor", and the person accepting the proposal is called the "promisee".
>
> **2(e) "Agreement".** Every promise and every set of promises, forming the consideration for each other, is an agreement.

Putting Exh.P-2 on the litmus test on the touchstone of the above provisions, the same would not qualify to be treated as an agreement (contract).

6. Even otherwise, to grant a decree in a suit for specific performance is discretionary and even if the agreement is proved, the courts are not bound to pass a decree for specific performance keeping in view the parameters laid down in Section 22 of The Specific Relief Act, 1877, which reads as under:

> "The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principle and capable of correction by a Court of Appeal."

7. Both the courts below have rightly appreciated evidence available on record in its true perspective and have rightly proceeded to dismiss the suit of the appellant *vide* impugned judgments and decrees dated 05.12.2012 and 09.03.2017. No illegality or irregularity has been found in the impugned judgments and decrees passed by the courts below warranting interference by this Court in its appellate jurisdiction.

8. Resultantly, finding no force, this appeal is dismissed.

(M.M.R.) Appeal dismissed.

PLJ 2018 Lahore 291 (DB)

***Present*: IBAD-UR-REHMAN LODHI AND ALI AKBAR QURESHI, JJ.**

***Syed* ALI RIAZ KIRMANI and another--Petitioners**

versus

ELECTION TRIBUNAL, PUNJAB BAR COUNCIL, LAHORE and others--Respondents

W.P. No. 25216 of 2016, decided on 2.11.2017.

Constitution of Pakistan, 1973--

----Arts. 4 & 199--Due process of law--Pakistan Legal Practitioners & Bar Council Rules 1976, R. 3, 4, 5 & 61 Election of Punjab Bar Council--Exclusion of votes from final count--Right of franchise--Annulment of election by Returning Officer--Filing of objections--By filing objection petitions, objectors complained that their votes were excluded from final count, as such, they were disfranchised--Election tribunal allowed objection petition--Challenge to--Respondents objected to maintainability of objection petition before election trial--High Court framed issue as to Whether objectors fell within definition of "aggrieved persons"--Held that under law returning officer shall publish a programme of election of member of Provincial Bar Council by providing a date by which objections to validity of election of a member shall be filled and that such objections may be filed by any "candidate at election" or by any five voters to contest validity of election of candidate--Under Rules, remedy is available only to a candidate at election and in case of any five voters, an objection petition would only be competent if validity of election of a candidate is called in question--In present case, no candidate at election has ever filed an objection petition and voters who have filed objection petition, have never prayed for a relief, which is available to voters by calling in question validity of election of a candidate--Objectors in this particular case have voiced against their alleged disfrnachization and for inclusion of their votes into final count and in fact validity of any election of a candidate in particular sense has never been called in question by objectors--No aggrieved person has ever made competent to file objection petition calling in question validity of election of a candidate and further no objection petition is available in scheme of law on subject providing remedy to voters in election to ask for inclusion of their votes in final count, which for any reason were not included by election staff in final count--High Court held that objection petition before tribunal was not legally maintainable--Petition allowed.

[Pp. 294 & 297] A, B, C & D

Mr. Abid Saqi, Advocate for Petitioners.

Mr. S.M. Zeeshan Mirza, Advocate for Respondent 2.

Mr. Muhammad Shahzad Shaukat, Advocate for Respondent No. 4.

Date of hearing: 2.11.2017.

JUDGMENT

Ibad-Ur-Rehman Lodhi, J.--Through this Constitutional petition, the petitioners have called in question the order passed by the Election Tribunal especially constituted under Rule 3(c)(i) of Pakistan Legal Practitioners & Bar Councils Rules, 1976 (hereinafter

to be referred as Rules) to probe into objection petition filed by some voters from Polling Booths No. 19, 24, 37, 39 and 42 of different Polling Stations of Lahore Division established for the purposes of conduct of elections of Punjab Bar Council on 22.11.2014. In the objection petition, the objectors complained that their votes were excluded from the final count and in such manner, they have been disfranchised. The objection petitioners have also sought a finding against order dated 27.11.2014 passed by the Returning Officer of the said election with a request to include their votes/ballots in the final count.

The learned Tribunal by means of impugned judgment dated 28.07.2016 proceeded to allow the objection petition. The order of the Returning Officer dated 27.11.2014 and the subsequent final notification intimating the result of the election issued on 12.12.2014 to the extent of GROUP OF DISTRICT-VIII Lahore Division were declared as annulled with a direction that ballot papers of Polling Stations/Booths No. 19, 24, 37, 39 and 42 not having the seal or signatures of the Polling Officer, but issued by the Returning Officer, shall be counted and after inclusion of such ballot papers in final count, final result be prepared and successful candidates be notified accordingly.

2. At the start of hearing, learned counsel for the objection petitioners/respondents herein was asked to show the competence and maintainability of objection petition under Rule 5(1)(h) read with Rule 61 of the Rules, to which, learned counsel after some hesitation responded that maintainability and competence of the objection petition was never questioned by the present petitioners before the Tribunal or even before this Court in the present Constitutional petition, therefore, a relief, which was never prayed for, cannot be granted or even considered. In support of his such contentions, learned counsel for the objection petitioners by placing reliance on cases titled *"Ali Muhammad through Legal Heirs and others versus Chief Settlement Commissioner and others"* (2001 SCMR 1822) and *"Akhtar Abbasand others versus Nayyar Hussain"* (1982 SCMR 549) has held that High Court, while exercising powers under Article 199 of The Constitution of Islamic Republic of Pakistan, 1973 does not enjoy *suo motu* jurisdiction to grant relief to a party, which was never claimed.

To resolve controversy, as to whether the objection petition filed on behalf of the "voters" was competent and maintainable in view of Rules referred to hereinabove and further that whether this Court would be competent to ask for such questions from the objection petitioners, we have minutely gone through the record.

In order to dispose of the objection petition, the learned Tribunal framed a number of issues. We are concerned at the moment with Issues No. 12 and 13, which are reproduced herein below:--

12. Whether the present objection petition is not maintainable in its present form? OP-Ghulam SarwarNahang
13. Whether the objectors are barred to file this objection petition and also to raise objections referred in the grounds of objection petition? OP-Ghulam Sarwar Nahang

The learned Tribunal, while answering such issues, has held that Rule 5(1)(h) read with Rule 61 of the Rules provides a remedy to the **"aggrieved persons"** by way of filing an objection petition before the Tribunal, therefore, it cannot be said that objection petition before the Tribunal was not maintainable.

For ready reference, Rules 5(1)(h) and 61 are reproduced as under:--

5(1)(h) The Returning Officer shall publish a programme of the election of Members of the Provincial Bar Council (and the Islamabad Bar Council) in the official gazette specifying, the date by which objections to the validity of election of a member shall be filed.

61 An objection to the election under Paragraph (h) of sub-rule (1) of Rule 5 or under Paragraph (h) of sub-rule (1) of Rule 30, may be filed by any candidate at the election or by any five voters to contest the validity of the election of a candidate, by letter signed and delivered to the Chairman of the Bar Council who shall refer such objection to the Election Tribunal concerned for disposal within fifteen days of the date fixed for filing objections. The objection shall be accompanied by a deposit of Rs.20,000/-.

The joint reading of both these Rules do create a picture that the Returning Officer shall publish a programme of the election of the members of Provincial Bar Council by providing *inter alia* a date by which objections to the validity of election of a member shall be filed and that such objections may be filed by any **"Candidate at the election"** or by any live voters to contest the validity of the election of a candidate.

It is, thus, clear that objection petition within the meaning of above referred Rules is a remedy available only to a candidate at the election and in case of any five voters, an objection petition would only be competent if the validity of the election of a candidate is called in question.

The learned Tribunal has imported the category of "aggrieved persons" for the purposes of maintaining an objection petition under the referred Rules, which class of persons is not provided in the relevant Rules, rather only "a candidate" or at least "live voters" are made competent to call in question the validity of the election of a candidate.

In the present case, no candidate at the election has ever filed any objection petition and the voters, who have filed the objection petition, have never prayed for a relief, which is available to the voters by calling in question the validity of election of a candidate. The objectors in this particular case have in fact voiced against their alleged disfranchisation and for inclusion of their votes into final count and in fact validity of any election of a candidate in particular sense has never been called in question by the objectors.

3. So far as contention of learned counsel for the objectors to the effect that High Court does not enjoy jurisdiction under Article 199 of The Constitution of Islamic Republic of Pakistan, 1973 to extend a relief, which was never prayed for in explicit terms, is concerned, suffice it to say that the provisions of The Code of Civil Procedure, 1908 are applicable, while this Court is hearing a Constitutional petition.

The provisions of Order VII Rule 7, C.P.C., which are being referred in response to the contentions as noted hereinabove are reproduced herein below:

> *"Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.*

This Court, thus, is of the view that while deciding a Constitutional petition, it is empowered to grant an effective or ancillary relief, even if not prayed for.

We are fortified in support of such contention with the case of *"Haji Ibrahim versus S. Rehmatullah(Represented by Legal Heirs)"* (1985 SCMR 241), wherein the Hon'ble Supreme Court of Pakistan has held as under:

> *"in our considered opinion a discretion is vested in this behalf in the Courts to be judicially exercised in proper cases in order to avoid multiplicity of proceedings, to shorten litigation, and to do complete justice between the parties and mould the relief according to the altered circumstances in the larger interest of justice."*

Similarly, in case titled *"Samar Gul versus Central Government and others"* (PLD 1986 Supreme Court 35), the Hon'ble Supreme Court of Pakistan has observed in the following manner:

> *"Therefore, we have no hesitation to hold that no prejudice has been caused to the respondents on account of couching the relief in the declaratory form. It is well-settled that a Court is empowered to grant such relief as the justice of the case may demand and for purposes of determining the relief asked for, the whole of the plaint must be looked into, so that the substance rather than the form should be examined. The argument advanced on behalf of the respondents is accordingly without substance that no prayer for redemption of the mortgage was made by the appellant in his suit."*

The Hon'ble Supreme Court of Pakistan in case titled *"Javaid Iqbal versus Abdul Aziz and another"* (PLD 2006 Supreme Court 66) has held as under:

> *"13. On its part, in the exercise of its revisional jurisdiction, Lahore High Court was perfectly justified in observing that the suit could not fail merely for the reason that some relief which was available and not been claimed. Honourable Judge of the High Court is perfectly justified in observing that the suit could not have been dismissed on account of any defect in form. In view of the assertion of the respondents that they had passed on total sale consideration and obtained possession in part performance of sale, they would be entitled to full protection of their possession within the contemplation of Section 53-A of the Transfer of Property Act, 1882. In our considered opinion, both the Courts below failed to take into account the legal impact and effect of the provisions contained in Section 53-A of the Transfer of Property Act and the provisions of Code of Civil Procedure, 1908 providing sufficient mechanism for doing complete justice to the parties. Evidently and essentially, this was a fit case for exercise of jurisdiction under Order VI, Rule 17, Order VII, Rule 7 and Section 151, C.P.C., rather than attaching much importance to the defective drafting of the plaint and the prayer clause. The view taken by the High Court in exercise of its revisional jurisdiction, in our considered opinion, does not suffer from any inherent legal infirmity misreading of record, misconception of law or error of jurisdiction. To the contrary the judgment of the High Court in the peculiar facts and circumstances of the case, on the face of the record, appears to be just, fair, equitable and expedient to achieve the ends of justice and to defeat the mischief. The order of remand is, therefore, fully justified and not open to any exception."*

In another case titled *"Syed Phool Badshah and others versus ADBP through Manager, Peshawar Branch and others''* (2012 SCMR 1688), the Hon'ble Supreme Court of Pakistan has provided illuminated principle by observing as under:

"7. The provisions of Order VII, Rule 7 of the Civil Procedure Code empowers the Court to grant an effective or ancillary relief even if not prayed, as the plaint as whole is to be looked into in order to determine relief for which plaintiff is entitled, however, no relief can be granted upon the facts and documents not disclosed in the pleading.''

Despite the fact that Issues No. 12 and 13 relating to maintainability of objection petition and *locus standi* of the objectors were specifically framed, but while answering such issues, the learned Tribunal has proceeded to a wrong direction by extending the competence of filing objection petition to aggrieved persons, which was never the intention of the legislation on the point. No aggrieved person has ever been made competent to file objection petition calling in question the validity of election of a candidate and further that no objection petition is available in the scheme of law on the subject providing remedy to the voters in the election to ask for inclusion of their votes in the final count, which for any reason were not included by the election staff in the final count. The learned Tribunal in our considered view has not dealt with the objection petition in the manner, in which it should have been addressed and the objection petition, which was neither competent nor maintainable, was finally allowed.

4. In view of above discussion, we have reached to an irresistible conclusion that objection petition filed under Rule 5(1)(h) read with Rule 61 of the Rules by the voters asking for inclusion of their votes/ballots in the final count was not competent and not maintainable. As such, the order impugned herein passed by the learned Tribunal is not sustainable and by setting aside the same, we declare the objection petition filed by the respondents as incompetent and not maintainable.

5. This Constitutional petition is **allowed** in the above lines.

(Z.I.S.) Petition allowed.

PLJ 2018 Lahore 552

***Present*: IBAD-UR-REHMAN LODHI, J.**

MUHAMMAD GOHAR QAYYUM--Petitioner

versus

MUHAMMAD USMAN and others--Respondents

C.R. No. 75611 of 2017, decided on 3.10.2017.

Civil Procedure Code, 1908 (V of 1908)--

----O.VII R. 11--Suit for permanent injunction--Rejected--Appeal--Dismissed--Unauthorised possession production of forged document--Initiation of criminal proceedings--Challenge to--Trial court has further proceeded to order for initiation of criminal proceedings against plaintiff/present petitioner particularly for production of forged document treating same as genuine one--When confronted, learned counsel for petitioner has admitted that in order to get said criminal proceedings quashed, independent proceedings have been initiated by plaintiff--When such criminal proceedings have separately been challenged, same has no relevance with present civil revision petition. [P. 553] A

Civil Procedure Code, 1908 (V of 1908)--

----O.VII R. 11--Rejection of plaint--Courts below have rightly rejected plaint by invoking provisions of Order VII Rule 11 C.P.C. and in doing so, both courts have committed no illegality or irregularity warranting interference by this Court in its revisional jurisdiction--Petition dismissed. [P. 553] B

Mr. Amir Shahzad Anjum, Advocate for Petitioner.

Date of hearing: 3.10.2017.

ORDER

The plaint of the suit for permanent injunction filed by the present petitioner was rejected by the learned trial Court on 20.02.2017 under the provisions of Order VII Rule 11 C.P.C.

Feeling aggrieved, the petitioner preferred an appeal, which was also dismissed by the learned Additional District Judge, Samundri *vide* impugned judgment and decree dated 29.04.2017.

2. Admittedly, the property for which injunction was sought by the plaintiff was State land and possession over the said property was unauthorized. In support of claim of the plaint, a *Jamabandi*, was produced before the Court, which on suspicion, was referred to Revenue Authorities and a report was received to the effect that it was a forged document.

Learned counsel for the petitioner after admission to the effect that it was a State land has submitted that the injunction was sought on the strength of longstanding possession over the property by the predecessor-in-interest of the petitioner.

The concept of adverse possession is no more recognized under the law.

A further grievance has been raised by the petitioner to the effect that in addition to rejection of plaint, the learned trial Court has further proceeded to order for initiation of criminal proceedings against the plaintiff/present petitioner particularly for production of forged document treating the same as genuine one. When confronted, learned counsel for the petitioner has admitted that in order to get the said criminal proceedings quashed, independent proceedings have been initiated by the plaintiff. When such criminal proceedings have separately been challenged, the same has no relevance with the present civil revision petition.

3. The courts below have rightly rejected the plaint by invoking provisions of Order VII Rule 11 C.P.C. and in doing so, both the courts have committed no illegality or irregularity warranting interference by this Court in its revisional jurisdiction.

4. Resultantly, having no substance, this petition is dismissed.

(M.M.R.) Petition dismissed.

PLJ 2018 Lahore 643

***Present*: IBAD-UR-REHMAN LODHI, J.**

SH. RIAZ AHMAD and another--Petitioners

versus

DEFENCE HOUSING AUTHORITY through Secretary and 2 others--Respondents

C.R. No. 421 of 2017, heard on 3.10.2017.

Limitation Act, 1908 (IX of 1908)--

----S. 5--Application for condonation of delay--Restoration of suit--Application of--An application was prepared u/S. 5 of Limitation Act, 1908, upon which, although Court fee of two rupees is affixed, but it carries no date as to when and who purchased same--Stamps of "filing" affixed on application for restoration of suit and affidavit annexed therewith and one shown to have been affixed on application seeking condonation of delay and affidavit annexed therewith further indicate that stamps were not affixed at one time and go--Application u/S. 5 of Limitation Act, 1908 and affidavit therewith were got inserted at some later stage, even after dismissal of main application, which carries a clear note of trial Judge that application for restoration of suit was supported with no application for condonation of delay--Petitioners have miserably failed to disclose as to when for first time, dismissal of suit came into their knowledge and further also failed to get delay condoned caused in filing of such application, rather in their such attempt, they have played some foul games and such conduct of petitioners disentitles them to ask for any equitable relief--No illegality or irregularity has been found in concurrent findings arrived at by Courts below, hence, no interference is called for in such findings in revisional jurisdiction of High Court--Civil revision was dismissed.

[P. 645] A, C & D

Limitation Act, 1908 (IX of 1908)--

----Art. 163--Application for restoration of suit--Period of 30 days--Article 163 of Limitation Act, 1908 provides a period of 30-days for filing an application for restoration of suit dismissed in default and starting point of limitation of this 30-days is date of dismissal.

[P. 645] B

Mr. Ahmad Waheed Khan, Advocate for Petitioner.

Mr. Tariq Masood, Advocate for Respondent.

Date of hearing: 3.10.2017.

JUDGMENT

When on 02.06.2012, it was last opportunity for the petitioners to file amended plaint after impleading some added parties, the suit was dismissed for non-prosecution on account of their non-appearance for whole of the day.

Subsequently, the petitioners filed application for restoration of suit, which was concurrently dismissed by the Courts below *vide* impugned order and judgment dated 19.11.2015 and 16.09.2016 respectively.

2. Admittedly, the petitioners filed application for restoration of the proceedings of suit on 01.03.2013. This application was supported with an affidavit of the petitioner. On the

same day, on receipt of application, learned trial Judge on its rear side ordered the requisition of original record of the suit. In the report of the office of Civil Judge, as also in the first order passed by the learned trial Judge on 01.03.2013 on the said application, there is no mention of filing of any independent application by the petitioners seeking condonation of delay caused in filing of application for restoration of the suit and here it would be beneficial to mention that when on 19.11.2015, learned Civil Judge proceeded to dismiss the application for restoration of the suit, he has clearly noted that petitioners have failed to file any application for condonation of delay.

Alongwith civil revision petition at page 64, a copy of application moved under the provisions of Section 5 of The Limitation Act, 1908 before learned Civil Judge has been annexed by the petitioners.

In the above background, the filing/insertion of such application for condonation of delay was doubted and in order to clarify the position, the original record of the restoration application was requisitioned.

Perusal of the original record reveals that scribe of the application of restoration petition drafted the same in a manner that he left almost a space of two lines in between two distinct paragraphs. However, the space left at the end of para 2 was subsequently filled in with a different pen by addition of under mentioned two lines:

لیکن مورخہ 23.02.13 کو سائل کے علم میں یہ بات آئی ہے کہ مقدمہ عنوان بالا مورخہ 02.05.12 کو بوجہ عدم پیروی خارج ہو گیا تھا۔

And this was the disclosure for the first time as to when the petitioners came to know about dismissal of suit. The date of knowledge although has been noted down in these two added lines as 23.02.2013, but again the petitioners failed to disclose any source of getting such knowledge.

The original record of restoration application has been arranged in the manner that the original application is placed at pages 3 and 4 and affidavit annexed therewith at page 5, whereas application for condonation of delay caused in filing the restoration petition is placed at page 39 and affidavit therewith at page 41.

The proceedings as carried out upon such application for restoration of suit indicate that the insertion of two lines at the end of para 2 of original application for restoration of suit was result of some afterthought and then in order to substantiate such added contention, an application was prepared under Section 5 of The Limitation Act, 1908, upon which, although Court fee of two rupees is affixed, but it carries no date as to when and who purchased the same. The stamps of "filing" affixed on the application for restoration of suit and affidavit annexed therewith and one shown to have been affixed on the application seeking condonation of delay and affidavit annexed therewith further indicate that the stamps were not affixed at one time and go. The application under Section 5 of The Limitation Act, 1908 and affidavit therewith were got inserted at some later stage, even after dismissal of main application on 19.11.2015, which carries a clear note of the learned trial Judge that application for restoration of the suit was supported with no application for condonation of delay.

3. Article 163 of The Limitation Act, 1908 provides a period of 30-days for filing an application for restoration of suit dismissed in default and starting point of limitation of this 30-days is the date of dismissal.

4. The petitioners have miserably failed to disclose as to when for the first time, dismissal of suit came into their knowledge and further also failed to get the delay condoned

caused in filing of such application, rather in their such attempt, they have played some foul games and such conduct of the petitioners disentitles them to ask for any equitable relief.

5. No illegality or irregularity has been found in the concurrent findings arrived at by the Courts below, hence, no interference is called for in such findings in revisional jurisdiction of this Court.

6. Resultantly, finding no force, this civil revision petition is dismissed.

7. Original record of learned trial Court be returned.

(A.A.K.) Revision dismissed.