REPORTED JUDGMENTS

OF

HON'BLE MR. JUSTICE MAMOON RASHID SHEIKH

(CHIEF JUSTICE, LAHORE HIGH COURT, LAHORE)

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MR. JUSTICE MAMOON RASHID SHEIKH

JUDGE, LAHORE HIGH COURT
(February 19, 2010 to December 31, 2019)

CHIEF JUSTICE, LAHORE HIGH COURT
(January 01, 2020 to March 18, 2020)

Mr. Justice Mamoon Rashid Sheikh was born on March 19, 1958 at Lahore. He attended Prep. School at Queen Mary College, Lahore, and subsequently did his Matriculation from St. Anthony's High School, Lahore. Thereafter, he graduated from Government College, Lahore.

He chose to join the legal profession by following in the footsteps of his father, Mr. Justice A.R. Sheikh. He joined the Punjab University Law College, Lahore, and obtained the LL.B. Degree. Subsequently he attended Brunel University, UK, and was awarded the GDSS.

Besides working in his father's law firm, he also remained associated with Ansari Law Associates, Nisar Law Associates and Surridge & Beecheno. He founded his own law firm SSR&I in 2006.

He practiced mainly on the civil, commercial, corporate and constitutional side. He also dealt with arbitration matters and cases involving carriage by air, land and sea. He dealt also with medical malpractice cases, insurance disputes and intellectual property disputes.

He served as a Member of the Executive Committee of the Lahore High Court Bar Association. He joined the Advocate-General Punjab's Office in 2009. He was elevated to the Bench in February 2010. He has dealt with civil, constitutional, criminal and commercial/corporate cases/matters. He acted as an Election Tribunal in the 2013 and 2018 general elections.

He has been the Inspection Judge for the Districts of Mianwali, Khanewal, Sahiwal, Multan, Rawalpindi, Faisalabad and Lahore. He delivers lectures at the Punjab Judicial Academy. He was a Member of the Graduate Studies Committee, University Law College, University of the Punjab, and was also Member Syndicate, University of the Punjab, Lahore.

He has attended and/or chaired a number of law conferences/seminars in Pakistan. He represented the Lahore High Court at the Pakistan Independence Day Celebrations, held at Oslo, Norway, in 2016. He participated in a law conference on the topic, "Convergence and Co-operation in Asian Business Law", at Korea University, Seoul, South Korea, in 2017. He was part of a Lahore High Court, delegation, which visited the United Kingdom, in 2017, to explore, identify and share issues/experiences in respect of judicial reforms and case flow management, etc.

He initiated the holding of the Sesquicentennial (150th) Anniversary Celebrations of the Lahore High Court, Lahore, in the year 2016. He acted as the Master of Ceremonies of the final event of the Celebrations.

He was appointed as the Chief Justice Lahore High Court, Lahore, on 06.12.2019, with effect from 01.01.2020, and took oath of office on the latter date.

TABLE OF CONTENTS

REPORTED JUDGMENTS OF HON'BLE MR. JUSTICE MAMOON RASHID SHEIKH AS AN ADVOCATE

P L D 2010 Lahore 419

Before Mamoon Rashid Sheikh, J

ABDUL SATTAR---Petitioner

Versus

STATION HOUSE OFFICER and another---Respondents

Writ Petition No.4074 of 2010, decided on 6th April, 2010.

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

----Ss. 22-A, 22-B & 200---Penal Code (XLV of 1860), Ss.420, 467, 468 & 471---Constitution of Pakistan (1973), Art. 199---Constitutional petition---Maintainability---Alternate remedy---Filing of private complaint---Dispute of civil nature---Grievance of petitioner was that police did not register a case of forgery against respondents and application under sections 22-A and 22-B Cr. P. C. was dismissed by Ex-officio Justice of Peace---Contention of respondents was that dispute between the parties was civil in nature and petitioner had not exhausted alternate remedy by way of filing private complaint before Court of competent jurisdiction, in respect of his allegations---Validity---Order passed by Ex-officio Justice of Peace did not suffer from any illegality or material irregularity---Petitioner had remedy by way of private complaint in respect of his allegations---Petitioner might avail of the alternate remedy provided to him under the statutory law, which was adequate in nature---High Court declined to interfere in the order passed by Ex-officio Justice of Peace---Petition was dismissed in circumstances.

PLD 2005 Lah. 470; 2006 SCMR 1192; 2003 SCMR 1185; 1993 SCMR 550; PLD 2000 SC 18 and PLD 2009 Kar. 65 ref.

PLD 2007 SC 539 rel.

(b) Administration of Justice---

----Every case is to be decided on its own peculiar facts and circumstances.

Rai Ashraf and others v. Muhammad Saleem Bhatti and others Civil Petition No.1398-L/2009 rel.

Ghulam Farid Sanotra for Petitioner.

Kalim Ilyas, A.A.-G. with Muhammad Irfan, S.H.O. and Munir Ahmed S.-I., P.S. Model Town, Gujranwala.

ORDER

MAMOON RASHID SHEIKH, J.---Through this writ petition the petitioner is seeking a direction to the respondents for registration of a case against one Zaib-un-Nisa and her husband Muhammad Asif who are alleged to have committed a fraud against the petitioner.

2. The brief facts of the case as given in the petition are that the petitioner on 18-1-2004 entered into an agreement of sale regarding two pieces/parcels of land one measuring 46-kanals, 161-sq. ft, situated at Mauza Talwandi Rahwali and the other measuring 2-kanals, situated at Mauza Gulabpur G.T. Road Gujranwala. The consideration for sale was fixed at Rs.53,50,000. At the time of signing of the agreement, out of the total consideration Rs.18,00,000 were paid in cash and through a cheque to Zaib-un-Nisa through her husband Muhammad Asif who was present at the time of execution of the agreement and was also one of the marginal witnesses. The balance consideration amounting to Rs.35,50,000 was paid through four cheques out of which three cheques were in the name of Muhammad Asif and one was drawn on self. Subsequently Zaib-un-Nisa and Muhammad Asif resiled from the agreement. The refusal by Zaib-un-Nisa and Muhammad Asif to honour the agreement led the petitioner to file an application for lodging of an F.I.R. against them before respondent No.1, under sections 420, 467, 468, and 471 of the P.P.C. Respondent No.1, declined to lodge the F.I.R. consequently the petitioner was constrained to file an application under sections 22-A and 22-B, Cr.P.C. before the learned Sessions Judge/Ex-Officio Justice of Peace Gujranwala. The petition came up for hearing before the learned Addl. Sessions Judge/Ex-Officio Justice of Peace, Gujranwala, who after summoning a report from respondent No.1 and after affording an opportunity of hearing to the petitioner dismissed the petitioner's application through order dated 22-2-2010. Feeling aggrieved the petitioner has filed this petition praying for a direction to respondent No.1 for registration of the F.I.R. against Zaib-un-Nisa and Muhammad Asif.

3. The learned counsel submits that a clear cut offence under section 420 of the P.P.C. is made out which is cognizable by police, hence, the finding in the impugned order dated 22-2-2010, passed by the learned Addl. Sessions Judge/Ex-Officio Justice of Peace is not sustainable. The learned Addl. Sessions Judge/Ex-Officio Justice of Peace assumed the role of the S.H.O., which is not warranted under the law. It was the mandatory duty of respondent No.1 to lodge the F.I.R. as contemplated under sections 154 and 155 of the Cr.P.C. The matter cannot be left to the sweet will of the concerned S.H.O., in this case respondent No.1. Reliance is placed

on PLD 2005 Lahore 470, PLD 2007 SC 539, 2006 SCMR 1192, 2003 SCMR 1185, 1993 SCMR 550, PLD 2000 SC 18 and PLD 2009 Karachi 65.

4. The learned A.A.-G. has controverted the stance of the petitioner and has submitted that a civil suit for declaration and perpetual injunction has been filed by the petitioner against Zaib-un-Nisa and Muhammad Asif, which suit is pending in the Civil Courts at Gujranwala. The petitioner has deliberately concealed this fact from the Court. A report to this effect was submitted before the learned Addl. Sessions Judge/Ex-Officio Justice of Peace, wherein, it was also contended that the dispute between the petitioner on the one hand and Zaib-un-Nisa and Muhammad Asif on the other hand is purely civil in nature. It is further submitted that even otherwise, the petition is not maintainable as the petitioner has not exhausted the alternative remedy by way of filing of a private complaint in respect of his allegations against Zaib-un-Nisa and Muhammad Asif before a Court of competent jurisdiction.

5. I have gone through the record with the assistance of the learned counsel and find that the impugned order dated 22-2-2010, does not suffer from any illegality or material irregularity. In the case reported as "Muhammad Bashir v. S.H.O., Okara Cantt and others (PLD 2007 SC 539) one of the cases relied upon by the petitioner's counsel, the Hon'ble Supreme Court of Pakistan has held that an S.H.O. under the provisions of section 154 of the Cr.P.C., is under a legal obligation to register an F.I.R. whenever an allegation regarding commission of a cognizable offence is levelled before him. However, at the same time in Para 41 of the said judgment, the Hon'ble Supreme Court of Pakistan has also observed that in the matter of ordering registration of an F.I.R. this Court has a discretion while exercising constitutional jurisdiction. It has been clarified therein that in the peculiar circumstances of a given case this Court may decline to exercise its writ jurisdiction in favour of ordering registration of a criminal case on the basis of the allegations levelled by a petitioner. Even otherwise, it is settled law that every case is to be decided on its own peculiars facts and circumstances and in the presence of an alternative remedy writ jurisdiction is not maintainable. Reliance in this regard is placed on an unreported judgment of the Hon'ble Supreme Court of Pakistan dated 9-9-2009, passed in Civil Petition No.1398-L/2009 "Rai Ashraf and others v. Muhammad Saleem Bhatti and others".

6. The petitioner has a remedy by way of filing of a private complaint in respect of his allegations. The petitioner may avail of the alternative remedy provided to him under the statutory law, which is adequate in nature, if so advised. With these observations, the petition is hereby dismissed in limine.

M.H./A-171/L Petition dismissed.

PLD 2010 Lahore 484

Before Mamoon Rashid Sheikh, J

ABDUL SATTAR---Petitioner

Versus

JUDGE FAMILY COURT, TOBA TEK SINGH and 2 others---Respondents

Writ Petition No. 16053 of 2010, decided on 21st July, 2010.

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

----S.5---Oaths Act (X of 1873), S.10---Constitution of Pakistan (1973), Art. 199---Constitutional petition---Special oath---Effect---Case between the parties was decided by Family Court on the basis of special oath on the Hod Qur'an administered to respondent---Plea raised by petitioner was that the courts below did not appreciate petitioner's offer to respondent for faking the special oath---Validity---Once an offer was made by one party and accepted by the other then the party making the offer could not resile from the same---Offer of party to a suit whereby it undertook to be bound by the statement made on oath by the other party on being accepted by the other party was in the nature of binding agreement---Judgment and decree passed by Family Court and confirmed by Lower Appellate Court did not suffer from any illegality or material irregularity or the judgments and decrees had been passed by exercise of excess of jurisdiction or that they were perverse in nature---High Court declined to interfere in concurrent judgments and decrees passed by two courts below---Constitutional Petition was dismissed in circumstances.

Umar Farooq v. Mehnaz Iftikhar and 2 others 2006 MLD 555 and Muhammad Mazhar v. Arshad Mehmood PLD 2005 Lah. 304 ref.

Muhammad Zaheer Butt for Petitioner.

ORDER

MAMOON RASHID SHEIKH, J.---Through this petition the petitioner has assailed the judgment and decree dated 18-1-2010 passed by the learned Judge Family Court, Toba Tek Singh and the judgment and decree dated 24-2-2010 passed by the learned District Judge, Toba Tek Singh.

2. The brief facts of the case are that the petitioner was married to respondent No.3 on 21-1-2006. The parties, however, became estranged and on 4-4-2009 respondent No.3

filed a suit for recovery of dowry as per list attached with the plaint or Rs.3,80,225 in lieu thereof being the value of the dowry. The suit was resisted by the petitioner, it was, however, decreed on 18-1-2010 by the learned judge, Family Court, Toba Tek Singh, on the basis of an oath taken on the Holy Qur'an by respondent No.3 under the Oaths Act, 1873. Feeling aggrieved the petitioner filed an appeal which was dismissed by the learned District Judge, Toba Tek Singh through judgment and decree dated 24-2-2010.

3. The petitioner has assailed the impugned judgments and decrees, inter alia, on the grounds that the same have been passed against the facts of the case, they suffer 'from misreading and non-reading of the record, the learned courts below have ignored the fact that the suit was for return of dowry and not for recovery of money and even after an admission by the petitioner the price of the dowry could not have been awarded to respondent No.3. Reliance has been placed on the judgment reported as Umar Farooq v. Mehnaz Iftikhar and 2 others (2006 MLD 555).

4. The learned counsel for the petitioner has vehemently argued that the learned courts below have not appreciated the petitioner's offer to respondent No.3 for taking oath on the Holy Qur'an in its true perspective. The offer was with respect to return of dowry and not for payment of the sum of Rs.3,80,225. It is further contended that the marriage took place between the parties in the year, 2006 and the suit was filed in 2009. The learned courts below have not taken depreciation of the dowry into account whilst awarding the decretal amount. Even otherwise, the shopkeepers from whom the alleged articles of dowry were purchased have denied having issued the receipts in respect thereto. He, therefore, prays that the impugned judgments and decrees be set aside being the result of illegal exercise of jurisdiction and having been passed with material irregularity.

5. I have gone through the petition as also the copies of the record appended thereto with the assistance of the learned counsel for the petitioner. Perusal of the record reveals that on 16-1-2010 the petitioner appeared before the learned Judge Family Court as his own witness (D.W.2) and whilst being cross-examined by respondent No.3's counsel he offered that if respondent No.3 were to take an oath on the Holy Qur'an, then he would be willing to pay her Rs.3,80,225 in respect of her claim. At that stage the counsel for respondent No.3 accepted the offer on her behalf and on 18-1-2010 respondent No.3 appeared before the learned Judge Family Court and took an oath on the Holy Qur'an and stated that her parents had given her dowry at the time of her marriage the value whereof being Rs.3,80,225. She further stated that she is entitled to recover the said amount. The petitioner in reply thereto made a statement that he had

heard respondent No.3's statement and he undertook to pay Rs.3,80,225 to respondent No.3 within six months i.e. on or before 18-7-2010. The learned Judge Family Court as a consequence proceeded to decree the suit of respondent No.3. It, therefore, does not lie in the mouth of the petitioner to contend that he had made an offer regarding return of dowry and not regarding payment of Rs.3,80,225. Even otherwise, it is settled law that once an offer is made by one party and accepted by the other then the party making the offer cannot resile from the same. Moreover, an offer of a party to a suit whereby it undertakes to be bound by the statement made on oath by the other party on being accepted by the other party is in the nature of a binding agreement. Reliance in this regard is placed on a judgment of a learned Division Bench of this Court reported as Muhammad Mazhar v. Arshad Mehmood (PLD 2005 Lahore 304).

6. The learned counsel for the petitioner has been unable to rebut the above. There is also no force in the other grounds raised by the learned counsel for the petitioner as the suit of respondent No.3 was decreed purely on the basis of the oath taken by her on the Holy Qur'an as a consequence of the offer made by the petitioner. The law laid down in the case of Umar Farooq (Supra) is not attracted to the' present case.

7. I, therefore, do not find that the impugned judgment. and decree dated 18-1-2010 passed by the learned Judge Family Court, Toba Tek Singh or confirmation of the same on appeal by the learned District Judge, Toba Tek Singh through the impugned judgment and decree dated 24-2-2010 suffer from any illegality or material irregularity or that the impugned judgments and decrees have been passed by exercise of excess of jurisdiction or that they are perverse in nature.

8. The petition is, therefore, dismissed in limine being devoid of force.

M.H./A-198/L Petition dismissed.

PLD 2010 Lahore 649

Before Mamoon Rashid Sheikh, J

IRSHAD BEGUM---Petitioner

Versus

MUHAMMAD RAFIQUE---Respondent

Civil Revision No.394-D of 2002, decided on 7th October, 2010.

(a) Punjab Pre-emption Act (IX of 1991)---

----S.17---Civil Procedure Code (V of 1908), O. VI---Pre-emption suit---Pleadings---Requirements---Date, time and place of the performance of Talb-i-Muwathibat were "conspicuous" by their "absence" in the plaint; as a consequence the plaint did not fulfil the requirements of law.

Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others PLD 2007 SC 302 fol.

Altaf Hussain v. Abdul Hameed alias Abdul Majeed through Legal Heirs and another 2000 SCMR 314; Haji Noor Muhammad v. Abdul Ghani and 2 others 2000 SCMR 329; Alaf Din v. Mst. Parveen Akhtar PLD 1970 SC 75; Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others 1992 SCMR 241; Muhammad Daud v. Mst. Surriya Iqbal and another PLD 2000 Pesh. 54; Mst. Majidan Khanum v. District Judge, Vehari 1984 CLC 3270; Blacks Law Dictionary; Haq Nawaz v. Muhammad Kabir 2009 SCMR 630; Muhammad Iqbal v. Ali Sher 2008 SCMR 1682; Muhammad Amin and 4 others v. Paira 2010 MLD 261 and Mst. Bashiran Begum v. Nazar Hussain and another, PLD 2008 SC 559 ref.

(b) Pleadings---

----Party cannot lead evidence beyond its pleadings and in case such evidence is led, the same is not to be read, nor a party can be allowed to improve its case through evidence if the case has not been set up in the pleading.

Muhammad Iqbal v. Ali Sher 2008 SCMR 1682 rel.

(c) Revision---

----Revisional jurisdiction partakes of appellate jurisdiction---Principles.

Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others 1992 SCMR 241 fol.

Afrasiab Khan and Imran Hassain for Petitioner.

Kazim Hussain Kazmi for Respondent.

Date of hearing: 7th October, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.---Through this petition the petitioner has assailed the judgment and decree dated 14-12-2001 passed by the learned Additional District Judge, Attock in Civil Appeal No.159 of 2001 entitled Muhammad Rafique v. Mst. Irhhad Begum, whereby the judgment and decree dated 30-7-2001 of the learned Civil Judge, Attock decreeing the petitioner's suit for possession through pre-emption, has been reversed.

2. Brief facts giving rise to the petition are to the effect that the petitioner filed a suit for possession through pre-emption regarding land measuring 6 kanal 19 marlas situated in Village Sabaz Pir, Tehsil Hassan Abdal, District Attock, fully described in the plaint.

3. The suit arose out of the sale of the land in dispute through Mutation No.906 dated 9-2-1995. The petitioner filed the suit on 13-3-1995 the same was however, dismissed through judgment and decree dated 25-2-1999 by the learned Civil Judge, Attock. As a result of the petitioner's appeal the suit was remanded for decision afresh by the learned Additional District Judge, Attock through judgment and decree dated 6-12-2000. Upon remand the suit of the petitioner was decreed in her favour by the learned Civil Judge, Attock through judgment and decree dated 30-7-2001. Feeling aggrieved, the respondent filed an appeal, which was accepted through the impugned judgment and decree dated 14-12-2001 of the learned Additional District Judge, Attock.

4. The limited question, which requires adjudication in this petition is whether the petitioner was able to prove the Talbs as are required under the law in order to entitle her to obtain a decree for possession through pre-emption. The learned appellate court below after having gone through the record and appreciating the evidence brought on the record came to the conclusion that the petitioner had failed to establish the Talb-i-Muwathibat consequently the Talb-i-Ishhad was also not proved with the result that the decree in the petitioner's favour was set aside.

5. The learned counsel for the petitioner contends that the learned appellate court below has misappreciated the law as also the facts brought on the record. The sale of the land in question took place through Mutation No.906 dated 9-2-1995 against the total

consideration of Rs.14,000, however, in order to defeat the petitioner's right of enforcement of pre-emption, the amount has mentioned as Rs.28,000 in the mutation. The petitioner being a co-sharer in the land in question (Shafi Sharik) had a prior right of pre-emption, the Talb-i-Muwathibat was made as soon as the petitioner came to know of the same the Talb-i-Ishhad was made on 22-2-1995 and the suit of Talb-e-Khusumat was made on 13-3-1995. All the ingredients were brought on the record but the learned appellate court below by misreading and non-reading of the record had dismissed the petitioner's suit.

6. The respondent's counsel at the outset has questioned the maintainability of the petition as also the suit of the petitioner by submitting that the petitioner's plaint as drafted does not conform to the requirements as laid down by the Hon'ble Supreme Court of Pakistan in the judgment reported as Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others (PLD 2007 SC 302). Contends that the plaint is silent as to the time, date and place in terms of section of the Punjab Pre-emption Act, 1991, as is envisaged in Mian Pir Muhammad's case (supra). He submits that without prejudice to any argument that may be available to him under the law, the suit of the petitioner is even otherwise liable to be dismissed.

7. The petitioner's counsel in rebuttal submits that the suit was filed prior to Mian Pir Muhammad's case (supra) and the same is not hit by the said judgment. Further submits that the petitioner's suit was in conformity with the law as laid down by the Hon'ble Supreme Court of Pakistan at the relevant date. He refers to the cases reported as Altaf Hussain v. Abdul Hameed @ Abdul Majeed through Legal Heirs and another (2000 SCMR 314) and Haji Noor Muhammad v. Abdul Ghani and 2 others (2000 SCMR 329). Also contends that the plaint is in conformity with the requirements of Order VI of the Code of Civil Procedure, 1908, which envisages that only material facts are to be given in the pleadings and not the evidence the party intends to rely upon. Further submits that the petitioner through her evidence was able to establish the time, date and place of performance of Talb-i-Muwathibat, however, the learned appellate court below failed to appreciate this fact. Contends that even otherwise Mian Pir Muhammad's case (supra) is not applicable in the instant case as the petitioner's case does not fall in the category of a pending case. In this respect submits that a revision is not a continuation of proceedings/suit. Relies on Alaf Din v. Mst. Parveen Akhtar (PLD 1970 SC 75), Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others (1992 SCMR 241), Muhammad Daud v. Mst. Surriya Iqbal and another (PLD 2000 Peshawar 54), Mst. Majidan Khanum v. District Judge, Vehari (1984 CLC 3270 Lahore).

8. The learned counsel for the respondent on the other hand submits that the instant petition is part of a lis and the word "lis" has been defined in the Blacks Law Dictionary as:

> "A piece of litigation; a controversy or dispute."

Further submits that the reliance placed on the afore-noted judgments by the petitioner is misconceived, the matter has been finally settled by the Hon'ble Supreme Court of Pakistan.

9. I have considered the arguments addressed at the bar and find that the objection of the respondent's counsel has force. The matter has been addressed in the pronouncements of the Hon'ble Supreme Court of Pakistan reported as Haq Arawaz v. Muhammad Kabir (2009 SCMR 630), Mst. Bashiran Begum v. Nazar Hussain and another (PLD 2008 SC 559), Muhammad Iqbal v. Ali Sher (2008 SCMR 1682) and also the judgment reported as Muhammad Amin and 4 others v. Paira (2010 MLD 261). Whilst following the ratio laid down in Mian Pir Muhammad's case (supra) the Hon'ble Supreme Court of Pakistan has held that:--

> "As to the next, contention of the learned counsel for the petitioner regarding applicability of the above referred case i.e. Mian Pir Muhammad (supra), on the pending cases filed before the pronouncement of the said judgment, it may be mentioned here that proposition in hand stands answered by this Court in the case of Mst. Bashiran Begum v. Nazar Hussain and another, PLD 2008 SC 559, wherein, it was held that the requirement of mentioning the date, place and time in the plaint is also essential even in the pending cases. The relevant portion of the said judgment reads as follows:--
>
> "According to the dictum laid down by the larger Bench of this Court mentioned above, the requirement of Talbs with requisite details in the plaint is also essential even in the pending cases."
>
> In the instant case, in para.2 of the plaint, the petitioner has only mentioned the date and place but the time of making the Talb-i-Muwathibat has not been stated therein we are, therefore of the opinion that the learned Judge in the High Court has rightly declined to interfere with order of dismissal of the suit by the Additional District Judge, Jhelum dated 6-3-2006. Resultantly, this appeal is dismissed."

10. I have examined the plaint. The date, time and place of the performance of Talb-i-Muwathibat are "conspicuous by" their "absence". As a consequence the plaint does not fulfil the requirements as laid down by Mian Pir Muhammad's case (supra). The contention of the learned counsel' for the petitioner to the effect that the plaint was filed in conformity with the requirements of Order VI of the Code of Civil Procedure, 1908 also does not have force in view of the judgments supra of the Hon'ble Supreme Court. Similarly the contention of the learned counsel for the petitioner that the petitioner was able to prove her case by leading evidence is devoid of force as it is settled-law that a party cannot lead evidence beyond its pleadings and in case such evidence is led, the same is not to be read, nor a party can be allowed to improve its case through evidence if the case has not been set up in the pleadings. Reliance in this regard is placed on Muhammad Iqbal's case (supra).

11. As to the learned counsel for the petitioner's contention that Mian Pir Muhammad's case (supra) is not attracted to the petitioner's case as the instant petition being a revision petition is not a continuation of the suit and consequently cannot be termed as a "pending case", suffice it to say that the contention is misconceived the reason therefor is two-fold. Firstly, in Maulvi Abdul Qayyum's case (supra) relied upon by the learned counsel for the petitioner it has been held that:--

> "(7) The distinction between the remedy by way of appeal and revision is not unknown. The appeal is the continuation of original proceedings before the higher forum for the purposes of testing the soundness of the decision of the lower Court. On the other hand, the remedy of revision is discretionary and the revisional Court has to proceed under certain limitations in interfering with the judgment and decree of the lower Court, but both on filing the appeal or revision, as the case may be, the decree of the lower Court is put in jeopardy. Indeed the correction of error in the proceedings of the Court below, is common characteristic of both the -remedies. The concept of acceptance of appeal is that the lower Court has failed to pass the decree which should have been passed. The same object is achieved when a revision from the decree of the lower Court is accepted. Thus in a way revisional jurisdiction partakes of appellate jurisdiction. A case on this point is the one decided by a Full Bench of Madras High Court in Chappan v. Moidin Kutti (ILR 1899 Madras 68) where Subramania, J. expressed the view that appellate jurisdiction includes revisional powers. Again in Nagendra Nath Dey and others v. Suresh Chandra Dey and others (59 IA 283), the Judicial Committee regarded an application for revision as an appeal in

ordinary acceptance of the term. That was a matter arising out of an execution petition, which was opposed by the judgment-debtor as barred by Article 182 of the Limitation Act. In this regard, the precise observations of their lordships of the Judicial Committee are:

".....There is no definition of appeal in the Code of Civil Procedure but their lordships have no doubt that any application by a party to an Appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent "

Similar was the opinion of a Division Bench of the erstwhile Dacca High Court in Mymensingh Co-operative Town Bank Ltd. v. Rajendra Chandra Roy (PLD 1961 Dacca, 312); the Court on the authority of some precedents from Calcutta High Court, in which it was laid down that under Article 182 the Limitation Act ran from the date of the order in revision, maintained that for the purposes of execution of a decree, the appeal included a revision."

Hence, by having filed the instant petition the petitioner has himself put his case "in jeopardy" as, "in a way revisional jurisdictional partakes of appellate jurisdiction". Secondly, the question of applicability of Mian Pir Muhammad's case (supra) to. pending case has been laid to rest by the Hon'ble Supreme Court in the precedents cited above including Haq Nawaz's case (supra).

12. This Court, therefore, does not find any force in this petition it is accordingly dismissed with no order as to costs.

M.B.A./I-55/L Petition dismissed.

2011 CLC 79

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD ASLAM and 2 others---Petitioners

Versus

Mst. RASHIDAN BIBI and others---Respondents

Civil Revision No. 2194 of 2010, decided on 10th June, 2010.

Specific Relief Act (I of 1877)---

----S.9---Suit for recovery of possession---Concurrent findings of fact by the Courts below---Trial Court decreed the suit in favour of plaintiffs on the ground that defendants had forcibly dispossessed them---Judgment and decree passed by Trial Court was maintained by Appellate' Court---Validity---Concurrent findings of fact arrived at by Courts below against defendants---Both the Courts below had passed judgments and decrees after weighing evidence led by parties and had concurrently found that memorandum of exchange had been acted upon and defendants were in possession of the property obtained through exchange---Defendants were unable to explain or establish otherwise, and it did not lie in the mouth of defendants to contend that memorandum of exchange was not acted upon---High Court declined to interfere in concurrent judgments and decrees so passed---Revision was dismissed in circumstances.

Ch. Muhammad Masaud Akhtar Khan for Petitioners.

ORDER

MAMOON RASHID SHEIKH, J.---Through this petition the petitioners have assailed the judgments and decrees dated 15-12-2007 and 24-3-2010 passed respectively by the learned Civil Judge, Shakargarh and the learned Additional District Judge, Shakargarh.

2. Briefly stated the facts according to the petitioner are to the effect that admittedly a memorandum of exchange was executed on 12-7-1991 between the petitioners and the predecessor-in-interest of the respondents (hereinafter to be referred as the respondents") in respect of parcels of land situated in Mauza Azizpur, Tehsil Shakargarh, owned by both the parties measuring in the case of the petitioners 10 marlas and in the case of the respondents 13 marlas. The said memorandum of exchange

is stated to have not been acted upon. As a consequence, no exchange of property took place nor any title was transferred nor any mutation was entered into the revenue record nor any exchange deed was registered. 'On 28-11-2001 the respondents brought a suit under section 9 of the Specific Relief Act, 1877 against the petitioners for recovery of possession of the land in question (10 marlas) on the premise that the respondents were the owners in possession of the said land on the basis of the memorandum of exchange dated 12-7-1991 whereunder the parties had exchanged their respective lands. The petitioners, however, on 10-11-2001 forcibly dispossessed the respondents from the land in question. The said suit of the respondents was decreed by the learned Civil Judge, Shakargarh on 10-4-2003. The appeal/revision (it is not clear from the record as to whether an appeal or a revision was filed) filed by the petitioners against the said decree was dismissed by the learned Additional District Judge, Shakargarh. The petitioners being the owners of the land in question filed a suit for "Establishment of Title and Recovery of Possession," on 31-1-2004 in respect of the land in question but the same was dismissed by the learned Civil Judge, Shakargarh, through the impugned judgment and decree dated 15-12-2007. Feeling aggrieved the petitioners filed an appeal which was also dismissed through the impugned judgment and decree dated 24-3-2010 of the learned Additional District Judge, Shakargarh.

3. The learned counsel for the petitioner has advanced the argument that the impugned judgments and decrees have been passed illegally and with material irregularity. In support of his contention he submits that the learned courts below failed to appreciate that the memorandum of exchange is not a document of title, the said memorandum was not acted upon, no exchange of land took place, no formal instrument of transfer of property was ever executed, the petitioners were deprived of the possession of the land in question through a decree obtained by the respondents in the suit filed by them under section 9 of the Specific Relief Act, 1877. The petitioners have a vested title in the land in question.

4. The record of the case has been gone through with the assistance of the learned counsel for the petitioners.

5. The decree dated 10-4-2003 passed in the respondents suit under section 9 of the Specific Relief Act, 1877 was, inter alga, passed on the basis of the report of the Local Commissioner, who was appointed at the joint request of the parties through order dated 12-2-2002. The learned Local Commissioner's report is comprehensive in nature. It was reported therein, inter alia, on the basis of the admissions made by the petitioners

that the petitioners were in possession of both parcels of land subject matter of the memorandum of exchange. It is worth noting that the appeal/revision filed, by the petitioners against the said decree dated 10-4-2003 also failed.

6. There is a concurrent finding of facts arrived at by the learned courts below against the petitioners. The learned courts below have passed the impugned judgments and decrees after weighing the evidence led by the parties. Both the learned courts below concurrently held that the memorandum of exchange had been acted upon and the petitioners are in possession of the property obtained through the exchange. The learned counsel for the petitioners has been unable to explain or establish otherwise. It, therefore, does not lie in the mouth of the petitioners to contend that the memorandum of exchange was not acted upon.

7. Under the circumstances I do not feel persuaded to intervene in the matter. The petition is accordingly dismissed in limine being devoid of force.

M.H./M-568/L Petition dismissed.

2011 CLC 130

[Lahore]

Before Mamoon Rashid Sheikh, J

MUNAWAR MEHMOOD and another---Petitioners

Versus

NADEEM SIDDIQUI and others---Respondents

Civil Revision No. 1363 of 2010, decided on 13th October, 2010.

Civil Procedure Code (V of 1908)---

----O. VI, R.17---Amendment of pleadings---New plea---Belated application---Suit was filed on 26-10-2007 and application for amendment of pleadings was filed on 24-3-2010---Both the courts below dismissed the application and appeal filed by plaintiffs---Validity---Plaintiffs failed to give any explanation for not taking up the pleas sought to be introduced through proposed amendments at the initial stage of trial---Application filed by plaintiffs was just a device to lead evidence through back door---Plaintiffs were

not permitted to achieve indirectly which could not be achieved directly---Both the courts below had passed orders in accordance with law and plaintiffs failed to point out any illegality or material irregularity or that the courts had failed to exercise their jurisdiction vested in them--- High Court refused to allow amendment in pleadings--- Petition was dismissed in circumstances.

Mst. Ghulam Bibi and others v. Sarsa Khan and others PLD 1985 SC 345; Mst. Rahim Noor v. Mst. Salim Bibi and 2 others PLD 1992 SC 30; Ghulam Nabi v. Sardar Nazir Ahmad 1985 SCMR 824; SEMCO Salvage Pte Limited v. M.V. Kaptan Yusuf Kalkavan and another 1993 SCMR 593 and Keramat Ali and another v. Muhammad Yunus Haji and others PLD 1963 SC 191 distinguished.

Ijaz Mahmood and others v. Manzoor Hussain and others 1988 SCMR 34 rel.

Dr. Hasan Mahfuz Jalisi v. Khawaja Moinuddin and 2 others PLD 2006 Kar. 98; Atlantic Steamer's Supply Company v. M.V. Titisee and others PLD 1993 SC 88; Muhammad Munir v. Shahida Saleem 2009 YLR 483; Abdul Hameed Dogar v. Federation of Pakistan and others 2010 SCMR 312 and Nazir Ahmad and 8 others v. Commissioner, Lahore Division Lahore and 3 others 2000 MLD 322 ref.

Ch. Muhammad Ashraf for Petitioners.

Mahmood Ahmad Bhatti for Respondents.

ORDER

MAMOON RASHID SHEIKH, J.---The brief facts necessary for adjudication of this petition are that the petitioners filed a suit against the respondents for specific performance of a contract on 26-10-2007. The respondents filed a written statement on 11-1-2008. Issues were framed on 30-1-2008, thereafter the petitioners led their evidence. However, on 30-7-2009 the right of the petitioners to lead evidence was closed. Feeling aggrieved the petitioners challenged the same before the District Judge, Lahore through a revision petition but the same was returned to the petitioners to be filed before this Court as the said Court lacked pecuniary jurisdiction in the matter. The said petition bearing C.R. No.2608 of 2009 was dismissed by Mr. Justice Mian Saqib Nisar (as he then was) on 17-12-2009. The petitioners' CPLA No.266 of 2010 against the order dated 17-12-2009 is pending before the Hon'ble Supreme Court of Pakistan. In

the meanwhile, after the evidence of the respondents had been recorded and the suit was fixed for final arguments, instead of addressing arguments the petitioners obtained a number of adjournments and finally on 24-3-2010 moved an application for amendment of the plaint. The respondents resisted the same, inter alia, on the ground that the proposed amendments are being sought at a belated stage, there is no nexus between the proposed amendments and the suit and if the proposed amendments are allowed the nature of the suit would be changed, moreover, the sought for amendments would change the form of the suit from a suit for specific performance of a contract to a suit for recovery of money/damages. The learned trial Court through order dated 17-4-2010 dismissed the petitioners' application by holding that the application is not maintainable at such a belated stage.

2. Feeling aggrieved the petitioners have filed this petition. It is contended that the learned trial court has passed the impugned order illegally and with material irregularity without keeping in mind the precedents in this respect. It is further contended that there is a host of authorities which support the petitioners' contention that amendment in the pleadings can be made even at the appellate stage before the Hon'ble Supreme Court of Pakistan. The nature of the suit would not be changed by the proposed amendment. The petitioner is only trying to bring on record the nature of the developments made in the property by the petitioners during their possession thereof. In case the factum of development is not established, the petitioners shall suffer loss. Moreover, the damages suffered by the petitioners on account of the mutation in question also need to be brought on the record. The prayer of the plaint as it exists covers the relief being sought through the amendments, hence, the nature of the suit remains the same. Reliance has been placed on the judgments reported as Mst. Ghulam Bibi and others v. Sarsa Khan and others (PLD 1985 SC 345), Mst. Rahim Noor v. Mst. Salim Bibi and 2 others (PLD 1992 SC 30), Ghulam Nabi v. Sardar Nazir Ahmad (1985 SCMR 824) and SEMCO SALVAGE PTE Limited v. M.V. Kaptan Yusuf Kalkavan and another (1993 SCMR 593) and Keramat Ali and another v. Muhammad Yunus Haji and others (PLD 1963 SC 191).

3. The learned counsel for the respondents has vehemently opposed the stand of the petitioners. It is contended that the petitioners' application for amendment of the plaint is mala fide. The application was moved on 26-3-2010 when all the avenues for leading evidence were closed for the petitioners and they had miserably failed to prove their ' case. The application is only a device to produce evidence through the back door as the petitioners' right to lead evidence has been closed and even this Court in C.R. No.2608

of 2009 has denied them the opportunity to lead evidence. It is settled law that amendments in pleadings cannot be allowed at such a late stage in the proceedings of a suit. Moreover, what has not been achieved directly cannot be allowed to be achieved indirectly. The sought for amendments would entirely change the nature of the suit. Both pleas are inconsistent, hence, self destructive and should not be allowed. The prayer clause does not allow recovery of damages. Reliance is placed on the judgments reported as Ijaz Mahmood and others v. Manzoor Hussain and others (1988 SCMR 34), Dr. Hasan Mahfuz Jalisi v. Khawaja Moinuddin and 2 others (PLD 2006 Karachi 98), Atlantic Steamer's Supply Company v. M.V. TITISEE and others (PLD 1993 SC 88), Muhammad Munk v. Shahida Saleem (2009 YLR 483), Abdul Hameed Dogar v. Federation of Pakistan and others (2010 SCMR 312) and Nazir Ahmad and 8 others v. Commissioner, Lahore Division, Lahore and 3 others (2000 MLD 322).

4. I have gone through the record with the assistance of the learned counsel for the parties and have also heard them at length.

5. The petitioners' evidence was closed on 30-7-2009 and ever since then they have been in the process of getting that decision reversed but to-date they have been unsuccessful. It has been established on the record that after the evidence of the respondents had been concluded and the suit was set down for final arguments the petitioners kept on obtaining adjournments and finally filed the application in question for amendment of the plaint. I have gone through the said application. It has been drafted in a very rudimentary style. No reason whatsoever has been set out as to the need for making the amendment in the plaint nor has any explanation been given for the belated filing of the application.

6. A feeble attempt has been made in ground (f) of the petition to explain the reason for seeking the amendment in the plaint. The relevant portions of the said ground are reproduced hereunder for ease of reference:--

> "(f) That during pendency of suit the petitioners came to know that plaintiffs have mentioned in the plaint that defendants in violation of - the terms of agreement and for the purpose of creating further complications through transfer the suit property through Mutation No.119 in favour of their father and caused lot of mental torture and loss of Rs.1,45,50,000 could not have been mentioned in the original point (sic)."

7. From a perusal of the application for amendment in the plaint no explanation becomes apparent for not taking of the said plea at the initial stages of the trial. Indeed, even the ground reproduced hereinabove does not show why the said plea was not taken at the initial stage. The plea of suffering mental torture by the petitioners' father as a result of the mutation in question is a fact which should have been in the contemplation of the petitioners at the time they filed the suit. The application has been made at a stage when evidence of both parties has been recorded and the case has been repeatedly adjourned for final arguments at the request of the petitioners.

8. The authorities quoted at the bar by the learned counsel for the petitioners do not advance their case.

9. The petitioners have failed to give an explanation for not taking up the pleas sought to be introduced through the proposed amendments at the initial stage of trial. It would, therefore, seem that the application is just a device to lead evidence through the back door as contended by the learned counsel for the respondents. The petitioners can, therefore, not be permitted to achieve indirectly which could be achieved directly.

10. The learned counsel for the respondents has placed heavy reliance on Ijaz Mahmood's case (supra) wherein the honourable Supreme Court whilst declining to interfere in the matter observed as under: -

> ".....the application (for amendment had been made) at a stage when the evidence of both parties had been recorded and the case had been fixed for. arguments. The amendment, if allowed, would have entailed further recording of evidence. No explanation has been offered by the petitioners for not taking up the said plea at the initial stages of the trial. In the circumstances we are not prepared to interfere with the order of the trial Court."

11. Whilst respectfully relying on Ijaz Mahmood's case (supra) I find that there is force in the contentions of the learned counsel for the respondents and hold that the learned Courts below have passed the impugned orders in accordance with law. The learned counsel for the petitioners has been unable to point out any illegality or material irregularity in the same or that the learned Courts below have failed to exercise their jurisdiction vested in them.

12. This petition is accordingly dismissed with no orders as to costs.

M.H./M-580/L Revision dismissed.

2011 CLC 652

[Lahore]

Before Mamoon Rashid Sheikh, J

Messrs ZAKIUDDIN AHMAD SIDDIQUI and another----Petitioners

Versus

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

Writ Petition No.692 of 2006, decided on 10th December, 2010.

(a) Islamabad Rent Restriction Ordinance (IV of 2001)---

----S. 17---Constitution of Pakistan Art.199---Constitutional petition--Ejectment of tenant---Concurrent findings of fact---Interference---Principle---Rent Controller as well as' Lower Appellate Court passed eviction orders against tenant on the ground of default in payment of monthly rent and personal use---Validity---High Court in its extraordinary Constitutional jurisdiction declined to interfere in cases having concurrent findings of fact unless it could be established that findings of fact by Courts below were result of misreading or non-reading of evidence or were perverse, arbitrary or fanciful---Tenant had failed to show that there had been misreading or non-reading of evidence on the part of Courts below---Tenant also could not establish that judgments passed by two Courts below suffered from any legal infirmity---Constitutional petition was dismissed in circumstances.

Muhammad Azizullah v. Abdul Ghaffar 1984 CLC 2837; Abdullah v. Hassan Abbas 1985 CLC 892 and Muazam Hanif v. Settlement Officer/Collector and another 2006 SCMR 642 distinguished.

Shamshad Begum v. Mst. Huma Begum and others 2008 SCMR 79; Malik Muhammad Hussain v. District Returning Officer and others 2008 SCMR 488; Haji Abdullah and 10 others v. Yahya Bakhtiar PLD 2001 SC 158 and Hanif and others v. Malik Ahmad Shah and another 2001 SCMR 577 rel.

(b) Administration of justice---

----Subsequent events may be taken into consideration by the Courts while deciding cases.
Mst. Amina Begum and others v. Mehar Ghulam Dastgir PLD 1978 SC 220 rel.

Syed Zulfiqar Abbas Naqvi for Petitioners.

Moazzam Ali Shekh for Respondent No.3.

Date of hearing: 22nd October, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- This petition calls into question the judgment dated 8-11-2005 passed by the learned Rent Controller, Islamabad and the judgment dated 2-3-2006 passed by the learned Additional District Judge, Islamabad.

2. The brief facts giving rise to this petition are to the effect that on 21-10-2003 respondent No.3 filed an ejectment petition against the petitioners, under section 17 of the Islamabad Rent Restriction Ordinance, 2001, before the learned Chief Rent Controller, Islamabad, in respect of the (non-residential) demised premises, fully described in the petition, inter alia, on the grounds that the lease had expired, the petitioners had committed default and that, the family members of respondent No.3 require the demised premises for their personal bona fide need. The petition was resisted and out of the divergent pleadings of the parties the following seven issues were framed:

(1) Whether the lease agreement has been terminated between the parties? OPA

(2) Whether the respondent is not paying the rent regularly? OPA

(3) Whether the rented premises is required for personal bona fide need of the petitioner? OPA.

(4) Whether the petition is not maintainable in its present form? OPR

(5) Whether the petition is false and frivolous and liable to be dismissed? OPR

(6) Whether the rent agreement was verbally extended? If so its effect? OPR

(7) Relief.

3. Evidence was recorded and on the basis of the same Issues Nos.1, 2, 3 and 6 were decided in favour of respondent No.3 whereas. Issues Nos.4 and 5 were decided against the .petitioners. As a consequence the petition was accepted by the learned Rent Controller, Islamabad, through the impugned judgment dated 8-11-2005. Feeling aggrieved the petitioners filed an appeal, under section 21 of the Ordinance (ibid), before the .District Judge, Islamabad, against the judgment dated 8-11-2005. The said appeal was dismissed by the learned Additional District Judge, Islamabad, through judgment dated 2-3-2006. Hence, the instant petition.

4. The learned counsel for the petitioners has assailed the impugned judgments, inter alia, on the grounds that in Para-6 of the ejectment petition the averments in respect of default have been given, however, no specific dates of default have been mentioned. As a consequence, it cannot be established as to when the default was committed by the petitioners. The default, if any, relates to an incident five years prior to filing of the ejectment petition. The petitioners had made good the default and they also paid the penalty in this respect. Respondent No.3 accepted payment of the same consequently the matter was regularized and the situation was accepted by respondent No.3. This is exemplified by the fact that respondent No.3 started accepting rent at an enhanced rate after the regularization/settlement. Contends that respondent No.3 failed to prove the ground of default. It is further contended that the personal bona fide need of the family members of respondent No.3 has not been established on the record. Both learned Courts below have misread and non-read the material brought on the record. Moreover, there is mis-appreciation of the law and facts of the case. Relies on the judgments reported as Muhammad Azizullah v. Abdul Ghaffar 1984 CLC 2837 and Abdullah v. Hassan Abbas 1985 CLC 892.

5. The learned counsel for respondent No.3 controverts the stance of the petitioners. He supports the impugned judgments and submits that there are concurrent findings of fact against the petitioners. In such like cases this Court does not normally interfere with in its extra-ordinary constitutional jurisdiction. Relies on the judgment reported as Muazam Hanif v. Settlement Officer/Collector and another 2006 SCMR 642.

6. Further submits that there is .no misreading or non-reading of evidence. Respondent No.3 was able to establish personal bona fide need before the learned Courts below.

7. Also submits that the petitioners have admitted default. Even otherwise the default stands established by the fact that subsequent to the ejectment order respondent No.3 filed a suit against the petitioners for recovery of the arrears of rent. The said suit was decreed on 22-5-2010 and the appeal filed by the petitioners against the, said decree was dismissed on 9-10-2010 by the learned Additional District Judge, Islamabad. During the course of arguments the learned counsel for respondent No.3 has placed on record a certified copy of the .judgment and decree, dated 9-10-2010, in support of his contention.

8. a. Arguments nears. Record perused.

9. I have considered both impugned judgments and I find that whilst the evidence of respondent No.3 was being recorded, the petitioners were given opportunity for cross-

examination of respondent No.3's witnesses but the petitioners failed to avail of the same with the result that their right of cross-examination was closed. The petitioners thereafter led evidence in support of their case. On the basis of the evidence led by the parties the learned Courts below came to the conclusion that respondent No.3 had proved his case. Indeed, there are concurrent findings of fact against the petitioners. It is settled law that this Court in its extraordinary constitutional jurisdiction normally does not interfere in such like cases unless it can be established that the findings of fact by the learned Courts below are a result of misreading or non-reading of evidence or they are perverse, arbitrary or fanciful. Reliance is placed on the judgments reported as Shamshad Begum v. Mst. Huma Begum and others 2008 SCMR 79, Malik Muhammad Hussain v. District Returning Officer and others 2008 SCMR 488, Haji Abdullah and 10 others v. Yahya Bakhtiar PLD 2001 SC 158 and Hanif and others v. Malik Ahmad Shah and another 2001 SCMR 577.

10. In the instant case the petitioners' counsel has been unable to show that there has been misreading or non-reading of evidence on the part of the learned Courts below. He has similarly been unable to establish that the impugned judgments suffer from any of the infirmities mentioned above. The contentions raised by the learned counsel for the petitioners are, therefore, repelled. The judgments cited at the bar by the learned counsel for the petitioners are not attracted to the case.

11. As to the contention of the learned counsel for respondent No.3 that the suit of respondent No.3 for recovery of the arrears of rent has been decreed and the petitioners' appeal against the said decree has also failed consequently default on the petitioners' part stands established. It may be noted that the said decrees have been passed subsequent to the ejectment order. Under the law subsequent events may be taken into consideration by Courts whilst deciding cases. Reference is made to the judgment reported as Mst. Amina Begum and others v. Mehar Ghulam Dastgir PLD 1978 SC 220. However, in the facts and circumstances of the case this point does not require examination, even though the-learned counsel for the petitioners' has not 'denied passing of the said decrees.

12. Under the circumstances, this petition fails. It is accordingly dismissed, with no order as to costs. The petitioners are, however, given three months from today to put respondent No.3 into the vacant physical possession of the demised premises.

M.H./Z-9/L Petition dismissed.

2011 CLC 1471

[Lahore]

Before Mamoon Rashid Sheikh, J

SAMIA BIBI----Petitioner

Versus

ABDUL HAMEED and 2 others----Respondents

Writ Petition No.5140 of 2009, decided on 26th May, 2011.

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

----S. 14 (2) (b) & (c)---Constitution of Pakistan, Art.199---Constitutional petition---Appeal--- Maintainability--- Pecuniary jurisdiction---Suit for recovery of dowry was decreed by Family Court in favour of wife in a sum of Rs.30,000/- in lieu of dowry articles---Lower Appellate Court allowed the appeal and suit for recovery of dowry articles was dismissed--- Plea raised by wife was that in view of S.14(2)(b) and (c) of West Pakistan Family Courts Act, 1964, no appeal was maintainable before Lower Appellate Court---Validity--- Lower Appellate Court lost sight of the provisions of S.14 of West Pakistan Family Courts Act, 1964; judgment and decree passed by Lower Appellate Court was against the express provisions of the statute and the same was passed in excess of the jurisdiction and without lawful authority and was liable to be declared as such---High Court set aside the judgment and decree passed by Lower Appellate Court and restored that of Family Court---Petition was dismissed in circumstances.

Muhammad Aslam Chaudhary for Petitioner.

Muhammad Zubair Saeed for Respondent No.1.

ORDER

MAMOON RASHID SHEIKH, J.--- The suits of the petitioner, one regarding the recovery of dowry and the other for recovery of maintenance (for self and the minor daughter of the parties) and delivery charges, were decreed by the learned Judge Family Court, Bhakkar through the consolidated judgment and decrees dated 9-10-2008. The petitioner was, therefore, held entitled to recover. Rs.30,000/- in lieu of dowry and maintenance at the rate of Rs.600/- per month from January, 2007 till July, 2008 whereas the minor was held entitled to recover maintenance at the rate of Rs.600/- per month with

10 per cent annual increase from January, 2007 till her marriage; the claim of the petitioner for recovery of delivery charges was, however, declined. Feeling aggrieved respondent No.1 filed an appeal which was partially allowed by the learned District Judge, Bhakkar through the judgment and decree dated 3-2-2009 with the result that whilst allowing the petitioner and the minor the maintenance awarded to them the learned appellate Court below dismissed the petitioner's claim for recovery of dowry.

2. At the outset the learned counsel for the petitioner submits that he has instructions to only assail the impugned judgment and decree dated 3-2-2009 passed by the learned District Judge, Bhakkar to the extent of dismissal of the petitioner's claim for recovery of dowry.

3. The short point of law involved in this petition is the question whether in view of the provisions of Clauses (b) & (c) of subsection (2) of section 14 of the Family Courts Act, 1964, the learned appellate Court below was justified in entertaining and adjudicating upon respondent No.1's appeal and thereby reversing the judgment and decree of the learned Judge Family Court to the extent of the petitioner's claim for recovery of dowry.

4. The relevant provisions of section 14 of the Act, ibid, are being reproduced hereunder for ease of reference:---

> "14. (1) Notwithstanding anything provided in any other law for the time being in forces, a decision given or a decree passed by a Family Court shall be appealable.

?
?????????? (a) ??????????????????????.

?????????? (b) ??????????????????????.
??????????

(2) No appeal shall lie from a decree passed by a Family Court.

??????????
?????????? (a) ??????????????????????.

(b) for dower or dowry not exceeding rupees thirty thousand.

(c) for maintenance of rupees one thousand or less per month.

?????????? (3) ??????????????????????.
?

??????????? (4) ??????????????????????.

5. The learned counsel for respondent No.1/defendant when confronted with the above provisions of section 14 of the Act, ibid, could not justify as to how respondent No.1/defendant's appeal was competent given the fact that under the said provisions no appeal lies from a decree passed by a Family Court for recovery of dowry not exceeding Rs.30,000/- and for recovery of maintenance of Rs. 1000/- or less per month, which is the position in the instant case.

6. It seems that the learned appellate Court below lost sight of the provisions of section 14 of the Act, ibid. The impugned judgment and decree of the learned appellate Court below is regrettably against the express provisions of the statute. The decree of the learned appellate Court below was, therefore, passed in excess of jurisdiction and without lawful authority and is liable to be declared as such.

7. In the result this petition is allowed and the impugned judgment and decree dated 3-2-2009 of the learned District Judge, Bhakkar is set aside and the judgment and decree dated 9-10-2008 of the learned Judge Family Court, Bhakkar is upheld.

M.H./S-92/L?? Petition allowed.

2011 MLD 223

[Lahore]

Before Mamoon Rashid Sheikh, J

NUSRAT BIBI---Petitioner

Versus

S.H.O. and another---Respondents

Writ Petition No. 13336 of 2010, decided on 21st June, 2010.

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

----S. 154---Constitution of Pakistan, Art.199---Constitutional jurisdiction of High Court---Scope---Petitioner seeking direction to police to register F.I.R.---Validity---Under the provisions of S.154, Cr. P. C., the S.H.O. is under a legal obligation to register an F.I.R. whenever allegations regarding commission of cognizable offence are levelled before him---High Court, however, in the matters of ordering registration of F.I.Rs., has a discretion while exercising its constitutional jurisdiction and may therefore, in the peculiar circumstances of a given case, decline to exercise its constitutional jurisdiction.

Muhammad Bashir v. Station House Officer, Okara Cantt. and others PLD 2007 SC 539 fol.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Maintainability---Non-availability of alternative remedy---Effect---Every case has to be decided on its peculiar facts and circumstances and in the presence of an alternative statutory remedy constitutional petition is not maintainable.

Rai Ashraf and others v. Muhammad Saleem Bhatti and others Civil Petition No. 1398-L of 2009 fol.

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

----Ss. 22-A, 22-B & 154---Constitution of Pakistan, Art.199---Constitutional petition---Petitioner had assailed the order of Justice of Peace declining the request of petitioner to direct the S.H.O. to register case against the respondent---Validity---Case of the petitioner, as per the Police report, appeared to be based on a false premise---Petitioner also had the alternative statutory remedy by way of filing a criminal complaint but she had not

exhausted said remedy before filing the constitutional petition---Constitutional petition, was dismissed, in circumstances---Petitioner, however, may avail of the alternative remedy provided by law by way of filing of a private complaint in respect of her allegations, if so advised, which shall not be influenced by any observation made in the present judgment.

Muhammad Aslam v. Justice of Peace/Additional Sessions Judge, Burewala, District Vehari and another 2010 PCr.LJ 296 and Gul Waiz and another v. Zuhra Bibi and others 2010 PCr.LJ 45 distinguished.

Abdul Ghaffar Khan for Petitioner.

Kalim Ilyas, Assistant Advocate-General Punjab on Court's call.

ORDER

MAMOON RASHID SHEIKH, J.---Through this petition the petitioner has prayed that a direction may be issued "...to the local Police to register a case in terms of section 154 of the Cr.P.C. to substantiate the allegation in the interest of safe administration of criminal justice."

2. The brief facts as per the petition are that one of the friends of the petitioner's husband namely Muhammad Amin (respondent No.2) tried to commit Zina-bil-Jabr with her on 15-5-2010, around 3-00/4-00 pm, when the petitioner had gone to the cattle-shed in the Ihata of respondent No.2 (which shed the petitioner's husband shared with respondent No.2) to fetch her cattle. Whilst the petitioner was at the shed, respondent No.2 tried to commit Zina-bil-Jabr with her. The petitioner, however, put up resistance and hearing her cries the petitioner's husband and others reached the spot and respondent No.2 failed to achieve his aim. In the struggle the petitioner sustained injuries. The petitioner moved the local police for registration of a criminal case against respondent No.2 and also requested that her medical examination be conducted. The petitioner's request was, however, not acceded to. The petitioner was, therefore, constrained to move the Ilaqa Magistrate on 18-5-2010 for getting herself medically examined. The said application was allowed. The petitioner was medically examined and MLR No.147 of 2010 dated 19-5-2010 was issued by the W.M.O., R.H.C.; Renala Khurd. On 20-5-2010 the petitioner filed an application under sections 22-A and 22-B of the Cr.P.C. for registration of an F.I.R. against respondent No.2. The said application came up for hearing before the learned Additional Sessions Judge/Ex-Officio Justice of Peace, District Okara. Comments were called for from the local Police and after

going through and relying on the same the learned Additional Sessions Judge/Ex-Officio Justice of Peace, dismissed the application on 4-6-2010.

3. The learned counsel for the petitioner contends that an offence has been committed by respondent No.2 against the petitioner and in passing the impugned order the learned Additional Sessions Judge/Ex-Officio Justice of Peace, has erred in law. The said decision is not sustainable in the eye of the law. The learned Additional Sessions Judge/Ex-Officio Justice of Peace, has assumed the role of the S.H.O., which is not permissible under the law. Respondent No.1 is duty bound to register a criminal case, as envisaged by sections 154 and 155 of the Cr.P.C., on the petitioner's application. Respondent No.1 has, however, not fulfilled the mandatory duty cast upon him by the law. Reliance by the learned Additional Sessions Judge/Ex-Officio Justice of Peace, on the Police report is not justifiable under the law.

4. In support of his contentions the learned counsel has placed reliance on the judgments reported as Muhammad Aslam v. Justice of Peace/Additional Sessions Judge, Burewala, District Vehari and another [2010 PCr. LJ 296 (Lahore)], Gul Waiz and another v. Zuhra Bibi and others [2010 PCr.LJ 45 (Peshawar)] and Muhammad Bashir v. Station House Officer, Okara Contt. and others (PLD 2007 SC 539).

5. The learned A.A-G. who is present on Court's call submits that the impugned decision of the learned Additional Sessions Judge/Ex-Officio Justice of Peace, is unexceptionable. Further submits that even otherwise the petitioner has not exhausted the alternative remedy provided under the law by way of filing of a private complaint before approaching this Court. Contends that each and every case has to be decided on its peculiar facts and circumstances and in the presence of an alternative remedy a constitutional petition is not maintainable.

6. I have examined the record with the assistance of the learned counsel for the petitioner and the learned A.A-G. and have also heard their arguments.

7. I find that the learned Additional Sessions Judge/Ex-Officio Justice of Peace, based his decision on the report of the local Police which was inter alia to the effect that the version of the petitioner was false, she had actually been involved in a quarrel with the womenfolk of respondent No.2 over some squabble amongst the children of the two families. The petitioner had sustained injuries during the said altercation and had subsequently been thrown out of his house/Ihata by respondent No.2. The petitioner had approached the Police to seek revenge. No cognizable offence was stated to have been made out. Basing its

decision on the said report the learned Additional Sessions Judge/Ex-Officio Justice of Peace declined passing any direction to the local Police and observed that if the petitioner has any grievance, she may file a private complaint.

8. The Hon'ble Supreme Court of Pakistan in Muhammad Bashir's case, (supra), has held that under the provisions of section 154 of the Cr.P.C. the S.H.O. is under a legal obligation to register an F.I.R. whenever allegations regarding commission of a cognizable offence are levelled before him. At the same time, however, in para-41 of the said judgment the Hon'ble Supreme Court has observed that in matters of ordering registration of F.I.Rs. this Court has a discretion while exercising its constitutional jurisdiction. This Court may, therefore, in the peculiar circumstances of a given case decline to exercise its writ jurisdiction.

9. I find force in the arguments of the learned A.A-G. inasmuch as every case has to be decided on its peculiar facts and circumstances and in the presence of an alternative statutory remedy writ petition is not maintainable. Reliance is placed on an unreported judgment of the Hon'ble Supreme Court of Pakistan dated 9-9-2009 passed in Civil Petition No.1398-L of 2009 "Rai Ashraf etc. v. Muhammad Saleem Bhatti etc."

10. The case of the petitioner, as per the Police report, appears to be based on a false premise. Moreover, the alternative statutory remedy by way of filing of a criminal complaint is available to the petitioner but she has not exhausted that' remedy before filing the petition. The precedents cited by the learned counsel for the petitioner do not advance his case.

11. This petition is accordingly dismissed.

12. The petitioner may, however, avail of the alternative remedy provided by law by way of filing of a private complaint in respect of her allegations, if so advised.

13. It is observed that in case the petitioner files a private complaint, the learned court seized of the matter shall not be influenced by any observation made in this order.

MA.K./N-104/L Petition dismissed.

2011 MLD 2004

[Lahore]

Before Mamoon Rashid Sheikh, J

NASEEM HAIDER---Petitioner

Versus

JARRAR HUSSAIN and others---Respondents

Civil Revision No.2046 of 2007, heard on 14th July, 2011.

Partition Act (IV of 1893)---

----Ss. 3 & 4---Qanun-e-Shahadat (10 of 1984), Art.114---Suit for partition--Estoppel---Local Commissioner found suit property as indivisible and recommended that property be put to sale and parties given their respective shares from the sale proceeds---When process of sale of suit property through open auction was initiated, parties arrived at a compromise and it was settled that one of the co-sharers would pay the entire sale price of the suit property to the other co-sharers in the property within three months, in consideration whereof the other co-sharers undertook to vacate the property in dispute and hand over the vacant possession to the offering co-sharer---Said co-sharer could not deposit the agreed sale amount within stipulated period of three months; but on his application, period to deposit amount was extended and he deposited the amount in the extended period---Respondents (other co-sharers) received their respective shares, while share of the petitioner was deposited in the Treasury under the order of the court---Contention of the petitioner was that compromise effected between the parties was not binding on him as the consideration was not paid by the respondent co-sharer in time; that petitioner in application under S.3 of Partition Act, 1893 had offered enhanced price to all the other share-holders; that application by respondent co-sharer for enlargement of time was wrongly accepted by the Trial Court behind the petitioner's back and that he had been condemned unheard---Validity---Compromise in question was effected between the parties as a consequence of the earlier application of the petitioner filed under Ss.3 & 4 of the Partition Act, 1893---Question of estoppel would arise in the case but counsel for the petitioner had not been able to satisfy the court on that score---Petitioner was also unable to show or point out any illegality or material irregularity in the impugned orders of the courts below---Concurrent findings of fact of the courts below against the petitioner, could not be interfered with by High Court in revision, when the petitioner appeared to be merely delaying the matter.

Firdous Begum and 6 others v. Mst. Salamat Bibi and another 2008 CLC 248 **ref**.

Bashir Ahmad Qureshi for Petitioner.

Ch. Muhammad Abdullah for Respondents.

Date of hearing: 14th June, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.---The brief facts giving rise to this petition are that respondents Nos. 1 to 3 filed a suit for partition against the petitioner and respondents Nos.4 and 5 in respect of the property in dispute fully described in the plaint. On 12-10-2004 a preliminary decree was passed by the learned trial Court which was not challenged by either party. Consequently, a Local Commissioner was appointed for determination of the mode of execution of the decree. The learned Local Commissioner through his report submitted that the property could not be partitioned through metes and bounds. It was, therefore, recommended that the property be put to sale and the parties be given their respective shares from the sale proceeds. The process for sale of property through open auction was initiated through order dated 11-10-2005. The parties, however, on an application filed under sections 3 and 4 of the Partition Act, 1893, arrived at a compromise on 20-10-2005. As per the terms of the said compromise it was settled that respondent No.4 would pay the sale price of the property amounting to Rs.1,400,000 to the other co-sharers in the property within three months. In consideration whereof the other co-sharers undertook to vacate the property in dispute and hand over the vacant possession thereof to respondent No.4. Whilst the compromise took place between the parties the process of sale of the property through open auction continued in pursuance of the order dated 11-10-2005 of the learned trial court. The sale consideration was not deposited by respondent No.4 as agreed to by the parties within the stipulated period. Meanwhile respondent No.5, who is represented by his L.Rs., passed away. Consequently, on the next date of hearing i.e. 21-12-2005, the learned trial court ordered that the L.Rs. of the deceased respondent No.5 be brought on the record. At the same time respondent No.4 moved an application for enlargement of time to deposit the amount of Rs.1,400,000 in compliance of the order dated 20-10-2005. The petitioner, meanwhile, as a consequence of the pending auction proceedings filed an appeal on 31-10-2005 through which the learned trial Court's orders dated 11-10-2005 and 20-10-2005 were challenged. The former being the order whereby the auction proceedings were initiated in respect of the property and the latter being the order whereby the compromise between the parties was recorded. The learned appellate court

through order dated 31-10-2005 stayed the auction proceedings, however, the proceedings before the learned trial court were not stayed. Consequently, respondent No.4' s application for enlargement of time was accepted on 24-2-2006 and on 24-10-2006 respondents Nos. 1 to 3 and 5 received their respective shares of the consideration from respondent No.4 in pursuance of the above compromise. The share of the petitioner under orders of the learned trial court was deposited in the Treasury. Feeling aggrieved the petitioner filed a revision petition which was dismissed by the learned Additional District Judge, Lahore, on 8-6-2006. The said order was challenged before this Court through Writ Petition No.6527 of 2006, however, the same was disposed of as having been withdrawn, on 2-3-2007, on the statement of the learned counsel for the petitioner to the effect that he would like to pursue the application filed by the petitioner before the learned trial court. The aforementioned application had been filed by the petitioner under section 3 of the Act, ibid, and was dismissed by the learned trial court through the impugned order dated 6-6-2007. The petitioner filed an appeal which was dismissed through the impugned order dated 5-11-2007 by the learned Additional District Judge, Lahore. Feeling aggrieved the petitioner has filed the instant petition against the impugned orders dated 6-6-2007 and 5-11-2007.

2. Arguments heard. Record perused.

3. The learned counsel for the petitioner submits that the compromise effected between the parties on 20-10-2005 was not binding on the petitioner as the consideration was not paid by respondent No.4 in time. The petitioner through his application under section 3 of the Act, ibid, had offered to pay Rs.1,600,000 as the price of the property in dispute. The learned courts below did not take this factor into account. The petitioner was willing to pay an enhanced price to all the share-holders whereas respondent No.4 had bought the property in dispute at a lesser price. Further submits that the application moved by respondent No.4 for enlargement of time was wrongly accepted by the learned trial court behind the petitioner's back. The petitioner has been condemned unheard. Relies on the judgment reported as Firdous Begum and 6 others v. Mst. Salamat Bibi and another (2008 CLC 248).

4. The learned counsel for the respondents controverts the stand of the petitioner and submits that a compromise was effected between the parties on 20-10-2005 as a consequence of an application filed earlier by the petitioner under sections 3 and 4 of the Act, ibid. Does not deny the fact that respondent No.4 failed to pay the consideration to the other co-sharers within the stipulated period according to the terms of the compromise. He, however, submits that the time was enlarged by the learned trial court on 24-2-2006. The share of respondents Nos. 1 to 3 and 5 was duly paid to and received

by them whereas the petitioner's share was deposited in the Treasury under Court orders. This factum has been recorded by the learned trial court during the proceedings in pursuance of respondent No.4's application for enlargement of time. Further submits that the question of the petitioner having not been given notice of the said application or the petitioner having been condemned unheard has already been considered and decided against the petitioner in the earlier round of litigation. The final order being the one passed in Writ Petition No. 6527 of 2006 on 2-3-2007, through which the petitioner withdrew the said petition. That order has attained finality. Also contends that the share of the petitioner was deposited in the Treasury as ordered by the learned trial court. The petitioner is merely prolonging the matter for ulterior motives. Further contends that the application moved by the petitioner under section 3 of the Act, ibid, is the second application filed by the petitioner in this respect which in itself is not maintainable. The learned courts below in the impugned orders dated 6-6-2007 and 5-11-2007 have recorded this factum and decided that the petitioner is estopped from filing a fresh application. Supports the impugned orders and prays for dismissal of the petition.

5. I have gone through the impugned orders and find that the factum of the petitioner having filed the second application under section 3 of the Act, ibid, has been duly recorded in both the impugned orders. The documents filed by the petitioners with the petition do not include a copy of the earlier application filed by the petitioner under Sections 3 and 4 of the Act, ibid. The learned counsel for the respondents, whilst questioning the maintainability of the petition on account of not being properly documented, has provided a copy of the said application during the course of arguments, which copy is placed on the record. It appears from a perusal thereof and from the copies of the order sheets of the learned trial court that the compromise dated 20-10-2005 was effected between the parties as a consequence of the earlier application of the petitioner filed under Sections 3 and 4 of the Act, ibid. The question of estoppel does arise in the case and the learned counsel for the petitioner has been unable to satisfy me on this score. He has also been unable to show or point out any illegality or material irregularity in the impugned orders. Even otherwise, there is a concurrent finding of facts against the petitioner. Moreover, as submitted by the learned counsel for the respondents the petitioner's second application appears to be merely a dilatory tactic. As to the petitioner's contention that no notice was given to him by the learned trial court about the application of respondent No.4 for enlargement of time, the learned counsel for the petitioner has been unable to dispel the stand of the learned counsel for the respondents that this question was examined and decided against the petitioner in the earlier round of litigation. Indeed, the learned counsel for the petitioner did not have any answer in this respect. The authority cited by the learned counsel for the petitioner is not attracted to the case.

6. Another point worth noting is that in the second application under Section 3 of the Act, ibid, moved by the petitioner, para 5 whereof refers, the petitioner has tried to take the stand that after the death of respondent No.5 the property in question is divisible only between the petitioner and respondent No.4 giving the impression that he wants to deny the benefit of the property in question to respondents Nos. 1 to 3 and 5. Upon being confronted with this aspect the learned counsel for the petitioner has no reply.

7. Under the circumstances I do not find any illegality or material irregularity having been committed by the learned courts below whilst passing the impugned orders dated 6-6-2007 and 5-11-2007. In view thereof, and the fact that the petitioner appears to be merely delaying the inevitable, I do not find any force in this petition. It is accordingly dismissed, with no order as to costs.

H.B.T./N-46/L Petition dismissed.

2011 P Cr. LJ 182

[Lahore]

Before Mamoon Rashid Sheikh, J

Mst. YASMEEN---Petitioner

Versus

JAVAID IQBAL and 2 others---Respondents

Criminal Miscellaneous No. 620-H of 2010, decided on 28th May, 2010.

Criminal Procedure Code (V of 1898)---

----S. 491---Habeas corpus---Custody of minor---Petitioner, paternal aunt of the minor living abroad, alleged that minor who was a special child was handed over to her by parents of the minor for treatment abroad and they had taken the minor back---Validity---Minor was in the custody of natural parents where he was happy in their custody and was not agitated or disturbed in any manner---Petitioner did not have any certificate issued by Guardian Court in his favour or any other instrument appointing her as the duly constituted guardian of the minor---Petitioner was unable to establish that she had independent source of income or that her relationship with her husband was not going through a rough patch---High Court declined to interfere in the custody of minor with respondents---Petition was dismissed in circumstances.

Abdul Rehman Khakwani and another v. Abdul Majid Khakwani and 2 others 1997 SCMR 1480 distinguished.

Muhammad Nawaz Chaudhary for Petitioner.

Muhammad Farid Chaudhary for Respondents Nos. 1 and 2.

Shaukat Fazal, A.S.-I. Police Station, Manga along with the alleged detenue.

ORDER

MAMOON RASHID SHEIKH, J.---The petition was adjourned on the last date of hearing at the parties' request for exploring the possibility of arriving at an out of Court settlement and pending the same the custody of the alleged detenu, a boy aged about 4 years (hereinafter referred to as "the minor"), was ordered to be retained by respondents Nos. 1 and 2 who undertook to produce the minor before the Court today which they have done.

2. The learned counsel submit that the parties have been unable to arrive at an out of Court settlement. It is, therefore, prayed that the petition may be heard and decided on merits.

3. The brief facts giving rise to the present petition as narrated in the petition are to the effect that the minor is the real son of respondents Nos. 1 and 2 whereas the petitioner is the paternal aunt of the minor. The petitioner is resident (sic) abroad and since the minor is a special child, respondents No. 1 and 2 handed over his custody to the petitioner so that she may bring up the minor by providing him special care, attention and treatment. The minor has been with the petitioner ever since his birth. The petitioner came to Pakistan in September, 2009 along with the minor and started residing with the minor. Respondents Nos.1 and 2 came to the petitioner's residence along with certain other persons on 1-4-2010 and forcibly snatched the minor from the petitioner and at the same time also took away the title deed of the petitioner's house, a vehicle, the petitioner's and the minor's passports and other documents. Respondents Nos.1 and 2 also threatened the petitioner of dire consequences and said that she can only regain the custody of the minor if she transfers her property in the names of respondents Nos. 1 and 2. It is prayed that the concerned S.H.O. (respondent No.3) be directed to recover the minor from the illegal custody of respondents No. 1 and 2 and his custody be handed over to the petitioner.

4. The learned counsel for the petitioner contends that the minor was handed over to the petitioner by respondents Nos. 1 and 2 of their own freewill and accord. The petitioner has

been taking good care of the minor and has had him treated abroad as the minor is a special child and needs specialized medical treatment and care. Respondents Nos. 1 and 2 voluntarily gave up the custody of the minor to the petitioner knowing full well that she would provide him with a better and brighter future. The petitioner is residing in Japan and is better equipped to take care of the minor as that country has better medical facilities as compared to Pakistan. Contends that the custody of the petitioner was legal. The act of respondents Nos. 1 and 2 ,of snatching away the minor from the petitioner is illegal. Prays that the custody of the minor be handed over to the petitioner. Relies on a judgment of the honourable Supreme Court of Pakistan reported as Abdul Rehman Khakwani and another v. Abdul Majid Khakwani and 2 others (1997 SCMR 1480).

5. The learned counsel for respondents Nos. 1 and 2 submits that the minor is the real son of respondents Nos. 1 and 2. It is not denied that the minor is a special child requiring special care. It is also not denied that the minor was handed over to the petitioner about 4 years back. It is, however, submitted that upon her return to Pakistan in September, 2009 the petitioner came to visit respondents Nos.1 and 2 and left the minor with them of her own freewill and ever since then she has not bothered to even enquire about the minor's welfare. It is further submitted that albeit the petitioner is the paternal aunt of the minor, yet in the presence of respondents Nos. 1 and 2 who are the real parents of the minor, the petitioner does not have any right to demand the custody of the minor. The minor is living with his parents and there is no element of illegal custody and/or confinement of the minor. It is further contended that the petition has been filed by concealment of material facts. The petitioner is currently estranged from her husband and is living alone in Pakistan. She has no independent source of income. Moreover, she herself abandoned the minor, therefore, it does not lie in her mouth to claim his custody. It is prayed that the petition be dismissed.

6. Arguments heard. Record perused.

7. It is an admitted position that the minor was handed over to the petitioner by respondents Nos. 1 and 2 about 4 years back. Upon being given the custody of the minor the petitioner took him abroad and the minor stayed in her custody. However, upon the petitioner's return to Pakistan in or around the month of September, 2009 the custody of the minor exchanged hands. Neither party has been able to establish with any degree of exactitude as to how and when or under what circumstances the custody of the minor exchanged hands. From the resume of the facts given hereinabove the correct position does not become clear. Be that as it may, the minor is in the custody of his natural parents. He has been brought before the Court. It appears that he is happy in their custody and is not

agitated or disturbed in any manner. The learned counsel for the petitioner has relied on the case of Abdul Rehman Khakwani and another (supra) but it does not apply to the facts and circumstances of the case. In that particular case although the facts were somewhat similar, however, upon handing over of the custody of the minor by the natural parents to the petitioner (in that case) a certificate had been issued by the learned Guardian Judge appointing the petitioner therein as the guardian of the minor. In the instant case the petitioner has been unable to show any certificate to this effect or any other instrument appointing her as the duly constituted guardian of the minor. The learned counsel for the petitioner has tried to controvert the stance of respondents Nos. 1 and 2. He has, however, been unable to establish that the petitioner has an independent source of income or that her relationship with her husband is not going through a rough patch.

8. Under the circumstances I do not feel persuaded to interfere in the matter. The petition is accordingly dismissed.

M.H./Y-5/L?? Petition dismissed.

2011 P L C (C.S.) 4

[Lahore High Court]

Before Mamoon Rashid Sheikh, J

MUHAMMAD SAEED

Versus

E.D.Q. and others

Writ Petition No.8257 of 2009, heard on 16th July, 2010.

Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974--

----R. 17-A---Constitution of Pakistan (1973), Art.199---Constitutional petition--Appointment of one of the unemployed children of deceased civil servant---Petitioner, who was one of the sons of deceased civil servant, had prayed that he should be adjusted and appointed on the post of junior clerk in pursuance of provisions of R.17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974---Said rule had provided that only one child of a Government Servant who died during service, could get job against a post in BPS-1 to 5 in the department in which deceased was working at the time of his death---Petitioner's brother was already appointed as Naib Qasid in the department under R.17-A of Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, as only one child of deceased could get benefit of R.17-A of Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, application of the petitioner, was rightly rejected in circumstances.?

M.H. Sajid Sial for Petitioner.

Kalim Ilyas, A.A.-G. for Respondents.

Date of hearing: 16th July, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- The report and parawise comments have been filed by the respondents. The learned counsel for the petitioner states that he has gone through the same and is ready to argue the petition.

?2. With the consent of the parties this petition is being treated as a Pacca matter and shall be disposed of on the basis of the available record.

3. The petitioner has, inter alia, prayed that a direction may be issued to the respondents to adjust and appoint the petitioner on the job applied for by him i.e. to the post of Junior Clerk, in pursuance of the provisions of Rule 17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974.???????????

4. Rule 17-A of the Rules (ibid), inter alia, provides that only one child of a Government Servant who dies during service or is declared invalidated/incapacitated for further service can get a job against a post in BPS-1 to BPS-5 in the Department in which such Government Servant was working at the time of his death provided the dependant of the Government Servant is otherwise eligible for the post.

5. The grounds for invoking the above provision are stated to be that the petitioner's father was a Government Servant who died during service on 14-8-1982. The petitioner was a minor at that time and upon attaining majority he is entitled to get appointed to a post in BPS-1 to BPS-5 in his father's Department.

6. It is submitted that in the instant case the petitioner applied for the post of Junior Clerk under Rule 17-A of the Rules (ibid) but after being interviewed by the District Recruitment Committee, Jhang he was verbally informed on 1-6-2007 that his application has been rejected as his elder brother had already been appointed as Naib Qasid on 20-10-1993 under Rule 17-A of the Rules ibid. It is contended that the petitioner's brother had in fact been recruited as Naib Qasid on the basis of merit and not under Rule 17-A of the Rules ibid. The petitioner consequently filed an appeal before respondent No.1 on 25-6-2007 against the verbal order dated 1-6-2007. The petitioner's appeal was accepted on 25-9-2007 and respondent No.2 was directed to re-consider the matter but respondent No.2 did not comply with the order dated 25-9-2007. The petitioner was, therefore, constrained to file an application before the District Coordination Officer, Jhang for implementation of respondent No.1's order dated 25-9-2007 but to no avail. It is further contended that the petitioner is not being appointed under Rule 17-A of the Rules ibid in pursuance of the orders of the District Coordination Officer, Jhang and respondent No.1 whereas other candidates have been accommodated from time to time on the basis of the Rules ibid. A.case of discrimination has been made out.

7. The learned Assistant Advocate-General has controverted the stance of the petitioner and has drawn the attention of this Court to the report and parawise comments and the copies of the documents appended thereto. Submits that the petitioner's brother namely

Saifullah was appointed as Naib Qasid on 20-9-1993 under Rule 17-A of the Rules ibid. In support thereof he refers to the copy of the petitioner's brother's appointment letter and the minutes of the meeting of the District Recruitment Committee, Jhang held in the office of the then Deputy Commissioner, Jhang on 20-10-1993 in pursuance whereof the petitioner's brother was appointed. The learned Assistant Advocate-General contends that under Rule 17-A of the Rules ibid only one child of a deceased Government Servant can be accommodated. In the instant case the petitioner's elder brother has already availed of the benefit under the said provision, therefore, the petitioner cannot invoke the same. Further submits that the order passed by respondent No.1 is erroneous inasmuch as the petitioner's brother was appointed in pursuance of Rule 17-A of the Rules (ibid) as is borne out from the record. Prays that the petition be dismissed being misconceived.

8. When confronted with the above, the learned counsel for the petitioner submits that the petitioner's brother was not appointed under the provisions of Rule 17-A of the Rules ibid. The said appointment was made on the basis of merit as has been declared by respondent No.1. Further submits that the petitioner is being discriminated against by the respondents.

9. Having gone through the record. and considering the arguments of the parties this Court does not find any force in the contention of the learned counsel for the petitioner in view of the contents of the minutes of the meeting of the District Recruitment Committee, Jhang held on 20-10-1993 under the chairmanship of the then Deputy Commissioner, Jhang. The case of the petitioner's brother was fully discussed and considered during the said meeting and the petitioner's brother's appointment letter was issued as a consequence of the decision of the Committee dated 20-10-1993 which was in turn based on the provisions of Notification No.SOR-III-2-42/92, dated 28-8-1993, i.e. Rule 17-A, of the Rules, (ibid). And as only one child of a deceased Government Servant can benefit from Rule 17-A of the Rules ibid, the petitioner is precluded from invoking the same.

10. So far as the contention of the petitioner's counsel that the petitioner has been discriminated against, the learned counsel for the petitioner has been unable to point out any specific instance in this respect.

11. Under the circumstances this petition has no force and is dismissed accordingly.

H.B.T./M-574/L?? Petition dismissed.

2011 PLC 34

[Lahore High Court]

Before Mamoon Rashid Sheikhs, J

PUNJAB SEED CORPORATION through Managing Director

Versus

EMPLOYEE'S OLD-AGE BENEFIT INSTITUTION through Chairman Board of Trustees and 3 others

Writ Petition No.9311, Civil Miscellaneous Nos.1 and 1986 of 2010 decided on 20th May, 2010.

Employees' Old Age Benefits Act (XIV of 1976)---

----Ss. 11 & 33---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Petitioner/establishment having failed to get it registered under provisions of S.11 of Employees' Old-Age Benefits Act, 1976, its premises was sealed---Validity---Petitioner had an equally efficacious, alternative remedy by way of filing a complaint before Adjudicating Authority under S.33 of Employees' Old-Age Benefits Act, 1976, but it had approached High Court without exhausting the alternative remedy---Rights and obligations of the parties would be adequately safeguarded, if the petitioner was to file complaint before the Adjudicating Authority as envisaged under S.33 of the Employees' Old-Age Benefits Act, 1976---Petitioner having not availed equally efficacious remedy provided to it under the law before invoking the constitutional jurisdiction of High Court, constitutional petition was not maintainable---However, as seeds stored in the sealed premises, were liable to perish, it was ordered that the store of the petitioner be desealed immediately with the direction that the petitioner would approach the authority concerned; and if so approached, pending disposal of the complaint of the petitioner, no coercive measures would be taken against the petitioner.

Rupali Polyester Ltd. v. Employees Old-Age Benefits Institution and another 1991 PLC 318; Ujala Cotton Mills v. Employees Old-Age Benefits Institution and others 1994 PLC 560; Mubarak Ali and Sons v. Employees Old-Age Benefits Institution and others 1994 PLC 686; Messrs Shamas Textile Mills v. Employees Old-Age Benefits Institution and others 1994 PLC 694; University of Faisalabad through Authorized Representative v. Regional Head Faisalabad North Region Employees Old-Age Benefits Institution, Faisalabad 2008 PLC 161; Abdul Latif v. The Government of West Pakistan and others PLD 1962 SC 384; Pir Muhammad v. Government of Sindh and 3 others 1990 MLD 869 and Pakistan Burmah Shell Limited v. Employees Old-Age Benefits Institution and others 2004 PLC 63 ref.

Mian Hamid Ullah Khan for Petitioner.

Kashif Ali Chaudhry for Respondents.

ORDER

MAMOON RASHID SHEIKH, J.--- In view of the urgency of the matter, I intend to dispose of this petition with the consent of the parties as a Pacca matter on the basis of the available record.

2. Learned counsel for respondent No.3, has raised a preliminary objection as to the maintainability of the petition inter alia on the grounds that the impugned order, dated 25-1-2010 and the consequential sealing of the petitioner's pre-store No.3 at the petitioner's plant at Sahiwal on 7-5-2010 has been carried out in accordance with law and in consonance of the directions given by this Court on 29-9-2009 in Writ Petition No.4838 of 2009. Further submits, without prejudice to the above, that the petitioner has an equally efficacious, alternative remedy by way of filing a complaint before the Adjudicating Authority under section 33 of the Employees Old-Age Benefits Act, 1976. The petitioner has approached this Court without exhausting the alternative remedy. Hence, the petition is liable to be dismissed. Further submits that if the petitioner were to approach the Authority it would have ample opportunity to defend itself and in case of an adverse order it would not only have the remedy of an appeal but also of a review and if the petitioner still feels aggrieved it can approach this court under the constitutional jurisdiction. Relies on Rupali Polyester Ltd. v. Employees Old-Age Benefits Institution and another 1991 PLC 318, Ujala Cotton Mills v. Employees Old-Age Benefits Institution and others 1994 PLC 560, Mubarak Ali and Sons v. Employees Old-Age Benefits Institution and others 1994 PLC 686, Messrs Shamas Textile Mills v. Employees Old-Age Benefits Institution and others 1994 PLC 694 and University of Faisalabad through Authorized Representative v. Regional Head Faisalabad North Region Employees Old-Age Benefits Institution, Faisalabad 2008 PLC 161. It is further contended that the petitioner has been given several notices by the respondents for registration under the Act, ibid, however, despite service of notices the petitioner has to date failed to get itself registered as required under the law.

2-A. The learned counsel for the petitioner controverts the stance of the learned counsel for respondent No.3 and submits that the petition is maintainable. The respondents have violated the order of this Court, dated 29-9-2009 passed in Writ Petition No.4838 of 2009. The said order is quite clear, however, the respondents have deliberately

misinterpreted it to their own advantage. The impugned notice, dated 25-1-2010 and the act of sealing of the petitioner's store is patently illegal and against the order of this Court. Further submits that the various seeds being stored at the store in question have a very short shelf life and would perish/rot away during the ensuing hot weather. Immediate de-sealing of the store is called for under the circumstances. Relies on Abdul Latif v. The Government of West Pakistan and others PLD 1962 SC 384, Pir Muhammad v. Government of Sindh and 3 others 1990 MLD 869 and Pakistan Burmah Shell, Limited v. Employees Old-Age Benefits Institution and others 2004 PLC 63.

3. In the given facts and circumstances of the case, the order of this Court, dated 29-9-2009 passed in Writ Petition No.4838 of 2009 and the factual controversy as to service of previous notices to the petitioner I find that the rights and obligations of the parties would be adequately safeguarded if the petitioner were to file a complaint before the Adjudicating Authority as envisaged under section 33 of the Act, ibid, as in my view the petitioner has an equally efficacious remedy provided to it under the law which has not been availed of by the petitioner before invoking the constitutional jurisdiction of this Court.

4. In view of the above and more importantly the fact that the seeds stored at the petitioner's plant are liable to perish it is ordered that the store of the petitioner be de-sealed immediately. It is further directed that the petitioner shall approach the Authority within one month from today and if so approached pending disposal of the complaint of the petitioner, no coercive measures shall be taken against the petitioner for the recovery of impugned amount.

5. It is clarified that the petitioner shall be at liberty to raise all or any objections, which are available to it under the law against the impugned notices when it approaches the Authority under section 33 of the Act (ibid).

Disposed of with the above observations.

H.B.T./P-15/L Order accordingly.

2011 P L C (C.S.) 354

[Lahore High Court]

Before Mamoon Rashid Sheikh, J

TAHIR ABBAS

Versus

FESCO, JHANG and others

Writ Petition No.4552 of 2010, decided on 20th April, 2010.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Maintainability---Employer Organisation was a "public utility company" (Electric Supply Company), wholly owned and controlled by the Government and for all intents and purposes the said company followed the policies laid down by the Government of Pakistan vis-a-vis supply of electricity under its area of control---All the rules made applicable to the employees of the Company were the ones applicable to WAPDA employees---Company was trying to non-suit the petitioner/employee by quoting from the WAPDA Employees Medical Attendance Rules, 1979---Constitutional petition of employee was maintainable against the employer company, in circumstances.

Farrukh Bashir v. Federal Public Service Commission, Islamabad through Secretary and 2 others 2003 PLC (C.S.) 1161; Dr. Naveeda Tufail and 72 others v. Government of Punjab and others 2003 SCMR 291 and Aitchison College Lahore v. Muhammad Zubair and another PLD 2002 SC 326 ref.

(b) Pakistan Water and Power Development Authority Employees Medical Attendance Rules, 1979---

----R. 6(a)---Initial recruits/recruitments---Medical Board was not only meant for permanent employees but could assemble for initial recruits/recruitments.

Azhar Iqbal for Petitioner.

Mian Ashiq Hussain for Respondents.

Date of hearing: 20th April, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.-- With the consent of the parties this case is being treated as a Pakka matter and shall be decided on the basis of the available record.

2. The respondents have filed their report and parawise comments which are supported by copies of extracts from the WAPDA Employees Medical Attendance Rules, 1979.

3. The brief facts giving rise to this petition are to the effect that the petitioner was selected for appointment on contract basis as Assistant Line Man (ALM) under the Faisalabad Electric Supply Company (FESCO) in BPS-3 through appointment letter No.5043/Admn-II/A-25 dated 11-2-2010. The said letter was issued by respondent No.1. According to Clause 19 of the terms and conditions of the appointment letter the petitioner was required to report to respondent No.4 along with a Medical Fitness Certificate on or before 15-3-2010. In compliance of the said requirement the petitioner appeared before respondent No.2 for medical check up who through the impugned medical report dated 25-2-2010 declared that the petitioner suffers from Diabetes Mellitus. It was, therefore, held by respondent No.2 that the petitioner is unfit for induction in service.

4. The impugned medical certificate dated 25-2-2010 has been challenged, inter alia, on the grounds that, it is contrary to the Rules and Schedule as provided under the WAPDA Employees Medical Attendance Rules, 1979, the decision by respondent No.2 was not taken in a just, fair and proper manner, respondent No.2 has exercised his discretion in an arbitrary manner which is violative of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, the impugned report is ultra vires of the Rules, (ibid) and is violative of the provisions of section 24-A of the General Clauses Act, 1897. In this respect the learned counsel for the petitioner has referred to the Rules, ibid, and prays that the case of the petitioner be referred for reappraisal to a Medical Board as contemplated under Rule 6 of the Rules, (ibid). Relies on the judgment reported as Farrukh Bashir v. Federal Public Service Commission, Islamabad through Secretary and 2 others 2003 PLC (C.S.) 1161 to contend that the concept of absolute discretion does not exist in law and it was wholly incompatible with the guarantee provided by Article 4 of the Constitution of Islamic Republic of Pakistan, 1973. The respondents having exercised absolute discretion in the petitioner's case have acted illegally. Further submits that the severity of Diabetes Mellitus of which the petitioner is stated, be (allegedly) suffering from cannot be determined through a one time medical examination. To arrive at a just and proper conclusion as to the nature and treatment of the said disease series of tests and monitoring of the patient is required over a period of time to determine whether a person who suffers from Diabetes Mellitus is insulin dependent or his disease can be controlled through regulation of diet or through intake of oral medicines. Also relies on the judgment reported as Dr. Naveeda Tufail and 72 others v. Government of Punjab and others 2003 SCMR 291 to submit that the right to work is not less than a fundamental right of the petitioner which is being denied by the respondents.

5. The learned counsel for the respondents on the other hand has questioned the maintainability of the petition by contending that FESCO is a Public Limited Company and is not amenable to writ jurisdiction. On merits the learned counsel for the respondents refers to the respondents report and parawise comments as also the annexures appended thereto to controvert the petitioner's stand. He has adverted to rule 7 of the Rules, ibid, which states that:--

> "(7) New entrants including work charged will be recruited in medical category "A" unless otherwise specified by the Authority. The existing work charged employees who have rendered more than 10 years of service or have attained the age of 50 years can be retained in service even in lower medical categories in case their disability/disease, if any, is not advanced or of serious nature. Retention in lower medical category will be on recommendation of Medical Board duly approved by Director General Medical Services,"

He has also referred to the directions for Medical Examination of New Entrants which are. Annexure "C" to the report and parawise comments.

Also submits that the Schedule of Medical Categories and EYE/ENT standards under Rule 19 of the Rules, (ibid), stipulates that the petitioner does not fall within the given category. He cannot be given "AYE" status on account of his disability/disease which is of a permanent nature and cannot be cured. The petitioner, therefore, is not fit for general service, hence, he having not met the medical standard is not entitled to employment. The learned counsel for the respondents has also referred to Annexure-D to the report and parawise comments which is a copy of Clarification Regarding Medical Fitness of Drivers. The Clarification sets out the instructions to the Medical Board in respect of patients suffering from Diabetes Mellitus. It has also been stipulated therein that such patients who are insulin dependant should not be allowed to drive public vehicles/hold important machinery.

6. I have gone through the record as also the judgments cited by the learned counsel with their assistance. The learned counsel dilated upon the question of maintainability of the petition only in a perfunctory manner. The learned counsel for the petitioner relies on the judgment reported as Aitchison College Lahore v. Muhammad Zubair and another PLD 2002 SC 326 to contend that FESCO is under the control of the Federal Government and its activities are monitored through PEPCO. The shares of FESCO are wholly owned by the Government of Pakistan, hence, the petition is maintainable.

7. The fact remains that FESCO is an entity wholly owned and controlled by the Government and for all intents and purposes it follows the policies laid down by the Government of Pakistan vis-a-vis supply of electricity under its area of control. And more importantly it is a "public utility company". Even otherwise, all the rules made applicable to the employees of FESCO are the ones applicable to WAPDA employees. Indeed, the respondents are trying to non-suit the petitioner by quoting from the WAPDA Employees Medical Attendance Rules, 1979. I, therefore, hold that the petition is maintainable.

8. Turning to the contention of the petitioner that respondent No.2 has issued the impugned medical report by using absolute discretion which is against the rights of the petitioner I find that the Rules .(ibid), provide a remedy by giving the petitioner an opportunity of being examined by a Medical Board under Rule 6 of the Rules, ibid. The learned counsel for the respondents has tried to contend that the Medical Board is only meant for permanent employees and not for initial recruits. A perusal of Rule 6, however, negates his contention inasmuch as Rule 6(a) clearly stipulates that the Medical Board can be assembled for initial recruits/recruitments.

9. Under the circumstances this petition is accepted. The respondents are directed to constitute a Medical Board so as to examine the petitioner and if he is found medically fit, he may be given employment in terms of employment letter No.5043/Admn-II/A-25 dated 11-2-2010.

There shall be no order as to costs.

M.A.K./T-51/L Petition allowed.

2011 P L C (C.S.) 608

[Lahore High Court]

Before Mamoon Rashid Sheikh, J

IMRAN AHMAD KHILJI

Versus

FEDERATION OF PAKISTAN and 2 others

Writ Petition No.2730 of 2010, heard on 9th December, 2010.

Accommodation Allocation Rules, 2002---

---Rr. 6, 7, 15(2) & 29-A---Constitution of Pakistan, Art.199---Constitutional petition---Accommodation, possession of---Petitioner assailed retention of official accommodation by respondent beyond six months of his retirement---Validity---Entitlement to retain official accommodation could be availed by a Federal Government Servant once only--High Court declared that order of retention of official residence in question by respondent was illegal and without lawful authority and directed the authorities to deliver vacant possession of official residence in question to the petitioner---Petition was allowed.

I.C.A. No.149 of 2009 in Writ Petition No.1067 of 2009 rel.

Muhammad Nazir Jawad for Petitioner.

Shabbir Mahmood Malik, Standing Counsel for Federation.

Muhammad Ashraf, Joint Estate Officer, Estate Office, Islamabad.

Date of hearing: 9th December, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- The brief facts giving rise to this petition are to the effect that the petitioner is serving as a Lecturer in BS-17 in the Federal Government College for- Men, F-10/4, Islamabad. As a Government servant he is entitled to allotment of official residence from the pool of respondent No.2. Upon the petitioner's application Quarter No.66/4-E, Sector F-6/1, Islamabad, was allotted to the petitioner through Letter No.66/4-E, F-6/1/EIV/EO, dated 27-10-2007. The possession, however, of the said

quarter was not delivered to the petitioner. Respondent No.2 later on allotted another official residence to the petitioner bearing House No.9/2, CAT:III Sector G-10/2, Islamabad through letter No.9/2 CAT:III G- 10/2/EIV/E0, dated 5-1-2008,, on "subject to vacation basis". The possession of the said house, however, was not delivered to the petitioner as respondent No.3, the previous allottee of the said official residence, is still residing in the same. The petitioner made several requests for vacation of the house in question but the respondents have delayed the matter on one pretext or the other.

2. Reports and parawise 'comments were called for from respondents Nos. 1 and 2 and notice was also issued to respondent No.3. Respondents Nos. 1 and 2 filed their reports and parawise comments and respondent No.3 after repeated notices entered appearance on 6-12-2010 when he sought time to engage counsel. Respondent No.3 was given time and the petition was fixed for today. Respondent No.3 has filed his parawise comments but has failed to enter appearance today either in person or through counsel. He is accordingly proceeded against ex parte.

3. The learned counsel for the petitioner submits that the petitioner has been allotted House No.9/2, CAT: III, Sector G-10/2, Islamabad, as his official residence. Respondents Nos.1 and 2 have delayed handing over possession of the said house to the petitioner on one pretext or the other including the excuse that respondent No.3 is still residing in the house. Further submits that respondent No.3 retired on 19-11-2009 from Government service. According to the Accommodation Allocation Rules, 2002, respondent No.2 could retain the official residence for a period of six months from the date of his superannuation. As a consequence, respondent No.3 having retired on 19-11-2009 could retain his official residence uptil 18-5-2010 whereas respondent No.3 is still residing in the house without any entitlement and/or lawful orders.

4. It is contended that Rule 15(2) of the Rules, ibid, allows only a one time extension not exceeding six months to a retiring Government official for retaining his official residence. Consequently, respondent No.3 could only retain the house for six months and that period expired on 18-5-2010. Any extension thereafter is void and illegal. Relies on a decision dated 17-12-2009 of a learned Division Bench of this Court passed in I.C.A. No. 149 of 2009 arising out of Writ Petition No.1067 of 2009.

5. Further submits that, assuming without conceding, the official residence in question has been ordered to be retained by respondent No.3 in relaxation of rules under Rule 29-A of the Rules, ibid, the said order is illegal and without lawful authority as Rule 29-A, ibid, is

only applicable to Rules 6 and 7 of the Rules ibid as held through order dated 27-4-2009 of the honorable Islamabad High Court, Islamabad, passed in Writ Petition No.216 of 2009.

6. Prays that the retention of the house in question by respondent No.3 be declared to be illegal and without lawful authority and respondents Nos.1 and 2 be directed to deliver the vacant possession of the official residence in question to the petitioner without any further delay.

7. The learned Standing Counsel has controverted the stance of the learned counsel for the petitioner by, inter alia, contending that the house in question was allotted to respondent No.3 in accordance with the Rules, ibid. Respondent No.3 has been allowed to retain the house in question on standard rent after retirement subject to payment of advance dated rent by the Minister for Housing and Works through order, 16-12-2009. Respondent No.3 is currently serving in the Ministry of Kashmir Affairs and Gilgit-Baltistan as the Personal Secretary to the Governor of Gilgit-Baltistan. As such, respondent No.3 is entitled to retain the house in question. Contends that the house in question can only be handed over to the petitioner once it becomes vacant. Further contends that respondent No.3 has been allowed to retain the house in question by the competent authority in relaxation of Rules.

8. I have considered the arguments advanced by the learned counsel for the petitioner as also the learned Standing Counsel. I have also gone through the parawise comments filed by respondent No.3 which are, inter alia, to the effect that respondent No.3 can retain the house in question after his retirement during the period of his contract employment and for a further period of six months even after the expiry of the contract period. Respondent No.3 has further referred to Rule 3(4) of the Rules, ibid, to contend that as an employee on contract he is entitled to retain the house in question.

9. I am afraid I am unable to agree with the contention of the learned Standing Counsel and/or the stand taken by respondent No.3.

Rule 15(2) of the Rules, ibid, deals with the matter in issue and is quite unequivocal. It is being reproduced hereunder for ease of reference:---

> "15. Retention of Accommodation.
>
> (1) ……..
>
> (a) ……..

(b) ……..

(2) An allottee, on his retirement or expiry of contract period shall be entitled to retain the accommodation under his occupation for a period not exceeding six months, on payment of normal rent and this facility will be available to FGS once only."

10. As will be clear the entitlement to retain the official accommodation can be availed of by an FGS (Federal Government Servant) "once only". This interpretation of Rule 15(2) of the Rules, ibid, `is fortified by the judgment dated 17-12-2009 of a learned Division Bench of this Court passed in I.C.A. No.149 of 2009. The learned Division Bench in para-8 of the judgment whilst interpreting Rule 15(2) of the Rules (ibid), has held that:---

"(8) The Rule 15(2) of the Accommodation Allocation Rules, 2002, as re-produced above provides for only one extension period of six months to a person, who is in government service or is re-employed on contract. The appellant has availed of the one time extension of six months after his retirement from 29-11-2008 to 28-5-2009 and the Accommodation Allocation Rules, 2002, which govern the terms and conditions of government employees whether regular or on re-employed on contract basis do not envisage any further period beyond six months after the age of retirement"

11. As to the contention of the learned Standing Counsel that respondent No.3 has been granted an extension by the competent authority in relaxation of Rules, suffice it to say that no evidence of any such extension having been granted has been placed on the record.

12. Under the circumstances, this petition is accepted and it is declared that the order of retention of the official residence in question by respondent No.3 is illegal and, without lawful authority. Respondents No. 2 and 3 are accordingly directed to deliver the vacant possession of the official residence in question, described in para-3 above, to the petitioner within two months from today.

13. There is no order as to costs.

M.H./I-63/L Petition allowed.

2011 P L C (C.S.) 1202

[Lahore High Court]

Before Mamoon Rashid Sheikh and Kh. Imtiaz Ahmad, JJ

GHULAM MUSTAFA

Versus

SECRETARY, MINISTRY OF FOOD AND AGRICULTURE and 4 others

I.C.A. No.49 of 2011/BWP, heard on 9th May, 2011.

Civil service---

----Selection for post---Vested right---Appellant had worked for the post in question on contract basis and at the time of regular appointment authorities provided a list of such ex-employees---Appellant was not appointed during selection and Single Judge of High Court maintained the result---Plea raised by appellant in intro-court appeal was that on the basis of letter issued by authorities he had a vested right for appointment---Validity---Letter in question did not create any vested right and it only allowed ex-employees to compete for fresh recruitment on merit and they could only obtain employment if they had met the requisite criteria---Appellant having failed to gain employment on merit had chosen to challenge appointment of respondent but appellant had been unable to show any illegality or irregularity in the appointment or to establish that he had 'been discriminated against---Division Bench of High Court did not find any infirmity in the judgment passed by Single Judge---Intra-court appeal was dismissed in circumstances.

Syed Mujahid Ayub Wasti for Appellant.

Date of hearing: 9th May, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- This Intra-Court Appeal emanates from the judgment dated 8-2-2011 passed by a learned Single Judge in Chambers in Writ Petition No.993 of 2010/BWP whereby the said petition was dismissed.

2. The brief facts of the case are to the effect that the appellant was appointed on 14-12-2007 as a Laboratory Assistant (BS-5) on contract basis under the development project namely, "Establishment of Seed Testing Laboratories and Rehabilitation of Existing Laboratories," of the Federal Seed Certification and Registration Department, Ministry of

Food and Agriculture, Government of Pakistan. The appellant's contract was to inure from the date of assumption of charge till 30-6-2009 and was extendable up to the period of project on yearly basis. The project was due to be completed on 30-6-2009, consequently on 23-5-2009 the petitioner was informed that his services shall stand terminated w.e.f. 30-6-2009. In the meantime the project was transferred from the development to the non-development side along with the posts therein. Consequently, the employees of the project whose services had been terminated made a representation for adjustment/re-appointment in the new project. Respondent No.1 through letter dated 6-7-2009 advised that the ex-employees may be considered for appointment against any vacant posts on merit and in accordance with the codal formalities. The posts in question were advertised, thereafter, and the appellant applied for the same. The appellant, however, was unsuccessful in getting employment. Feeling aggrieved, he filed W.P. No.993 of 2010 whereby he sought a direction that he may be appointed to one of the posts and sought termination of the appointment of respondent No.5. The appellant was, however, unsuccessful and W.P. No.993 of 2010 was dismissed through the impugned judgment dated 8-2-2011.

3. The learned counsel for the appellant has mainly argued on the point that the recruitment of respondent No.5 was against the rules and merit. Respondent No.5 is not fit and eligible to be appointed to the post in question. Further contends that respondent No.5 does not belong to the Province of the Punjab but he has been appointed and posted at Bahawalpur. Under the quota system the seat of one Province cannot be carried over to the other Province. Respondent No.5 is under-qualified and the appellant having higher qualification and experience is eminently qualified to be appointed to the post in question. Also contends, that the petitioner should have been given employment as directed by respondent No.1 through letter No.F.1-12(1)2007-Plan-I dated 6-7-2009.

4. We have gone through the record with the assistance of the learned counsel for the appellant. We find that after transfer of the project from the development to the non-development side the services of all contract employees were terminated, however, the posts of the project were also transferred. Thereafter, the department advertised the posts in question through various daily newspapers. One of the said advertisements appeared in the daily "Express" Islamabad on 20-9-2009, a copy whereof is appended to the appeal as Annexure-K. Item No.2 therein relates to the posts in question. In Column No.5 of Item No.2 the quota for the above-mentioned posts on the basis of domicile has been given. According to the said quota one post is reserved against merit, five (5) for the Province of the Punjab, one for Punjab (female candidates), one for Sindh (Rural), one for Sindh (Urban) and one post for the Province of Balochistan.

5. As per the parawise comments submitted by the respondents before the learned Single Judge, respondent No.5 has been appointed against the seats reserved for the Province of the Sindh, in a Federal Government project. As such respondent No.5 can be appointed at a post in any one of the Provinces. Admittedly respondent No.5 belongs to the Province of the Sindh whereas the appellant is domiciled in the Province of the Punjab. The appellant seems to have competed on open merit or on the basis of the seats reserved for the Province of the Punjab. It is not the appellant's case that he should have been appointed on the seats reserved for the Province of the Sindh. We have given an opportunity to the learned counsel to show us as to how respondent No.5 being from the Province of the Sindh should not have been appointed against the quota reserved for that Province or being employed in a Federal Government project he cannot be posted outside his Province of domicile. The learned counsel has been unable to satisfy us. Similarly, the learned counsel has also been unable to show as to what right of the appellant has been infringed or in what manner has the appellant been discriminated against. The learned counsel's contention is, therefore, without force and is accordingly repelled.

6. As to the learned counsel's contention that the appellant should have been appointed on the strength of the directions issued by respondent No.1 through letter No.F,1-12(1)2007-Plan-I dated 6-7-2009, suffice it to say that the letter is by way of a request and in para 2 states:

> "2. A list of ex-employees of the above project is attached with the request that if the qualifications, experience and age limit of the respective persons commensurate with the qualifications, experience and age limit of the vacant posts, if any in a project, the said persons may please be considered for appointment on merit against the vacant posts after completing all codal formalities of fresh recruitment.

It would, therefore, follow that the said letter does not create any vested right. The letter only allows the ex- employees to compete for fresh recruitment on merit and they can only obtain employment if they meet the requisite criteria.

7. The appellant having failed to gain employment on merit has chosen to challenge the appointment of respondent No.5 but he has been unable to show any illegality or irregularity in the said appointment or to establish that he has been discriminated against.

8. We, therefore, do not find any infirmity in the impugned judgment. This appeal is accordingly dismissed in limine being devoid of force.

M.H./G-32/L Intra-Court appeal dismissed.

2011 PLC (C.S.) 1227

[Lahore High Court]

Before Mamoon Rashid Sheikh and Kh. Imtiaz Ahmad, JJ

MUHAMMAD AMEER AZAM and 3 others

Versus

ISLAMIA UNIVERSITY, BAHAWALPUR and 5 others

I.C.A. No.210 of 2010/BWP, heard on 3rd May, 2011.

Islamia University of Bahawalpur Act (IV of 1975)----

----Ss. 2, 11-A, 21(ii) & 42---Law Reforms Ordinance (XII of 1972), S.3(2), proviso---Intra-Court appeal---Maintainability---Right of appeal, revision or-review---Appellants were appointed on contract basis for a period of one year and University authorities terminated their contracts---Order passed by University was maintained by Single Judge of High Court---Plea raised by University was that Intra-Court appeal was not maintainable---Validity---Syndicate, in view of S.21(ii) read. with S.2 of Islamia University of Bahawalpur Act, 1975, was Authority of the University--Decision of Syndicate, terminating services of appellants was, therefore, a decision of an Authority as defined under S.21 of Islamia University of Bahawalpur Act, 1975---Revision and/or appeal lay to the Chancellor of the University against such decision/order under S.11-A and/or 42 of Islamia University of Bahawalpur Act, 1975--- Intra-Court appeal was not maintainable as same was hit by the provisions of proviso to S.3(2) of Law Reforms Ordinance, 1972---High Court, in circumstances, did not consider it necessary to give any finding on other objections---Infra-Court Appeal was dismissed.

Sh. Amjad Aziz v. Haroon Akhtar Khan and 10 others 2010 SCMR 1484 I.C.A. No.42 of 1997 and C.P.L.A. No.3165-L of 2004 rel.

Bilal Ahmad Qazi for Appellants.

Masood Ashraf Sheikh and Muhammad Aftab Anwar, A.O. (Litigation), I.U.B. for Respondents.

Date of hearing: 3rd May, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- Through this appeal the appellants have called into question the judgment dated 22-11-2010 passed by a learned Single Judge in Chambers in Writ Petition No.5355 of 2010/BWP.

2. The brief facts giving rise to the appeal are to the effect that the appellants along with others were appointed as Assistant Registrars on contract basis for a period of one year by the then Vice-Chancellor of the respondent University. The services of the appellants and others were, however, terminated on 21-10-2010 by the Syndicate of the respondent University. The appellants and seven other Assistant Registrars filed W.P. No.5355 of 2010/BWP challenging their termination. The said writ petition was, however, dismissed through the impugned judgment dated 22-11-2010.

3. At the outset the learned counsel for the respondent University has raised objections regarding the maintainability of the appeal. The first objection is to the effect that the appellants had a remedy against their termination by way of filing of a revision and/or an appeal before the Chancellor of the respondent University under sections 11-A and/or 42 of the Islamia University of Bahawalpur Act, 1975. The appeal is, therefore, barred under the provisions of the Proviso to subsection (2) of section 3 of the Law Reforms Ordinance, 1972. The second objection is to the effect that the petition was filed by eleven petitioners, that is to say the present appellants and seven other Assistant Registrars whose services have been terminated. The instant appeal has, however, been filed by just the present appellants. The other seven petitioners in the writ petition have not been made parties to the appeal either as appellants or respondents. The appeals is, therefore, incompetent and, as such, ' merits summary dismissal.

4. Further contends that the writ petition of the appellants is also incompetent -firstly for the reason that an adequate alternative remedy was available to the appellants by way of an appeal/revision but they did not exhaust that remedy. And secondly the appellants were contractual employees and the respondent University does not have any statutory rules of service. The rule of master and servant is attracted to the case. Relies on the judgment reported as Sh. Amjad Aziz v. Haroon Akhtar Khan and 10 others (2010 SCMR 1484).

Reserves the right to address further arguments on merits in case the appeal is held to be maintainable.

5. In support of his first contention the learned counsel for the respondent University relies on an unreported judgment passed against the respondent University by a learned Division Bench of this Court in I.C.A.. No.42 of 1997 on 28-10-2004. In the said judgment it has been, inter alia, held that:---

"... The Syndicate admittedly is an Authority, of the appellant University as stipulated in section 21 of the Islamia University of Bahawalpur Act, 1975. The said Act has conferred revisional powers on the Chancellor of the University in respect of any order passed by an Authority of the appellant University. In this view of the matter the present Intra-Court Appeal is not maintainable because a remedy by way of revision is provided in the aforesaid enactment."

Further submits that the said decision of the learned Division `Bench was challenged by the respondent University through CPLA No.3165-L of 2004. The Hon'ble Supreme Court of Pakistan in its judgment dated 22-9-2005 affirmed the above decision and held that an Intra-Court Appeal was not maintainable because of the remedy by way of a revision being available in the matter.

6. In support of the other question of maintainability the learned counsel for the appellants relies on the provisions of Order XLI of the Code of Civil Procedure, 1908.

7. The learned counsel for the appellants has vehemently opposed the preliminary objections. The, main thrust of his arguments is to the effect that the appellants were appointed under section 15(3) of the Act, ibid, and the matter of the appellants was to be placed before the Syndicate for approval whereas in the 52nd meeting of the Syndicate held on 11-10-2010 Agenda Item No.13 was put up whereby instead of recommending confirmation of the 'appointment of the appellants their termination was recommended which in itself was illegal and mala fide. The reason therefor is that under the Act, ibid, a recommendation for approval should have been made to the Syndicate but the manner and language in which Agenda Item No.13 was couched misled the Syndicate. There is no order, therefore, in the eye of the law passed by the Syndicate which would give rise to invoking of the revisional/ appellate powers of the Chancellor under section 11-A or 42 of the Act, ibid. The learned counsel for the appellants pressed this argument not only in reply to the preliminary objections but also on the merits of the case.

8. In reply to the second preliminary objection raised by the learned counsel for the respondent University that the appeal is not competent in absence of the other petitioners in the writ petition the learned counsel for the appellants has only to submit that the appeal is competent as framed.

9. We have considered the arguments of the learned counsel and have also gone through the record.

10. The arguments raised by the learned counsel for, the appellants in support of the maintainability of the appeal do not appear to have force.

11. The appellants in the writ petition did not raise the ground regarding the decision of the Syndicate taken in its 52 meeting to, be illegal and mala fide on the basis of Agenda Item No.13 being not properly framed. Indeed, before the learned Single Judge in Chambers, the appellants along with their rejoinder to the parawise comments filed by the respondent University filed a copy of the minutes of the 52nd meeting of the Syndicate. The appellants were, therefore, aware of the language of Agenda Item No.13, however, this ground was not raised by them either through the writ petition or the rejoinder. When confronted with the fact that this ground was not raised before the learned Single Judge how can the matter be agitated for the first time in the appeal the learned counsel for the appellants does not have an answer.

Be that as it may, we find that there is an order of the Syndicate of the respondent University passed in its 52nd meeting after due consideration of the appellants' case. The argument that the Syndicate could have only approved the appointment of the appellants and not considered their termination does not find favour with us nor has the appellants' counsel been able to show anything from the Act, ibid, or any other statute and/or rules that the Syndicate could only give a positive decision and could not decide anything in the negative. If this argument of the learned counsel is to be accepted then the Syndicate would not be able to either terminate the services of any employee of the University or take disciplinary action against such an employee or indeed take any disciplinary action against any delinquent student. The intent of the Act, ibid, or the rules cannot be interpreted to be so.

Section 21(ii) read with section 2 of the Act, ibid, defines the' Syndicate to be an Authority of the University.

The impugned decision of the Syndicate terminating the services of the appellants is, therefore, a decision of an Authority as defined under section 21 of the Act, ibid. A revision and/or appeal lies to the Chancellor of the, respondent University against such a decision/order under section 11-A and/or 42 of the Act, ibid.

Section 3(2) of the Law Reforms-Ordinance, 1972 reads as under:---

> "2. An appeal shall also lie to a Bench of two or more Judges of a High Court from an order made by a Single Judge of that Court under clause (1) of Article 199 of the

Constitution of the Islamic Republic of Pakistan not being an order made under sub-paragraph (i) of paragraph (b) of that clause:

Provided that the appeal referred to in this, subsection shall not be available or competent if the application brought before the High Court under Article 199. arises out of any proceedings in which the law applicable provided for at least one appeal or one revision or one review to any Court, Tribunal or Authority against the original order."

Being in respectful agreement with the reasoning of the judgments of a learned Division Bench of this Court in I.C.A: No.42 of 1997 and the Hon'ble Supreme Court of Pakistan in CPLA No.3165-L of 2004 we hold that the Intra-Court Appeal' is not maintainable being hit by the provisions of the Proviso to section 3(2) of the Ordinance, ibid.

11. In view of the above, we do not consider it necessary to give any finding on the other preliminary objections raised by the learned counsel for the respondent University.

12. Under the circumstances, this appeal is dismissed being not maintainable, with no order as to costs:

M.H./M-888/L Intra-Court Appeal dismissed.

P L D 2011 Lahore 165

Before Mamoon Rashid Sheikh, J

AHMAD KAMAL NASIR---Petitioner

Versus

CANTONMENT BOARD, RAWALPINDI and another---Respondents

Writ Petition No.1525 of 2009, heard on 30th November, 2010.

Cantonments Act (II of 1924)---

----S. 60---Notification S.R.O. No.1786(I)/73, dated 26-12-1973---Stamp Act (II of 1899), S. 27-A---Constitution of Pakistan, Art.199---Constitutional petition---Transfer of Immovable Property Tax---Value of property---Determination---Sale of plot in question took place and sale-deed in dispute was presented before authorities for registration---Authorities citing non-payment of transfer of immovable property tax declined to register sale-deed in question as authorities wanted to charge it according to its own rates---Plea raised by petitioner was that tax for registration of sale-deed was to be charged on sale consideration mentioned in sale-deed---Validity---Amount of transfer of immovable property tax to be levied on a given sale-deed was to be based on consideration mentioned in sale-deed and not according to valuation table prepared by authorities---Sale consideration mentioned in sale-deed was according to the valuation table prepared by revenue authorities---Demand of transfer of immovable property tax by authorities was illegal and without lawful authority---High Court directed the authorities to calculate transfer of immovable property tax leviable on sale-deed in dispute on the basis of sale consideration mentioned therein---Petition was allowed in circumstances.

Sardar Ali Shah and another v. Cantonment Board Taxila through Executive Officer 2009 MLD 1462 rel.

Okara Textiles Limited and another v. Deputy District Officer (Registration), Okara and another PLD 2007 Lah. 507 and Sheikh Alla-赴d-Din v. Cantonment Executive Officer, Walton Road, Lahore PLD 2009 Lah. 389 ref.

Hafiz Ahmed Saeed for Petitioner.

Mirza Waqas Rauf for Respondent.

Date of hearing: 30th November, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.---With the consent of the parties this petition is being treated as a Pacca matter and shall be decided on the basis of the available record.

2. The brief facts giving rise to the petition, as given in the petition, are that the petitioner purchased the residential plot in question (fully described in para-1 of the petition) from one Atif Shamsher, through the sale-deed in dispute, for a total consideration of Rs.9,20,000. The sale-deed in dispute after completion was presented by the petitioner to respondent No.2 for registration against a receipt therefor. However, when the petitioner approached respondent No.2 for collecting the (registered) sale-deed, he was informed that the sale-deed in dispute had not been registered as the tax on transfer of immovable property (lands and buildings), hereinafter referred to as "the TIP Tax", in respect of 'the plot in question had not been paid. The petitioner approached respondent No.1 for payment of the TIP Tax. Upon inquiry he was informed that the TIP Tax would be chargeable at the rate of 1% of the value of the plot in question according to the valuation table prepared by respondent No.1. The petitioner protested against the demand as according to him the TIP Tax was chargeable on the basis of the consideration mentioned in the sale-deed in dispute. The petitioner was, however, directed to pay the TIP Tax as demanded by respondent No.1.

3. The petitioner assails the demand of respondent No.1, inter alia, on the grounds that it is against the provisions of section 60 of the Cantonments Act, 1924, read with Notification bearing S.R.O. No.1786(1)/73 dated 26-12-1973. Under the law respondent No.1 can only charge the TIP Tax on the basis of the consideration mentioned in the sale-deed in dispute and, moreover, respondent No.2 has no authority to retain the sale-deed in dispute.

4. The learned counsel for the petitioner submits that under section 60 of the Act, ibid, read with the Notification, ibid, respondent No.1 has the authority to collect the TIP Tax within its limits. The TIP Tax is, however, to be charged and collected at the rate of 1% of the sale consideration mentioned in the sale-deed in dispute. The demand of respondent No.1 for charging of the TIP Tax according to the valuation table prepared by respondent No.1 is illegal and without jurisdiction. Further' submits that the consideration mentioned in the sale-deed in dispute is in consonance with the value of the plot in question as given in the valuation table (Notification No. 296DO(R)/HRC dated 24-6-2008) prepared by the District Officer (Revenue),

Rawalpindi, under section 27-A of the Stamp Act, 1899. The consideration mentioned in the sale-deed in dispute is by no stretch of the imagination less than the value of the plot in question mentioned in the said valuation table. The respondents can only charge and collect the TIP Tax in terms of section 60 of the Cantonments Act, 1924, read with Notification bearing S.R.O. No.1786(I)/73 dated 26-12-1973 and the consideration as given in the sale-deed in dispute which in turn is based on the valuation as given in Notification No.296 DO(R)/FIRC dated 24-6-2008 read with section 27-A of the Stamp Act, 1899.

5. Relies on the judgments reported as Sardar Ali Shah and another v. Cantonment Board Taxila through Executive Officer (2009 MLD 1462), Okara Textiles Limited and another v. Deputy District Officer (Registration). Okara and another (PLD 2007 Lahore 507), Sheikh Alla-ud-Din v. Cantonment Executive Officer, Walton Road. Lahore (PLD 2009 Lahore 389).

6. Further submits that the petitioner is willing to pay the TIP Tax leviable at the current rate but according to the consideration mentioned in the sale-deed in dispute.

7. The learned counsel for the respondents submits that the petitioner is liable to pay the TIP Tax according to the valuation table prepared by respondent No.1. Further submits that the rate of the TIP Tax has been enhanced from 1% to 3% by virtue of Notification No.296 DO(R)/HRC, dated 24-6-2008. Prays that the petition may be dismissed.

8. I have examined the record with the assistance of the learned counsel for the parties. I find that the matter in issue revolves around the interpretation of S.R.O. No.1786(I)/73 dated 26-12-1973. The relevant portions whereof are being reproduced hereunder for ease of reference:--

> "S.R.O.No.1786(I)/73.---In exercise of the powers conferred by section 60 of the Cantonments Act, 1924 (II of 1924), the Cantonment Board, Rawalpindi, with the previous sanction of the Federal Government hereby imposes a tax on transfer of immovable property (lands and buildings) within the limits of the Rawalpindi Cantonment payable by the transferee at the rate of 1 per cent of the consideration money of such property:
>
> Provided that the tax shall not be charged on the--

(a)�� transfer of immovable property acquired for construction of mosques and other places of worship;

(b)�� transfer of evacuee property made at the first time to a claimant; and

(c)�� transfer of property to the legal heirs after the demise of the owner or owners.

2. In case no consideration money is paid to the transferor, or is concealed or is deliberately shown less, then market value assessed by the Cantonment Board authorities shall be taken as consideration money for the purposes of assessment of the tax.

3��������� (Emphasis provided)

9. From a perusal of the above, it is evident that the TIP Tax is to be charged according to the consideration mentioned in the instrument of sale. In this case the sale-deed in dispute. And not according to the valuation table prepared by the concerned Cantonment Board (respondent No.1). I find support for the above from the judgment in Safdar Ali Shah's case (supra) wherein Mr. Justice Maulvi Anwarul Haq (as he then was), inter alia, held that:

"(3) I have gone through this file. I find that Annexure-C 1 has been prepared by the Executive Officer of the respondent-Board proposing increase in the rates already fixed by the Collector in terms of section 27-A of the Stamp Act, 1899. There being no legal basis for the said rates proposed by the Executive Officer either in terms of said section 27-A or section 60 of the Cantonments Act, 1924, the same are wholly without lawful authority and the petitioners cannot be asked to pay TIP with reference to the said proposed rates. Apart from this relevant S.R.Os. issued by the respondent-Board itself which are Annexures R.I and R.2 the Board is competent to recover TIP Tax at the rate of 2% (later enhanced to 5%) of the consideration money paid by the transferee. The mode of charging and levying the tax having been, thus, prescribed the respondent-Board otherwise will not be having any lawful authority to charge the tax on any amount other than consideration paid by the transferee, which of course is to be determined from the transfer document."

10. It is an admitted fact that the sale of the plot in question took place and the sale-deed in dispute was presented before respondent No.2 for registration. Respondent No.2, however, citing non-payment of the TIP Tax declined to register the sale-deed in dispute. The TIP Tax was not paid as respondent No.1 sought to charge it according to its own rates. This demand of respondent No.1, as has been held above, is illegal and without lawful authority. The amount of TIP Tax to be levied on a given sale-deed is to be based on the consideration mentioned in the sale-deed and not according to the valuation table prepared by respondent No.1. In the instant case, the sale consideration has been mentioned in .the sale-deed in dispute in the amount of Rs.9,20,000 which admittedly is according to the valuation table prepared by the D.O.R. (Rawalpindi).

11. Under the circumstances, this petition is accepted and respondent No.1 is directed to calculate the TIP Tax leviable on the sale-deed in dispute on the basis of the sale consideration mentioned therein. The petitioner shall, however, be liable to pay the TIP Tax at the current rate which according to the learned counsel for the respondents is 3 per cent. Respondent No.2 in turn is directed to complete the formalities for registration of the sale-deed in dispute after payment of the TIP Tax as mentioned hereinabove and to deliver the registered sale-deed to the petitioner against a proper receipt.

12. There is no order as to costs.

M.H./A-19/L[illegible] Petition allowed

P L D 2011 Lahore 490

Before Kh. Imtiaz Ahmad and Mamoon Rashid Sheikh, JJ

ASHIQ HUSSAIN SABRI---Appellant

Versus

SECRETARY HEALTH, GOVERNMENT OF THE PUNJAB and 8 others---Respondents

I.C.A. No.158 of 2010/BWP, heard on 4th May, 2011.

Law Reforms Ordinance (XII of 1972)---

----S. 3---Limitation Act (IX of 1908), S.4 & Art.151---Intra Court appeal---Limitation---Holidays---Order assailed by appellant was passed on 6-7-2010 and stipulated 20 days for filing of Intra-Court appeal were to expire on 26-7-2010---On the last day of limitation, High Court's registry for non-urgent cases was closed due to summer vacations, which was due to last till 10-9-2010 and benefit of S.4 of Limitation Act, 1908, was made available in such like cases---Appellant was required to file Intra-Court appeal on 10-9-2010 but the appeal was filed on 20-9-2010, which was beyond the period of limitation prescribed under Art.151 of Limitation Act, 1908, even after giving the benefit to appellant of S.4 of Limitation Act, 1908---Even a single day's delay in filing of appeal could be fatal unless a plausible explanation as to cause of delay was given for condonation of the same---Infra-Court appeal was dismissed in circumstances.

Qaisar Mushtaq Ahmad v. Controller of Examinations and others PLD 2011 SC 174 and Food Department, Gujranwala through its Deputy Director and others v. Ghulam Farid Awan 2010 SCMR 1899 rel.

Shabbir Ahmad Bhutta along with Ms. Feroza Yasmeen Goraya for Appellant.

Nemo for Respondent.

Date of hearing: 4th May, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.---At the outset the attention of the learned counsel for the appellant has been drawn to the fact that the instant appeal is barred by time. The learned counsel in reply submits that the appeal is within time, however, by way of abundant caution, an application (C. M. No.1 of 2010) under section 4 of the Limitation Act, 1908, for condonation of delay has been filed. In support of his contention states that the impugned

order was passed by the learned Single Judge in Chambers on 1-7-2010, thereafter, w.e.f. 12-7-2009 to 10-9-2010 the long vacation of this Court ensued and upon reopening of the Court the appeal was filed on 20-9-2010 within the stipulated 20 days minus the period of the summer vacation. Seeks to invoke the provisions of section 4 of the Act, ibid. In support of his contention he has drawn our attention to para-3 of the application for condonation of delay wherein the above reason has been given. The said para is being reproduced hereunder for ease of reference:

> "That summer vacation have been started w.e.f. 12-7-2010 and to be ended on 12-9-2010, this impugned decision has been passed on 1-7-2010, 20 days will be expired on 21-9-2010, due to this reason, the appeal is being filed."

2. We have considered the contentions of the learned counsel for the appellant and have also gone through the record with his assistance. We are, however, afraid that we cannot agree with his contentions. Article 151 of the Schedule to the Act, ibid, provides twenty (20) days time for filing of an Intra Court Appeal. The said Article reads as under:--

Second Division Appeals

Description of suit		Period of limitation	Time for which period beings to run
1		2	
151	From a decree or order of a High Court in the exercise of its original jurisdiction	Twenty days	The date of the decree or order.

3. In the instant case the impugned order is dated 6-7-2010 and the stipulated 20 days were to expire on 26-7-2010. However, on 26-7-2010 this Court's registry for non-urgent cases was closed due to summer vacation which was due to last till 10-9-2010. As per' the Office Order No.20057/AR(J), dated 15-7-2010, benefit of Section 4 of the Act, ibid, was made available in such like cases. Section 4 of the Act, ibid, provides asunder:--

> "(4) Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that Court re-opens."

Consequently, the appellant was required to file the appeal on 11-9-2010. The appeal was, however, filed on 20-9-2010 which is clearly beyond the period of limitation prescribed under Article 151, ibid, even after giving the benefit to the appellant of Section 4 of the Act, ibid.

4. There is, therefore, a delay of 9 days in filing of the appeal. The appellant has tried to make out 'a case that the appeal-.could have been filed till 21-9-2010 and was filed one day prior thereto i.e. on 20-9-2010, therefore, the appeal is within time. As has been discussed above, there is a delay of 9 days in filing of the appeal. The learned counsel for the appellant has been provided an opportunity for explaining the delay of 9 days. The learned counsel in reply has only reiterated the contents of para. 3 of the C.M, and has provided no plausible or cogent reason for the delay.

5. It is settled law that normally even a single day's delay in filing of an appeal can be fatal unless a plausible explanation as to the cause of delay can be given for condonation of the same. Reliance in this regard is placed on the judgments reported as Qaisar Mushtaq Ahmad v. Controller of Examinations and others (PLD 2011 Supreme Court 174) and Food Department, Gujranwala through its Deputy Director and others v. Ghulam Farid Awan (2010 SCMR 1899).

6. As has been mentioned above, the learned counsel for the appellant in trying to explain the delay has only reiterated the contents of para 3 of the C.M. The said para unfortunately does not come to his aid. No plausible reason for explaining the delay has been forthcoming, despite an opportunity having been provided.

7. Under the circumstances we hold that the appeal is barred by time and is, therefore, dismissed accordingly.

M.H./A-131/L Intra-Court appeal dismissed.

P L D 2011 Lahore 493

Before Mamoon Rashid Sheikh, J

MUHAMMAD YOUNAS---Petitioner

Versus

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

Writ Petition No.6928 of 2011, heard on 18th May, 2011.

(a) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Reappraisal of evidence---Scope---High Court in exercise of its extraordinary Constitutional jurisdiction does not normally undertake reappraisal of evidence.

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

-----S. 5--Constitution of Pakistan, Art. 199---Constitutional petition---Maintenance allowance---Annual increase---Principle---Grievance of father of minor was that Family Court while fixing monthly maintenance allowance also fixed 15% annual increase---Validity---Record did not establish that /father was equipped with means to discharge his liability towards annual increase in maintenance of minor as ordered by the Courts below---High Court declined to interfere in the award of maintenance awarded to minor but rate of annual increase of maintenance was reduced from 15% to 5% annual---Minor was at liberty to approach Family Court for increase in her maintenance due to any change in any circumstance---Petition was allowed accordingly.

Tauqeer Ahmad Qureshi v. Additional District Judge, Lahore and 2 others PLD 2009 SC 760 rel.

Javed Bashir for Petitioner.

Ch. Muhammad Irfan Nasir Sindhu for Respondents Nos. 2 and 3.

Date of hearing: 18th May, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.---With the consent of the parties this petition is being treated as a Pacca matter and shall be decided on the basis of the available record.

2. This petition assails the judgment and decree dated 18-2-2011 passed by the learned Additional District Judge, Pasrur, District Sialkot.

3. The brief facts giving rise to the petition are to the effect that the petitioner and respondent No.2 were married to each other. Out of this wedlock they have one child, a minor daughter who has been arrayed as respondent No.3. Respondents Nos.2 and 3 filed a suit against the petitioner for recovery of Rs.20,000 (as delivery expenses in respect of respondent No.2) and the maintenance of respondent No.3. The learned Judge Family Court, Pasrur through judgment dated 28-9-2010 partially decreed the suit of respondents Nos. 2 and 3 with the result that respondent No.2's claim for delivery expenses was disallowed whereas respondent No.3 was allowed maintenance at the rate of Rs.1500 per month from her date of birth (29-5-2009) till her marriage with annual increase of 15 per cent. Feeling aggrieved respondents Nos. 2 and 3 filed an appeal which was allowed through judgment and decree dated 18-2-2011 passed by the learned Additional District Judge, Pasrur, District Sialkot. As a consequence respondentNa.2 was held entitled to recover Rs.15,000 as delivery expenses whereas the maintenance of respondent No.3 was enhanced from Rs.1500 per month to Rs.2000 per month, the period of maintenance and rate of annual increase remained the same.

4. The learned counsel for the petitioner contends that the impugned judgment and decree dated 18-2-2011 has been passed illegally and with material irregularity. It is a result of misreading and non-reading of evidence. The learned appellate Court below ignored the basic principle of law that quantum of maintenance has to be set according to the income and status of the father (in this case the petitioner). Under the law a father is duty bound to maintain his children but according to his financial status and source of income. Further contends that the petitioner has remarried and has a son out of this union. He is serving in the Army as a soldier and his monthly income is Rs.8,000 per month. These factors have not been kept in mind by the learned appellate court below. Further contends that the impugned decree has been passed in ignorance of the law as laid down by the Hon'ble Supreme Court of Pakistan in the judgment reported as Tauqeer Ahmad Qureshi V. Additional District Judge, Lahore and 2 others (PLD 2009 SC 760).

5. The learned counsel for respondents Nos. 2 and 3 has defended the impugned judgment and decree. Contends that each case has to be decided on the basis of its peculiar facts and circumstances. Respondents Nos. 2 and 3 were able to establish and prove their case beyond any shadow of doubt. The learned trial Court had erred in not awarding the delivery expenses to respondent No.2. The learned trial Court had similarly erred in not awarding the proper rate of maintenance to respondent No.3. This error was corrected by the learned appellate Court below. Contends that the rate of annual increase is in accordance with the law.

6. I have considered the arguments advanced at the bar and have also gone through the documents placed on the record.

7. It is settled law that this Court in exercise of its extraordinary constitutional jurisdiction does not normally undertake reappraisal of evidence. The judgments of the learned Courts below are based on the evidence brought on the record and have been passed after due consideration of the same. This Court whilst not being inclined to go into the findings of fact arrived at by the learned Courts below cannot help but notice that the 15 per cent annual increase granted to the minor respondent No.3 is on the higher side. This observation is based on the ratio of the judgment of the Hon'ble Supreme Court of Pakistan quoted at the bar by the learned counsel for the petitioner. In that particular case the question of executability of a decree for maintenance and yearly enhancement came up for consideration. The learned Courts below had awarded the minor 20 per cent annual increase in the maintenance. On the showing of the learned counsel for the appellant in that case it was established that the total maintenance payable to the minor with the annual increase of 20 per cent as decreed would come to Rs.6.88 crores. The Hon'ble Supreme Court, therefore, whilst taking note of this factor decided as under:--

> "9. We have given our anxious consideration to the entire facts and circumstances of the case. The minors are entitled to be maintained by the father in the manner befitting the status and financial condition of the father and for this reason the Family Court is under an obligation while granting the maintenance allowance, to keep in mind the financial condition and status of the father. It has to make an inquiry in this regard. It cannot act arbitrarily or whimsically. Furthermore, at the same time, the unjust enrichment of the minors cannot be permitted at the cost of the father. In the present case, there is nothing on the record to show that the appellant is a rich man and can afford paying at the end, Rs.6.88 crores to the minors towards their maintenance. We have also noticed that the Family Court had no basis before it and had no criteria for awarding 20% annual increase in the maintenance allowance granted by it and it gave no reasons for ordering such an increase. It thus acted arbitrarily, illegally and whimsically in awarding such an exorbitant annual increase in the maintenance allowance. There was no justification for the annual increase of maintenance allowance at the rate of 20%. It was not a reasonable exercise of authority by the Family Court.
>
> It is well-settled that the Judicial Officers are required to act justly, and fairly and reasonably in discharge of judicial functions. The argument that school fees of the

minors are more than the rate of maintenance allowance by the Family Court should not be interfered with, has also no force. The mother, if so desires or can afford, may put the children in expensive schools but the father's obligation to maintain the minors is only to the extent of his status and financial condition and the Family Court must keep these factors in mind while granting maintenance allowance.

10. There is no cavil to the proposition that the executing Court cannot go behind the decree but at the same time the executing Court can look into the questions whether the decree or part thereof is executable or inexecutable and if for any reason the decree has become inexecutable, the executing Court is empowered to declare so and if a part of the decree is inexecutable and that part is severable from other part(s) of the decree then the executing Court is empowered to refuse the execution of the inexecutable part of the decree and may proceed with the execution of the rest of the decree. In the present case, there is nothing on record to show that the appellant has the means to pay the increase as ordered by trial Court. As far the future prospects, the minors can always approach the Family Court for the increase in the maintenance allowance due to any change in the circumstances. The impugned judgments of the High Court and the Courts below are, therefore, not sustainable to the extent of annual increase of 20% in the maintenance allowance of the respondent's minors who shall be entitled only to the 5% annual increase in such an allowance as offered by learned counsel for the appellant, which in our opinion will meet the ends of justice.

In view of the above mentioned, this appeal is partly allowed. The annual increase of 20% over and above the maintenance allowance of Rs.3,000 per month per child ordered by the Family Court affirmed by the appellate Court and High Court is reduced to 5% annual increase with an observation that minors can always approach the Family Court for the increase in their maintenance allowance due to any change in any circumstances. There are, however, no orders as to costs."

8. In the instant case it has not been established on the record that the petitioner is equipped with the means to discharge his liability towards the annual increase in 'the maintenance of respondent No.3 as ordered by the learned Courts below.

9. Being in respectful agreement with the judgment of the Hon'ble Supreme Court of Pakistan whilst declining to interfere in the award of delivery expenses to respondent No.2 and the quantum of maintenance awarded to respondent No.3 this Court is inclined to

decrease the rate of annual increase in respondent No.3's maintenance from 15 percent per annum to 5 per cent per annum.

10. It is further observed that the minor respondent No.3 shall be at liberty to approach the Family Court for increase in her maintenance due to any change in any circumstances.

11. This petition is accordingly disposed of with the above observations.

M.H./M-889/L Order accordingly.

P L D 2011 Lahore 497

Before Mamoon Rashid Sheikh, J

MUHAMMAD IQBAL---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, RAHIMYAR KHAN and others---Respondents

Writ Petition No.2222 of 2011, decided on 2nd May, 2011.

(a) Administration of justice---

----Stay of proceedings---Principle---Mere filing of appeal/revision/ representation before higher forum does not automatically operate as a stay of the order impugned.

Shah Wali v. Ghulam Din alias Gaman and another PLD 1966 SC 983; H.M. Fazil Zaheer v. Kh. Abdul Harmed and others 1983 SCMR 906 and Government of Punjab through Secretary, Labour and Manpower, Civil Secretariat and others 2006 PLC (C.S.) 325(sic.) rel.

(b) Supreme Court Rules, 1980---

----O. XX---Petition for leave to appeal---Stay of proceedings---Principle--Filing of Civil Petition for Leave to Appeal' does not prevent, under O.XX of Supreme Court Rules, 1980, execution of a decree or order appealed against unless stay of execution of decree or order is passed by Supreme Court.

Hilbro Instruments (Pvt.) Ltd. through Chief Executive Lahore v. Mst. Sikandar Begum through Special Attorney PLD 2008 Lah. 57 ref.

(c) Contract Act (IX of 1872)---

----S. 128---Liability of surety---Scope---Liability of surety is co-extensive with that of principal debtor.

(d) Civil Procedure Code (V of 1908)---

---Ss. 47, 51, O.XXI, & R.24, O.XXXVII, Rr.1, 2---Supreme Court Rules, 1980, O. XX---Constitution of Pakistan, Art.199---Constitutional petition---Execution. of decree---Stay of proceedings---Pendency of Petition for leave to appeal before Supreme Court---Money decree was passed against petitioner who had assailed before Supreme Court the judgments and decrees passed against him---Plea raised by petitioner was that till final adjudication of petition by Supreme Court, proceedings of execution of decree against him should be stayed---Validity---Petitioner's conduct was not above board, as he was provided opportunity to file an objection petition but he failed to do so and instead without a stay order having been issued by Supreme Court sought to have the execution proceedings stayed---Executing Court acting in accordance with law rightly declined to stay the proceedings---Petitioner having failed to avail of the opportunities granted to him left the Executing Court with no choice but to proceed further in the matter in accordance with law---High Court declined to interfere in the matter, in exercise of extraordinary constitutional jurisdiction under Art.199 of the Constitution---Petition was dismissed in circumstances.

Raja Muhammad Sohail Iftikhar for Petitioner.

Date of hearing: 2nd May, 2011.

ORDER

MAMOON RASHID SHEIKH, J.---This petition calls into question the order dated 12-4-2011 passed by the learned Civil Judge/Executing Court, Rahim Yar Khan and the order dated 18-4-2011 passed by the learned Additional District Judge, Rahim Yar Khan.

2. Briefly stated the facts giving rise to this petition are to the effect that respondent No.3 filed a snit for recovery against the petitioner under the summary procedure provided under Order XXXVII of the C.P.C. The suit was decreed to the tune of Rs.6,50,000 plus costs (total Rs.6,80,800) through the judgment and decree dated 20-2-2010. The petitioner's appeal against the said decree (R.F.A. No.22/10/BWP entitled Muhammad Iqbal v. Muhammad Sharit) was dismissed by a learned Division Bench of this Court on 16-9-2010. The petitioner has challenged the dismissal of his appeal before the Hon'ble Supreme Court

of Pakistan through C.P.L.A. No.1883-L/2010. The said C.P.L.A. is pending. No stay order, however, has been passed by the Hon'ble Supreme Court of Pakistan.

3. Respondent No.1 in the meantime filed a petition for execution of the decree dated 20-2-2010. The said petition is pending before respondent No.2 (the learned executing court). The petitioner took the stand before the learned executing court that since his appeal is pending before the Hon'ble Supreme Court, the execution proceedings be stayed. The learned executing court in absence of any stay order declined his prayer. The execution process continued with the result that due to the petitioner's non-appearance his warrants of arrest were issued on 12-4-2011. Feeling aggrieved the petitioner filed a revision petition before the learned District Judge, Rahim Yar Khan, which came up for hearing before respondent No.1 who through the impugned order dated 18-4-2011 dismissed the petitioner's revision petition.

4. The learned counsel for the petitioner contends that the impugned orders dated 12-4.2011 and 18-4-2011 are bad in law inasmuch as both the learned Courts below ignored the fact that the petitioner's appeal is pending before the Hon'ble Supreme Court of Pakistan. This fact alone should have made the learned Courts below to stay their hands in the matter. The impugned orders are illegal and without lawful authority. In passing the impugned orders the provisions of section 51, Order XXXVII and Order XL of the C.P.C. have not been adhered to by the learned Courts below. Moreover, instead of issuing warrants of arrest of the petitioner the learned executing court should have first of all sought execution of the decree against the person who stood surety on behalf of the petitioner in the suit filed by respondent No.1 under the summary procedure provided under Order XXXVII of the C.P.C.

5. I have considered the arguments of the learned counsel for the petitioner and have also gone through the petition as also the record appended thereto with the assistance of the learned counsel for the petitioner.

6. I do not find force in the contention of the learned counsel for the petitioner that since the petitioner's C.P.L.A. was pending before the Hon'ble Supreme Court, the learned courts below should have stayed their hands in the matter. It is settled law that mere filing of an appeal/revision/representation before a higher forum does not automatically operate as a stay of the order impugned. I find support for the above proposition from the judgments reported as Shah Wali v. Ghulam Din alias Gaman and another (PLD 1966 SC 983), H.M. Fazil Zaheer v. Kh. Abdul Hameed and others (1983 SCMR 906) and Government of

Punjab through Secretary, Labour and Manpower, Civil Secretariat and others [2006 PLC (C.S.) 325(sic)].

7. Even otherwise, under Order XX of the Supreme Court Rules, 1980 the filing of a C.P.L.A. or an appeal does not prevent execution of B a decree or order appealed against unless a stay of execution of the decree or order is passed by the Hon'ble Supreme Court of Pakistan. As cited in a judgment reported as Hilbro Instruments (Pvt.) Ltd. Through Chief Executive, Lahore v. Mst. Sikandar Begum through Special Attorney (PLD 2008 Lahore 57) in C.P. No.48-L/2005 the Hon'ble Supreme Court of Pakistan passed the following order on 28-3-2005:--

> "Perused the explanation furnished by Mrs. Kaneez Faiza Bhatti, Civil Judge 1st Class/Magistrate Section 30, Sheikhupura. It is not satisfactory. She is warned to be careful in future. She must proceed with the cases unless stay is produced before her. A copy of this order be sent to the Registrar, Lahore High Court for keeping it in her personal file.
>
> The provisions of Order XX of the Supreme Court Rules, 1980 be brought to the notice of the Registrar of all the High Courts for "strict compliance by ail the Courts/Forums working under supervision control of the High Court."

8. The contention of the learned counsel for the petitioner is, therefore, misconceived. As held by the Hon'ble Supreme Court of Pakistan the learned Courts below are to proceed with cases unless a stay order is produced before them. Under the circumstances, this contention of the learned counsel. for the petitioner is repelled.

9. As to the contention of the learned counsel for the petitioner that the provisions of section 51, Order XXXVII and Order XL of the C.P.C. were not followed by the learned courts below nor any proceedings have been initiated for sale of the property of the person who stood surety for payment of the decretal amount during pendency of the suit, suffice it to say that this contention of the learned counsel also does not come to his aid. The reasons therefor being: firstly under section 128 of the Contract Act, 1872 the liability of a surety is co-extensive with that of the principal debtor which in this case is the petitioner. And secondly it is borne out from the record that not only is there no stay order in the petitioner's favour but also that the petitioner has been acting from day one in a manner designed to frustrate the execution of the decree. The petitioner despite being "served through his father did not appear before the executing court. Consequently, warrants, for his arrest firstly bailable and thereafter non-bailable were issued. The petitioner finally entered appearance before the learned executing court on 22-11-2010.

The petitioner in the meantime had filed a revision petition which was dismissed on 26-10-2010 with the observation that the petitioner as undertaken shall appear before the executing court. It appears that the petitioner appeared before the executing court on 22-11-2010 in view of the said order dated 26-10-2010 passed by the revisional court. After appearing before the learned executing court on 22-11-2010 the petitioner failed to appear on the subsequent date i.e. 10-12-2010. As a consequence non-bailable warrants of his arrest were issued for appearance on 21-1-2011. On this date the petitioner appeared and sought time to file an objection petition. Time was granted. On 8-3-2011 the petitioner instead of filing an objection petition filed an application that the proceedings before the learned executing court be stopped as the petitioner had filed the C.P.L.A. before the Hon'ble Supreme Court of Pakistan. But as there was no stay 'order in the field the learned executing court declined the said plea and directed the petitioner to either pay the decretal amount or to produce a copy of the stay order issued by the Hon'ble 'Supreme Court of Pakistan on the next date, which was fixed as 22-3-2011. Thereafter the matter was adjourned for a couple of dates and on 12-4-2011 the petitioner appeared before the learned executing court in the earlier part of the day and then absented himself. The learned executing court was, therefore, constrained to pass the impugned order dated 12-4-2011 which is being reproduced hereunder for ease of reference:-

The petitioner challenged the above order by way of a revision petition but the learned Additional District Judge primarily due to the conduct of the petitioner declined to interfere in the matter and dismissed the revision petition through the impugned order dated 18-4-2011.

10. From a resume of the facts given above it is evident that the petitioner's conduct has not been above board. He was provided an opportunity to file an objection petition. He failed to do so and instead without a stay order having been issued by the Hon'ble Supreme Court of Pakistan sought to have the execution proceedings stayed. The learned executing court acting in accordance with the law as quoted hereinabove declined the said prayer. The petitioner, therefore, having failed to avail of the opportunities granted to him left the learned executing court with no choice but to proceed further in the matter in accordance with the law.

11. Under the circumstances I do not feel inclined to interfere in the matter by exercise of the extraordinary constitutional jurisdiction vested in this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

12. This petition consequently fails and is accordingly dismissed in limine.

M.H./M-887/L Petition dismissed.

P L D 2011 Lahore 534

Before Mamoon Rashid Sheikh, J

WAJID ASGHER CHEEMA---Petitioner

Versus

Mst. ANSHKA and another---Respondents

Writ PetitionNo.7925 of 2011, heard on 16th May, 2011.

(a) Constitution of Pakistan---

----Art.199---Constitutional petition---Interlocutory orders---Principle---High Court does not normally interfere with interlocutory order in exercise of its constitutional jurisdiction, unless a case of grave miscarriage of justice is made out or where it is a case of lack of or excess of jurisdiction.

Mst. Sheren Masood v. Malik Nasirp Hassan, Judge Family Court, Lahore and another 1985 CLC 2758 rel.

(b) Guardians and Wards Act (VIII of 1890)---

----S. 25---Guardian, appointment of---Considerations---Duty of Guardian Judge---Welfare of minor is of paramount consideration---Guardianship proceedings are inquisitorial in nature and Guardian Judge has to go through all material available on record or which can be brought on record, in order to determine the question of welfare of minor---Technicalities of procedure are to be avoided.

(c) Guardians and Wards Act (VIII of 1890)---

----S. 25---Constitution of Pakistan, Art.199---Constitutional petition---Guardian, appointment of---Strike of lawyers---Right of cross-examination---Closing of such right---Principle---During proceedings before Family Court, right of petitioner to cross-examine witnesses of respondent was closed---Validity---On two dates immediately prior to passing of order in question, even though witnesses of respondent and counsel for parties were present, the matter could not proceed as the members of Bar were on strike---As the adjournments were not granted at the request of petitioner, therefore, closure of petitioner's right of cross-examination was not called for---On each occasion when petitioner requested for adjournment or indeed on the dates when members of Bar were on strike there was no objection on the part of respondent to the adjournment being granted---Absence of any objection to petitioner's request for

adjournment was deemed to be a routine adjournment not entailing penal action against petitioner---Rights of minor were involved and High Court granted one opportunity to petitioner to cross-examine Witnesses of respondent albeit at the cost of imposition of costs---High Court in exercise of constitutional jurisdiction set aside the order passed by Guardian Judge and case was remanded for recording of cross-examination on the witnesses of respondent---Petition was allowed accordingly.

Khalil Ahmad through Special Attorney v. Judge Family Court, Faisalabad and another 2010 YLR 336; Mst. Shaheen Akhtar v. Muhammad Arif and others 2008 YLR 1693; Sher Shah v. Mst. Rani Begum and 5 others 2010 YLR 308 and Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary, S&GAD, Karachi and another 1996 SCMR 1165 ref.

Mubashir Khan v. Javaid Kamran alias Javed Iqbal 2007 MLD 1072 and Muhammad Hussain and 5 others v. Akram Baig and 3 others PLD 1988 Lah. 183 rel.

Aftab Ahmad Bajwa for Petitioner.

Masud Abid Naqvi and Qaiser Mahmood Sra for Respondent No.1.

Date of hearing: 16th May, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.---With the consent of the parties this petition is being treated as a Pacca matter and shall be decided on the basis of the available record which includes certified copies of the proceedings before the learned Guardian Judge No.1, Lahore, presented during the course of arguments by the learned counsel for respondent No.1.

2. The brief facts giving rise to this petition are to the effect that Nikah ceremony of the petitioner with respondent No.1 was held on 28-12-2003 whereas Rukhsati took place on 9-10-2004. Out of this wedlock a girl namely Mahnoor Fatima Wajid (hereinafter referred to as "the minor") was born to the parties on 9-8-2007. The relationship between the parties, however, turned sour which ensued in litigation. The petitioner filed a guardianship petition which was disposed of on the basis of the compromise arrived at between the parties. Subsequently, the petitioner filed a fresh petition under

section 7 read with section 25 of the Guardians and Wards Act, 1890, for guardianship and custody of the person of the minor. During the pendency of the said petition a suit for recovery of maintenance was filed by respondent No.1 and the minor. In the said suit the petitioner was directed to pay Rs.10,000 per month as the interim maintenance of the minor. The said order was assailed by the petitioner through Writ Petition No.9852 of 2009. This petition was, however, disposed of on 4-6-2010 with the direction to the learned Judge Family Court to decide the suit within two months positively. The petitioner's guardianship petition and the said suit for recovery of maintenance were consolidated and after framing of consolidated issues trial of the suits ensued.

3. The petitioner led his evidence, whereafter respondent No.1 filed her own affidavit and the affidavits of her witnesses. The petitioner was, however, unable to cross-examine the said witnesses with the result that his right of cross-examination was closed by the learned Guardian Judge through the impugned order dated 5-4-2011.

4. The learned counsel for the petitioner submits that the proceedings before the learned Guardian Judge are adversarial in nature and the welfare of the minor is involved. In such like circumstances, the right of the petitioner to cross-examine respondent No.1's witnesses could not have been closed on technical grounds. Further submits that the petitioner had filed an application on 12-3-2011 for medical examination of respondent No.1 as she was incapable of appearing as a witness on grounds of mental incapacity. The learned Guardian Judge without deciding the said application proceeded to close the right of cross-examination of the petitioner through the impugned order.

5. Contends that the impugned order dated 5-4-2011 is illegal and militates against the norms of natural justice. Further contends that by being denied the right to cross-examine respondent No.1's witnesses the petitioner has been unable to establish his case as set up in the guardianship petition. Further submits that to meet the ends of justice one opportunity may be granted to the petitioner to cross-examine respondent No.1's witnesses.

6. The learned counsel for respondent No.1 has vehemently opposed the petition. He has called into question the maintainability of the petition by, inter alia, submitting that the impugned order dated 5-4-2011 is interlocutory in nature. Under the law such an order does not call for interference in the extraordinary constitutional jurisdiction of this Court. Relies on the judgments reported as Khalil Ahmad through Special Attorney v. Judge Family Court, Faisalabad and another (2010 YLR 336 (Lahore)), Mst. Shaheen

Akhtar v. Muhammad Arif and others (2008 YLR 1693 (Lahore)), Sher Shah v. Mst. Rani Begun: and 5 others (2010 YLR 308 (Lahore)) and Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary, S&JAD, Karachi and another (1996 SCMR 1165).

7. On merits the learned counsel for respondent No. 1 submits that the petitioner was given at least seven opportunities to cross-examine respondent No.1's witnesses. Costs were also imposed and the petitioner was informed that it was the absolute final opportunity for the petitioner to cross-examine respondent No.1's witnesses, the petitioner, however, failed to conduct cross-examination.

8. I have heard the arguments of the learned counsel for the parties and have also gone through the documents available on the file with their assistance.

9. There appears to be merit in the preliminary objection raised by the learned counsel for respondent No.1 as to the maintainability of the petition. This Court does not normally interfere with interlocutory orders in exercise of its writ jurisdiction, unless a case of grave miscarriage of justice is made out or where it is a case of lack of or excess of jurisdiction. Reliance is placed on the judgment reported as Mst. Shereen Masood v. Malik Nasim Hassan, Judge Family Court, Lahore and another 1985 CLC 2758.

10. In the instant case this Court cannot help but observe that this is a guardianship matter. The future of a minor is at stake. In such like cases the welfare of the minor is of paramount consideration. Guardianship proceedings are inquisitorial in nature. The Guardian Judge has to go through all the material available on the record or which can be brought on the record in order to determine the question of the welfare of the minor. Technicalities of procedure are, therefore, to be avoided.

11. A perusal of the order sheet of the learned Guardian Judge shows that seven (7) adjournments were granted by the learned Guardian Judge to the petitioner for cross-examination of respondent No.1's witnesses. However, on the two (2) dates immediately prior to passing of the impugned order, even though respondent No.1's witnesses and the learned counsel for the parties were present, the matter could not proceed as the learned Members of the Bar were on strike. The adjournments were, therefore, not granted at the request of the petitioner. In such circumstances closure of the petitioner's right of cross-examination was not called for. Moreover, on each occasion when the petitioner requested for adjournment or, indeed, on the dates when the learned Members of the Bar were on strike there was no objection on the part of respondent No.1 to the adjournment being granted. The absence of any objection to the petitioner's request or adjournment by

respondent No.1 would, therefore, be deemed to be a routine adjournment not entailing penal action against the petitioner. Reliance in this regard is placed on the judgments reported as Mubashir Khan v. Javaid Kamran alias Javed Iqbal (2007 MLD 1072(Lahore) DB) and Muhammad Hussain and 5 others v. Akram Baig and 3 others (PLD 1988 Lahore 183).

12. On this view of the matter coupled with the fact that the rights of a minor are involved this Court is inclined to grant one opportunity to the petitioner to cross-examine respondent No. 1's witnesses albeit at the imposition of costs.

13. This petition is accordingly accepted with the result that the impugned order dated 5-4-2011 is set aside and it is directed that the parties shall appear before the Guardian Judge on 20-6-2011, whereafter one opportunity shall be given to the petitioner to cross-examine respondent No.1's witnesses subject to payment of Rs.20,000 as costs. It. is clarified that if on the date so fixed the petitioner i3 unable to cross-examine respondent No.1's witnesses due to reasons not attributable to the petitioner then the learned Guardian Judge shall adjourn the matter in accordance with the law.

14. It is further directed that the learned Guardian Judge shall endeavor to expeditiously finally adjudicate upon the matter but no later than 20-9-2011.

M.H./W-11/L Petition allowed.

P L D 2011 Lahore *555*

Before Mamoon Rashid Sheikh, J

MUHAMMAD ABDULLAH RIAZ---Petitioner

Versus

UNIVERSITY OF HEALTH SCIENCES (UHS), LAHORE and another---Respondents

Writ Petition No.5917 of 2010/BWP, decided on 27th July, 2011.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Educational institution---Admission in medical college---Admission policy---Candidate claimed that he was eligible to have admission in medical college on the basis of "Hifz-e-Quran" certificate---Contention of the candidate was that authorities did not allow him to append the certificate to his application---Validity---Contention of the candidate was not borne out from the record---Even if the candidate had appended his "Hifz-e-Quran" certificate to his application he could not have been considered as Hifz-e-Quran candidate because as per criteria laid down in the prospectus, candidate was required to have secured at least 75% or above marks weighted aggregate marks to be eligible to be called for the "Hifz-e-Quran" test---Candidate had only secured 66.5727% weighted aggregate marks, therefore, he was ineligible to be called for the test---Candidate failed to establish or make out a case for interference by High Court in exercise of constitutional jurisdiction---Petition was dismissed in circumstances.

(b) Educational institution---

---Criteria, fixing of---Examination/admission---Scope---In matters of examinations and/or admissions to educational institutions, authorities of the concerned institution are the sole judges of the criteria laid down by the institution in its prospectus and/or calendar---Courts normally do not interfere in such like matters unless a case of grave injustice is made out, otherwise it would be difficult for the institution to run its affairs.

Muhammad Ilyas v. Bahauddin Zakariya University Multan and another 2005 SCMR 961; Memoona Noureen v. The V.C. Fatima Jinnah Women University, Rawalpindi 2011 CLC 230; Maria Wazir v. Principal of UHS, Lahore and others Writ Petition No.22356 of 2009 and Rahila Shabbir v. University of Health Sciences Writ Petition No.1527 of 2010 rel.

A.K. Aurangzeb for Petitioner.

M.A. Hayat for Respondents.

Date of hearing: 11th May, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.--With the consent of the parties this petition is being treated as a Pacca matter and shall be decided on the basis of the available record.

2. The brief facts of the case as given in the petition are to the effect that the petitioner is a student who applied to respondent No.1 for admission in the Government Medical/ Dental Institutions of the Punjab to read for the M.B.,B.S. degree in the Session 2010-11. The petitioner's application (Form No.761) was submitted to respondent No.1 on 3-11-2010. The petitioner applied to be considered against the seats reserved for disabled candidates and at the same time to be given additional 20 marks on account of being a Hafiz-e-Quran. The petitioner was, however, unable to obtain admission as he was declared to be not disabled, moreover, he was not considered at all as a Hafiz-e-Quran candidate.

3. Grievance has been made out that the -petitioner's application for being considered as a disabled candidate was wrongly turned down whereas he was eligible not only to be treated as a disabled candidate but also to have been contemporaneously considered for the award of 20 additional marks being a Hafiz-e-Quran. The "moot point" in this respect as raised in para.9 of the petition reads:

(i)???????? Whether a Disable Student is not eligible for 20-marks of Hifz?e-Quran?

(ii)??????? And if a Disable Student enhanced his additional qualification by Hifz-e-Quran then he is not entitled for additional 20 marks as other normal candidates entitled.

4. It is contended by the learned counsel for the petitioner that other candidates who secured an aggregate percentage less than the petitioner were selected against reserved seats for disabled candidates' while the petitioner was not only deprived of the benefit of the reserved seats but was also not considered for the additional 20 marks as a Hafiz-?e-Quran. The crux of the learned counsel's arguments is that the petitioner should have been given the extra credit for being a disabled student and in addition thereto he should have been given extra 20 marks reserved for Hafiz-e-Quran students. In this way the petitioner becomes eligible for admission but the petitioner was not given the opportunity. A case of

discrimination has been made out and violation of Articles 2A, 4, 8 and 25 of the Constitution of Islamic Republic of Pakistan, 1973, has been alleged.

5. The learned counsel for the respondent University whilst relying on the parawise comments filed on behalf of the respondents has controverted the stand of the learned counsel for the petitioner. Submits that to be eligible to be considered for being considered as a disabled candidate the petitioner was required to be examined by the requisite Medical Board., In this respect refers to the Prospectus of the respondent University for admission to the 2010-2011 session, the relevant provisions whereof, as given in the parawise comments, are being reproduced hereunder for ease of reference:-

"(ii) Seats for Disabled Students:

(a)? The admission against these seats shall be carried out strictly on merit from amongst the candidates who applied for these seats and have appeared in the Entrance Test and passed F.Sc. Pre-Medical or equivalent exam with a minimum of 60% marks.

(b)? The candidate will be required to produce a certificate from a government certified specialist as per Appendix-V in the Admission Form.

(c)? Such certificate will only make him/her eligible to apply against the reserved seats.

(d)? A Medical Board constituted by the Chairman Admission Board will make final decision about the suitability of the candidate for admission against the reserved seats.

(e)? The Medical Board shall consist of following committees each comprising 3 to 5 experts in the relevant field:

(i)???????? Physical & Mental 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 or mental impairment that has a substantial and long-term, 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.

*????????? 'long-term' means that the effect of the impairment has lasted or is likely to last for at least 12 months or 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 the structure criteria made by experts.

(h) The Merit List of disabled candidates shall be finalized on the basis of inter se merit.

(i) The disabled candidate selected by the Medical Board must have a valid domicile of the Punjab and should fulfil all other criteria for admission to medical/dental institutions of the province.

(j) The decision of the Medical Board shall be final. "

Further submits that the petitioner appeared before the Medical Board on 22-11-2010. The Medical Board found that the petitioner was not disabled. Refers to the findings of the Board as quoted in the parawise comments, which are being reproduced hereunder:

S. No.	SECTION	RECOMMENDATIONS
1.	History	* Loss of hearing in left ear with vomiting and Vertigo at the age of 12 years. * No hearing problem from Right ear.
2.	Clinical Examination	Left ear Normal tympanic membrane and Right ear Normal tympanic membrane. R.T. + False negative, Weber laternalized to Right. Audio-Normal Right ear, SNHL, left ear.
3.	Conclusion	No hearing disability for the purpose of admission to medical college as hearing from Right ear is normal.
4.	Recommendations	Not disabled.

???????????

Also submits that having not been found eligible to be treated as disabled candidate the petitioner was required to compete on open merit.

6. As to the petitioner's contention that his application for being considered as a Hafiz-e-Quran candidate was not entertained; the- learned counsel for the respondent University submits that any candidate applying for admission on open merit or reserved seats can apply to be considered as a Hafiz-e-Quran candidate provided he appends a "Hifz-e-Quran" certificate from a Madrassa to his application. The petitioner did not file the requisite certificate along with his application, hence he was not considered on this basis. Even otherwise, the petitioner had to fulfil the criteria laid down in the Prospectus for award of 20 extra marks as a Hafiz-e-Quran 'candidate. Relies on the relevant provisions of the Prospectus, as given in the parawise comments, the same are being reproduced hereunder for ready reference:--

"Submission of Admission Forms
(XIII) Marks of Hifz-e-Quran

(a)? Twenty (20) marks will be added to F.Sc. or equivalent marks of a Muslim Hafiz-e-Quran subject to the verification of the same by a Committee comprising eminent Huffaz-e-Quran, constituted by the Chairmari Admission Board.

(b)? The Committee will conduct a structured test of the candidates who claim to be Huffaz-e-Quran.

(c)? Only those candidates, who have secured 75 per cent or above weighted aggregate marks according to the formula given above, shall be invited for the test.

(d)? Hifz-e-Quran certificate alone issued by any Madrassa is NOT acceptable for the award of twenty (20) marks.

(e)? Hundred per cent (100%) proficiency in Hifz is required at the time of test by the candidate to attract the benefit of twenty (20) marks.

(f)?? As these Twenty (20) marks are to be added in F.Sc. marks, therefore, the merit will be calculated by adding 70 per cent of Hifz-e-Quran Marks (i.e., 14 marks) in the previous aggregate score of the successful candidate.

The decision of the Committee shall be final in this regard."

7. I have considered the arguments of the learned counsel and I have also gone through the record.

8. It is an admitted fact that the petitioner was considered against the seats reserved for disabled candidates. After being examined by the prescribed Medical Board he was adjudged as not having met the criteria to qualify as a disabled candidate. Under the terms of the Prospectus the petitioner was left with no choice but to compete on open merit. The petitioner could have improved his chances as a candidate competing on open merit had he appended the requisite "Hifz-e-Quran" certificate from a Madrassa along with his application. The record reveals that he did not do so. As a consequence, the petitioner was not called for "Hifz-e-Quran" test. As per the Prospectus passing of this test with 100% proficiency is a prerequisite for award of 20 extra marks as a Hafiz-e-Quran candidate.

9. When asked as to why the petitioner did not append the "Hifz-e-Quran" certificate with his application the learned counsel for the petitioner submits that the respondents denied the petitioner the opportunity to file the certificate by maintaining that the petitioner could only apply against one special category. That is to say he could either apply against the seats reserved for disabled candidates or apply for being considered as a Hafiz-e-Quran.

10. The contention of the learned counsel for the petitioner that the respondents did not allow the petitioner to append the certificate to his application is, however, not borne out from the record. Be that as it may, even if the petitioner has appended the "Hifz-e-Quran" certificate to his application he could not have been considered as a Hafiz-e-Quran candidate because as per the criteria laid down in the Prospectus the petitioner was required to have secured at least 75% or above weighted aggregate marks to be eligible to be called for the "Hifz-e-Quran " test. Admittedly the petitioner had only secured 66.5727% weighted aggregate marks. The petitioner was, therefore, ineligible to be called for the test.

11. It is settled law that in matters of examinations and/or admissions to educational institutions the Authorities of the concerned institution are the sole judges of the criteria laid down by the institution in its prospectus and/or calendar. The Courts normally do not interfere in such 'like matters unless a case of grave injustice is made out, otherwise it would be difficult for the institution to run its affairs. Reliance in this regard is placed on the judgments reported as Muhammad Ilyas v. Bahauddin Zakariya University Multan

and another (2005 SCMR 961) and Memoona Noureen v. The V.C. Fatima Jinnah Women University, Rawalpindi (2011 CLC 230) and the unreported judgments of a learned Division Bench of this Court passed in Writ Petition No.22356 of 2009 entitled "Maria Wazir v. Principal of UHS, Lahore and others and Writ Petition No.1527 of 2010 entitled "Rahila Shabbir v. University of Health Sciences".

12. The learned counsel for the petitioner has been unable to establish otherwise. No case is, therefore, made out for interference by exercise of the constitutional jurisdiction of this Court.

13. Under the circumstances, this petition fails and is accordingly dismissed with no order as to costs.

M.H./M-291/L?? Petition dismissed.

PLD 2011 Lahore 605

Before Mamoon Rashid Shaikh, J

SAHIBA DOST---Petitioner

Versus

CHAIRMAN ADMISSION BOARD/VICE-CHANCELLOR, UHS, LAHORE---Respondent

Writ Petition No.6076 of 2010/BWP, decided on27th July, 2011.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Educational institution---Admission in medical college---Admission policy---Order of preference---Candidate had only given choice of 3 medical colleges out of 18, at the time of filing admission form--Candidate could not come on the merit for the three medical colleges of her choice, therefore, she was not considered for other medical colleges and lost admission---Validity---Such was a policy matter and university had to follow the Policy enunciated by its prospectus and the same also had to be strictly adhered to by the candidates---If a candidate failed to make a choice, High Court in exercise of constitutional jurisdiction could not take the role of a policy maker---Candidate was not entitled to any discretionary relief for non-filing of the application form as per instructions given in the prospectus and/or the admission form---Candidate had made a conscious choice despite clear-cut warning contained in

both the prospectus and admission form---Preferred choices engendered costs, in the present case, the denial of admission to the candidate---High Court declined to interfere in admission process---Petition was dismissed in circumstances.

Maria Wazir v. Principal of U.H.S., Lahore and others Writ Petition No.22356 of 2009; Shahid Sarwar v. Chairman, Admission Board/Principal, King Edward Medical College, Lahore 2005 YLR 344; Muhammad Ilyas v. Bahauddin Zakariya University, Multan and another 2005 SCMR 961; Memoona Noureen v. The V.C. Fatima Jinnah Women University, Rawalpindi 2011 CLC 230 and Government of Punjab {Health Department) through Secretary Health, Lahore and another v. Naila Begum PLD 1987 Lah. 336 ref.

(b) Educational institution---

----Policy making---Jurisdiction---Interference by courts---Principle---Normally in academic matters university authorities are considered to be the best judges to interpret the rules and regulations framed by university authorities---Courts are to avoid interpreting the same unless a case of grave injustice is made out, otherwise it would be difficult for' university authorities to run their affairs.

Muhammad Iiyas v. Bahauddin Zakariya University, Multan and another 2005 SCMR 961; Memoona Noureen v. The V.C. Fatima Jinnah Women University, Rawalpindi 2011 CLC 230 and Government of Punjab (Health Department) through Secretary Health, Lahore and another v. Naila Begum PLD 1987 Lah. 336 rel.

Syed Shaheen Masood Rizvi for Petitioner.

M. A. Hayat for Respondent.

Date of hearing: 11th May, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J---With the consent of the parties this petition is being treated as a Pacca matter and shall be decided on the basis of the available record.

2. The facts relevant for disposal of the petition as given in the petition are to the effect that the petitioner applied to the respondent University for admission to the Government Medical Colleges of the Punjab, through admission form No.2475, to read for the degree of M.B.,B.S. in the 2010-2011 session. The petitioner secured grade A+ in the Intermediate Examination held in the year. 2010. In the Medical Entrance Test she secured 849 marks out of 1100. Her weighted aggregate marks for purposes of admission

were calculated to be 82.1415 percent. The last student to be admitted in a medical college in the Punjab under the respondent University secured 81.3818 percent weighted aggregate marks which are less than the petitioner's marks. The petitioner has, however, been denied the chance of admission.

3. At the outset the learned counsel for the respondent University whilst referring to the parawise comments submits that the factum of the petitioner having attained 82.1455% weighted aggregate marks is not denied. He also does not deny that the last candidate who gained admission in the Medical College in the Punjab secured 81.3818% weighted aggregated marks. Submits that the difficulty of the petitioner lies in the fact that the provisions of the Prospectus of the respondent University for admission in the Government Medical/Dental Colleges of the Punjab for the session 2010-2011 require that at the time of submission of forms the candidates have to give their choice in order of preference for the Medical/Dental Colleges they seek to gain admission in. The said choice is to be made in the admission form and that choice is final, Refers to page 35 of the Prospectus wherein the admission process has been given. Clause (vi) of the procedure for submission of admission forms stipulates that:

> **"Submission of Admission Forms**
> vi. The candidates will give 'their preferences for the medical/dental colleges in one single Admission Form which once given shall be final and cannot be changed subsequently. There is no need to submit separate admission forms for medical and dental colleges." (Emphasis provided in the Prospectus).

Also refers to the following warning contained in the admission forms:--

> "Very Important: Preferences once given shall be final and cannot be changed subsequently. Think carefully before writing. Cutting or erasing is not allowed." (Emphasis provided in the Admission Form)

4. Contends that the petitioner was, therefore, required t6 abide by the above conditions and to give her choice regarding the Medical Colleges in order of preference. This condition is mandatory and neither any subsequent change is entertainable nor any exceptions are made. Further submits that the petitioner only chose 3 Medical colleges out of a possible total of 18 Medical Colleges. The petitioner even though having

secured 82.1455% weighted aggregate marks did not make it on merit in the 3 Colleges she had chosen. Had she applied for admission to the other Colleges she was sure to have gained admission. Further submits that the petitioner made the conscious choice of not applying to any of the other Colleges. In support of his contention he has placed a photo-copy of the petitioner's admission form on the record.

5. The learned counsel for the petitioner when confronted with the above submits that the petitioner is the victim of the discriminatory and highhanded attitude of the respondent University. The petitioner had made it on merit but had not been given admission. Submits that it is a fit case for interference in the constitutional jurisdiction of this Court.

6. Further contends that the provisions being relied upon by the learned counsel for the respondent University are penal in nature. In view thereof there should have been an explicit warning that candidates should give their preferences for all the Medical Colleges in the Punjab and upon their failure to do so the candidates shall be considered only for those Colleges for which they have shown their preference. No such instructions were available in the form, hence, the petitioner was misled. The petitioner is an orphan, therefore, she could not have gone to study in institutions far away from her home town. The attitude of the respondent University's officials is bureaucratic. Their decisions in the matter are arbitrary and unfair. Also contends that interpretation of a penal clause has to be made beneficially in favour of the person in whose case it is being made. Prays for interference by appealing to the parental jurisdiction of this Court and submits that since there are seats available with the respondent University_ which have gone unfilled the respondent University be directed to accommodate the petitioner against the same.

7. In his reply the learned counsel for the respondent University reiterates that the terms and conditions of the Prospectus and/or the admission form are quite clear and they are mandatory in nature. Prospective candidates have to strictly abide by the same. Submits that there are no residual seats available with the respondent University. All the seats have been filled on merit. Classes for the session 2010-2011 commenced in January, 2011. It is too late in the day to accommodate the petitioner even if a seat exists, which in any case is not so. If the petitioner were to be accommodated against the seats which have already been filled then at least one student shall be disturbed. No such student has been made a party to the petition nor the admission of any such student/candidate has been

challenged in the petition in respect of whom discrimination is being alleged. An extra seat can be created, if at all, by the Government of the Punjab it is not within the domain of the respondent University. In any event the Province of the Punjab has not been made a party to the petition, hence, no such direction can be given.

8. I have considered the arguments of the learned counsel and have also gone through the material brought on the record.

9. The respondent University's Prospectus as also the admission forms clearly stipulate that candidates should fill in the forms carefully and preferences once made shall be final and cannot be changed subsequently. These provisions as per the learned counsel for the respondent University are mandatory in nature. The contention of the learned counsel for the petitioner that since these are penal provisions they should have been more explicit or that if any interpretation of these provisions is to be made then it should be made beneficially in favour of the petitioner to my mind do not carry weight. The provisions as quoted hereinabove are quite clear and are indeed unequivocal. The learned counsel for the petitioner has been unable to show that any exception/relaxation has been made by the respondent University in respect of the above conditions or to establish a case of discrimination. It is a policy matter and the respondent University has to follow the policy enunciated by its Prospectus and this also has to be strictly adhered to by the candidates. If a candidate fails to make a choice this Court in exercise of its constitutional jurisdiction cannot take the role of a policy maker. The petitioner is, therefore, not entitled to any discretionary relief for non-tilling of the application form as per instructions given in the Prospectus and/or the form. Reliance in this regard is placed on an unreported judgment dated 10-12-2009 of a learned Division Bench of this Court passed in Writ Petition No.22356/2009 entitled "Maria Wazir v. Principal of U.H.S., Lahore, etc." and the judgment, of a learned Division Bench of this Court reported as Shahid Sarwar v. Chairman, Admission Board/Principal, King Edward Medical College, Lahore (2005 YLR 344).

10. Even otherwise, it is settled law that normally in academic matters the University Authorities are considered to be the best judges to interpret the rules and regulations framed by the University Authorities. The Courts are to avoid interpreting the same unless a case of grave injustice is made out, otherwise it would become very difficult for the University Authorities to run their affairs. Reliance in this regard is placed on the

judgments reported as Muhammad Ilyas v. Bahauddin Zakariya University, Multan and another (2005 SCMR 961) and Memoona Noureen v. The V.C. Fatima Jinnah Women University, Rawalpindi (2011 CLC 230).

11. As to the contention of the learned counsel for the petitioner that there are residual seats available and the petitioner should be accommodated against the same, I am afraid this contention fails for two reasons: firstly, as stated by the learned counsel for the respondent University, there are no residual seats available; and secondly, even if any seats are available or an extra seat is created [which in any event is not permissible under the law, reliance is placed on the judgment reported as Government of Punjab (Health Department) through Secretary Health, Lahore and another v. Naila Begum (PLD 1987 Lahore 336)] and the respondent University and/or indeed the Government of the Punjab are directed to give admission to the petitioner, then, as the current academic session began in January, 2011, the petitioner would be at least 6 months behind her class/course-mates and would definitely be at a disadvantage academically. This position the petitioner would herself not like to be in.

12. Insofar as the learned counsel for the petitioner's appeal for invoking the parental jurisdiction of this Court is concerned suffice it to say that notwithstanding the reasons given hereinabove if this Court were to interfere in the matter then floodgates would be opened and other candidates would also demand to change the choices made by them, thus, creating difficulties for the respondent University. Whilst this Court has all the sympathy with the petitioner, however, at the same time it cannot be ignored that the petitioner had made a conscious choice despite the clear cut warning contained in both the Prospectus and the admission form. The fact, therefore, remains that preferred choices engender costs, in this case the unfortunate denial of admission to the petitioner.

Under the circumstances, this petition fails and is accordingly dismissed.

M.H./S-138/L?? Petition dismissed.

2011 PTD 536

[Lahore High Court]

Before Mamoon Rashid Sheikh, J

WI-TRIBE PAKISTAN LTD.

Versus

MINISTRY OF FINANCE and others

Writ Petition No. 1914 of 2010, decided on 10th December, 2010.

Customs Act (IV of 1969)---

----S.10---Sales Tax Act (VII of 1990), S.13---Notification S.R.O. 575(I)/2006, dated, 5-6-2006, serial No.16---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Classification of goods---Exemption from duty---Petitioner claimed exemption under Notification S.R.O. 575(I)/2006, dated, 5-6-2006, on the goods imported by it---Plea raised by authorities was that classification of goods could not be done by High Court in exercise of its Constitutional jurisdiction and petitioner was not entitled to avail exemption on the goods in question---Validity---Classification of goods was not always a pure question of fact and being a mixed question of fact and law, High Court was possessed of the jurisdiction to adjudicate upon such question in Constitutional jurisdiction, therefore, petition was maintainable---Goods in question were goods provided by petitioner to its customers and was included in the category of capital goods for service sector---Therefore, the petitioner was not entitled to claim the exemption---Objection was not sustainable, in view of the terms and conditions contained in the standard form contract, the petitioner entered into with its consumers---Goods in question remained property of petitioner and it had the right to re-possess the same---Goods were included in the purview of serial No.16 of Notification S.R.O. 575(I)/2006, dated, 5-6-2006 and petitioner was entitled to avail of the concession/exemption granted thereunder---Demand of authorities raised against goods in question was set aside---Petition was allowed in circumstances.

(C.P. No.D-1975/2010) fol.

Messrs P.M. International through Special Attorney v. Federation of Pakistan through Secretary Revenue Division (F.B.R.) and 3 others 2010 PTD 1293; Messrs FACO Trading through Attorney v. Federation of Pakistan through Secretary, Revenue Division, Islamabad and 2 others 2008 PTD 1216; Messrs Pioneer Cement Limited, Jauharabad, District Khushab v. Assistant Collector Sales Tax, Sargodha and another

2002 PTD 920; Messrs Samar Murtaza Corporation v. Collector of Customs, Customs House, Faisalabad and 4 others 1999 CLC 1084; Messrs Ampake Pipe Industries (Pvt.) Ltd. v. Collector Customs and others 1998 CLC 674; Agha Gas Company (Pvt.) Ltd. v. Central Board of Revenue and others 1997 PTD 269; Messrs Mubeen Enterprises Limited through Muhammad Mubeen Butt v. Federation of Pakistan through Secretary, Finance Division Customs Department, Government of Pakistan, Islamabad and 3 others 1997 MLD 424; New Jubilee Insurance Co. Ltd. v. The Collector of Customs and others 1997 MLD 2770; Collector of Customs, Customs House, Lahore and 3 others v. Messrs S.M. Ahmad and Company (Pvt.) Ltd., Islamabad 1999 SCMR 138; Collector of Customs (Valuation) and another v. Karachi Bulk Storage and Terminal Ltd. 2007 SCMR 1357 and Messrs EFU General Insurance Ltd. through Joint Managing Director, Karachi v. Federation of Pakistan through Ministry of Law and Parliamentary Affairs, Government of Pakistan, Islamabad and 3 others 2010 PTD 1159 ref.

Sayyid Murtaza Ali Pirzada for Petitioner.

Babbar A. Khan for Respondents.

Date of hearing: 29th November, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J,---With the consent of the parties this petition is being treated as a Pacca matter and shall be decided on the basis of the available record.

2. Briefly stated the facts are to the effect that the petitioner (a subsidiary of Qater Telecom) is an unlisted public limited company incorporated in Pakistan under the Companies Ordinance, 1984. The petitioner, inter alia, carries on the business of providing Long Distance International (LDI) and Wireless Local Loop (WLL) services in Pakistan under license from the Pakistan Telecommunication Authority (PTA). For running its business the petitioner imports telecommunication equipment. Some of such telecommunication equipment is known as consumer premises equipment (hereinafter referred to as "the CPE"). The petitioner claims to be entitled to import telecommunication equipment at concessional rates of customs duty and total exemption from sales tax, under Serial No. 16 of S.R.O. 575(I)/2006, dated 5-6-2006, issued by respondent No.3, under section 19 of the Customs Act, 1969, and section 13 of the Sales Tax Act, 1990. The said concession/exemption is being denied to the petitioner by respondents Nos. 4 and 5 on the basis of a clarification, issued by respondent No.3, in the case of another importer/taxpayer through letter dated 1-4-2010. As a consequence,

the petitioner has been forced to get clearance of its consignment of CPEs, under protest, by submitting Bank Guarantee in favour of the Collector Customs, Rawalpindi. The petitioner was, therefore, constrained to make a representation to respondent No.3, through letter dated 13-4-2010, explaining therein that the CPEs are the petitioner's final assets and are not saleable. In response thereto respondent No.6 under instructions of respondent No.3 through letter No.1/9/Mach./98. Pt.111/69707-R, dated 4-5-2010, turned down the petitioner's representation. The contents of the letter dated 4-5-2010 are being reproduced hereunder for ease of reference:--

> "I am directed to refer to your letter No. WTPL (CPE)2k10-2 dated the 13th April, 2010 on the subject cited above and to say that the case has been examined in the Board. It is informed that the subject consumer premises equipment (CPE). do not qualify in the scope of capital goods under S.R.O. 575(1)/2006, dated 5-6-2006, due to which such equipment have already been got cleared by certain importer(s) on payment of duty/taxes without claiming the benefit of subject concession. The F.B.R. has already given a decision on the subject issue ruling that CPEs are not entitled the benefit of being capital goods as envisaged under S.R.O. 575(I)/2006, dated 5-6-2006."

3. The learned counsel for the petitioner submits that the CPEs are to be used by the consumers/customers of the petitioner at their premises but the CPEs are essentially the assets of the petitioner, therefore, the petitioner is entitled to the benefit under Serial No.16 of S.R.O. 575(I)/2006.

4. The learned counsel for the petitioner further submits that similar petitions came up for hearing before the Hon'ble Sindh High Court and in one of those (C.P. No.D-1975/2010) a learned Division Bench of the Hon'ble Sindh High Court at Karachi, inter alia, held as under:--

> "(4) Mr. Abdul Ghaffar has drawn my attention to the provisions of preamble of the subject Notification to point out that it has been stated therein that the Federal Government was pleased to exempt plant machinery and equipment and apparatus, including capital goods from so much of the customs duty specified in the First Schedule in Column No.4 thereof and .the whole of sales tax leviable under the Sales Tax Act, 1990, subject to certain conditions.

5. He took us to Serial No.16 to show that communication equipment also has been included in this schedule and stated that it is an admitted fact that the equipment imported by him is communication equipment used for providing wireless internet services. He stated that the equipment in question is consumer premises equipment but has been installed at the consumer premises for the purpose of providing the internet services and has not been sold to the consumer but the ownership remains with the petitioner i.e. the importer. In this connection he drew our attention to the terms and conditions prescribed in the application to be made by the customers for provision of these services and pointed out sub-condition (a) of condition 2 in which it is categorically stated that all and any customer equipment supplied to the customer shall remain the property of WTL and all customer equipments shall be returned to WTL on termination of this contract and WTL shall return any security deposit if applicable, to the customer after making due deductions. The learned counsel also drew our attention to subc1ause (ii) of the impugned Notification wherein it has been mentioned that except for certain serial numbers including Serial No.16, in which the equipment imported by the petitioner falls, for exemption under all other serial numbers the Chief Executive or the person next in hierarchy duly authorized by the Chief Executive of the importing company shall certify in the prescribed manner and format that the imported items are for the company's bona fide requirement. He also drew our attention to the explanation to clauses (i), (ii) and (iii) wherein in sub-clause (c) the service sector listed at serial No.16 had been especially mentioned and it has been specified that these service sectors include the items mentioned at Serial No.(a) above. He, therefore, prayed that the prayers made by him should be allowed and it should be declared that he falls within the exemption prescribed in serial No.16 and the letter dated 1-4-2010 issued by the respondent should be declared of no legal effect.

6. The arguments of the learned counsel for the petitioner have been strongly opposed by the learned counsel for the respondent who submitted that the equipment in question is actually sold to the subscriber and tried to persuade us on the basis of his argument by quoting various charges which are being received by the petitioner.

7. We have examined the case in the light of our above arguments of the learned counsel and perused the relevant Notifications and the terms and conditions prescribed in application form and we are of the considered opinion that Serial No.16 of the impugned Notification does not place any restriction on the exemption provided to machinery, equipment and other capital goods for service sectors mentioned below therein if any such equipment is necessary for providing the services which that particular sector provides then it is entitled to exemption without any restriction. We are also of the

considered opinion that the equipment imported by the petitioner falls within the communication equipment for providing internet services to the subscriber and as per the terms and conditions of the contract the equipment though installed at the subscriber premises still belong to the petitioner and on the conclusion of the contract the petitioner that is the service provider has got the right to reposes the equipment.

8. In view of our above opinion, the letter dated 1-4-2010 wherein the exemption was refused allegedly for the reason that it was subscriber equipment cannot be sustained. This, in our view, is not based on proper reading of the Notification but conditions which have not been prescribed in the said Notification have been read into the said Notification by the respondent and the respondents or for that matter any other authority is not entitled to put words in a Notification which are not there. We are therefore of the opinion that the subject equipment imported by the petitioner falls within the ambit of Serial No.16 of S.R.O. No.575(I)/2006 dated 5-6-2010 and thus the petitioner fully qualifies for the exemption granted thereunder."

9. The learned counsel for the petitioner whilst relying on the above judgment submits that the case of the petitioner is similar in nature. The CPEs imported by the petitioner are for use in consumer premises for receiving wireless internet services provided by the petitioner. The CPEs are not sold to the consumers by the petitioner but remain the property of the petitioner. In this respect he has drawn my attention to the copy of the standard form contract normally entered into by the petitioner with its consumers, which has been appended to the petition at pages 26 to 28. The terms therein, inter alia, provide that "all equipment and data shall at all times be the property of wi-tribe". It is further provided that the equipment is returnable to wi-tribe by the consumer on termination of the contract. The learned counsel further submits that the petitioner has the right to re-possess the equipment. He, therefore, contends that the judgment of the Hon'ble Sindh High Court is applicable to the petitioner's case.

10. Prays that the petition be accepted.

11. The learned counsel for the Revenue has vehemently opposed the stance of the petitioner by, inter alia, calling into question the maintainability of the petition. Submits that the remedy, if any, of the petitioner lay before the Commissioner Appeals and not by way of filing of a petition before this Court. Further submits that the CPEs in question are goods provided by the petitioner to its consumers and do not fall in the category of capital goods for services sector. The petitioner is, therefore, not entitled to claim exemption in respect thereof as contemplated under S.R.O. 575(I)/2006. Further,

contends that the judgment of the Hon'ble Sindh High Court is not applicable to the facts of the case. Relies on the judgments reported as Messrs P.M. International through Special Attorney v. Federation of Pakistan through Secretary Revenue Division (F.B.R.) and 3 others (2010 PTD 1293), Messrs FACO Trading through Attorney v. Federation of Pakistan through Secretary, Revenue Division, Islamabad and 2 others (2008 PTD 1216), Messrs Pioneer Cement Limited, Jauharabad, District Khushab v. Assistant Collector Sales Tax, Sargodha and another (2002 PTD 920), Messrs Samar Murtaza Corporation V. Collector of. Customs, Customs House, Faisalabad and 4 others (1999 CLC 1084), Messrs Ampake Pipe Industries (Pvt.) Ltd. v. Collector Customs and others (1998 CLC 674), Agha Gas Company (Pvt.) Ltd. v. Central Board of Revenue and others (1997 PTD 269), Messrs Mubeen Enterprises Limited through Muhammad Mubeen Butt v. Federation of Pakistan through Secretary, Finance Division. Customs Department, Government of Pakistan, Islamabad and 3 others (1997 MLD 424) New Jubilee Insurance Co. Ltd. v. The Collector of Customs and others (1997 MLD 2770).

12. The learned counsel for the petitioner on the question of maintainability submits that firstly this question has been settled by the Hon'ble Sindh High Court by passing the afore-referred judgment, Further relies on the judgments reported as Collector of Customs, Customs House, Lahore and 3 others v. Messrs S.M. Ahmad and Company (Pvt.) Limited, Islamabad (1999 SCMR 138), Collector of Customs (Valuation and another v. Karachi Bulk Storage and Terminal Ltd. (2007 SCMR 1357) and Messrs EFU General Insurance Ltd: through Joint Managing Director, Karachi v. Federation of Pakistan through Ministry of Law and. Parliamentary Affairs, Government of Pakistan, Islamabad and 3 others (2010 PTD 1159) to submit that the instant petition is maintainable.

13. Arguments heard. Record perused.

14. I have gone through the judgments cited by the learned counsel for the revenue and the learned counsel for the petitioner on the question of the maintainability of the petition. I find that the Hon'ble Supreme Court of Pakistan in the judgment reported as 1999 SCMR 138 (supra) has, inter alia, held that:

> "(9) As regards the maintainability of writ petition in the presence of alternate remedy, it is a settled proposition of law that it is no bar if such remedy is only illusory in nature, as observed in Gulistan Textile Mills Limited v. Pakistan (1983 CLC 1474). No useful purpose would have been served if the respondent had been required to avail the remedy of appeal or revision because the highest body i.e. C.B.R. had already expressed its opinion against the respondent. A reference may

be made to Messrs Usmania Glass Sheet Factory Limited, Chitagong v. Sales Tax Officer, Chitagong (PLD 1971 SC 205) wherein it was observed that where a dispute arises between the parties in respect of fiscal right based on a statutory instrument, it can be determined in writ jurisdiction. After decision given by the C.B.R. it would have been difficult for the Federal Government to take a contrary view about the assessment/evaluation of the wood imported by the respondent, and in the circumstances no exception could be taken to the respondent's invoking Constitutional jurisdiction of the High Court. Classification of goods is not always a pure question of fact and being a mixed question of fact and law, the High Court is possessed of jurisdiction to adjudicate upon such question in Constitutional jurisdiction in the light of dictum of the Supreme Court in M.Y. Khan v. M.M. Aslam and 2 others (1974 SCMR 196) and Messrs Delite House Ltd. v. Assistant Collector, Customs (1988 CLC 5)."

15. By respectfully following the above precedent I hold the petition to be maintainable.

16. As to the contention of the learned counsel for the Revenue that the CPEs in question are goods provided by the petitioner to its consumers and do not fall in the category of capital goods for services sector, therefore, the petitioner is not entitled to claim the exemption in question, suffice it to say that this objection is not sustainable in view of the terms and conditions contained in the standard form contract the petitioner enters into with its consumers, a copy whereof has been appended to the petition and the relevant portions thereof have been referred to above in para-5. The CPEs in question remain the property of the petitioner and it has the right to re-possess the same.

17. I further find that the judgment of the Hon'ble Sindh High Court referred to above is applicable to the petitioner's case on all fours. I, therefore, hold that the CPEs in question fall within the purview of Serial No.16 of S.R.O. 575(I)/2006, dated 5-6-2006 and thus the petitioner is entitled to avail of the concession/exemption granted thereunder.

18. Under the circumstances, the petition is accepted and the impugned demand of the respondents is set aside. There is no order as to costs.

M.H./W-35/L Petition allowed

2011 Y L R 78

[Lahore]

Before Mamoon Rashid Sheikh, J

Mst. AYESHA NASEER---Petitioner

Versus

DISTRICT AND SESSIONS JUDGE, PAKPATTAN SHARIF and 3 others---Respondents

Writ Petition No. 5726 of 2010, decided on 5th May, 2010.

Constitution of Pakistan---

----Art.199---Criminal Procedure Code (V of 1898), 491---Constitutional petition---Application for issuance of writ in the nature of Habeas Corpus---Dismissal of application---Father of the minors died and they were in the custody of the petitioner being their mother---Application filed by the petitioner/mother under the Guardians and Wards Act, 1890 for appointment as guardian of the person and property of the minors, was allowed by the Guardian Judge---Petitioner filed application under S.491, Cr.P.C. alleging that respondents who were maternal grand father and maternal uncle, respectively of the minors, had abducted the minors---Said application having been dismissed by the Trial Court, petitioner had filed constitutional petition---Respondent/ alleged abductors, had stated that minors had been in their custody since the death of the father of the minors and had called into question the character of the petitioner and had levelled serious allegations against the petitioner---All minors who were intelligent, well-behaved and mature, not only mentally, but also physically, also repeated the allegations against their mother about her moral character---Minors had been living with their maternal relatives since the death of their father and had absolutely refused to reside with their mother---Petitioner/ mother could not establish with exactitude as to when the minors were removed from her custody---High Court, normally in constitutional petitions including those seeking a writ of Habeas Corpus, High Court would not go into factual controversies nor a detailed inquiry was held; in such like cases, High Court, could pass an order using its inherent jurisdiction in the largest interest and welfare of the minors---High Court could not interfere in the matter in its extraordinary constitutional jurisdiction especially when matter was sub judice before Guardian Judge.

Mst. Naziran Bibi v. Additional District Judge, Mianwali and 2 others 2006 MLD 493; Mst. Rehana v. Arshad Khan and 2 others 1991 MLD 1395; Mst. Nasim Akhtar v. Qazi

Muhammad Zubair 1992 MLD 70; Musarrat Waris v. Muhammad Afsar Khan and 4 others 2006 MLD 231; Ms. Louise Anne Fairley through Special Attorney v. Saijad Ahmad Rana and 2 others PLD 2007 Lah. 293; Marian Khan v. Mehryar Salim and another 2008 YLR 2647; Shaireen Abdullah v. Mehmood Akhtar PLD 1993 Lah. 466; Nisar Muhammad and another v. Sultan Zari PLD 1997 SC 852; 1997 PSC (Cr.) 839; PLD 1995 SC 633; 2005 SCMR 1410, PLD 1970 SJ&K 13; 2006 MLD 23; 1995 SCMR 1283; Mst. Ayisha Bibi v. Safdar Ali Shah and another 2005 CLC 894; Sughran Bibi v. Akhtar Hussain 2007 CLC 474; Ch. Nazir Ahmad v. Additional District Judge III, Sahiwal and others 1998 SCMR 1359; Muhammad Naeem Ahmad v. Asgeeri 2002 YLR 2854; Mst. Zubeda Khanum v. The District Judge, Karachi Sought and 2 others 1988 CLC 556 (Kar.) and Mst. Hamida Bibi v. Station House Officer and others 1998 PCr.LJ 140; Mst. Khalid Parveen v. Muhammad Sultan Mehmood and another PLD 2004 SC 1 and Naziha Ghazali v. The State and another 2001 SCMR 1782 ref.

Kalim Ilyas, A.A.-G. and Mian Abdul Qaddus for Petitioners.

Mian Shah Abbas for Applicant (in C.M. No. 1735 of 2010).

Muhammad Alamgir Khan for Respondents Nos. 3 and 4.

Dates of hearing: 28th April and 5th May, 2010.

JUDGMENT

MAMOON RASHID SHEIKH, J.---Through order dated 28-4-2010, with the consent of the parties, this petition has been treated as a Pacca matter and is being decided on the basis of the available record.

2. The brief facts giving rise to this petition (as stated in the petition) for, inter alia, issuance of a writ in the nature of habeas corpus are to the effect that the petitioner is the mother of the alleged detenues namely Talha Naseer, a boy aged about 13 years, Mehr-un-Nisaa, a girl aged about 12 years, Bareera, a girl aged about 10 years and Ghulam Rasool, a boy aged about 7 years (hereinafter referred to as "the minors"). The husband of the petitioner and the father of the minors died on 20-4-2007. After the death of the petitioner's husband the minors were in the care and custody of the petitioner being their mother. The petitioner, therefore, moved an application under the Guardian and Wards Act, 1890 for her appointment as the guardian of the person and property of the minors. The said petition was allowed on 25-3-2008 by the learned Guardian Judge, Pakpattan Sharif. The minors are stated to have been abducted by respondents Nos.3 and 4 on 17-2-2010 at about 1-00 p.m.

on their way back from school. A petition under Section 491 of the Cr.P.C. was filed by the present petitioner before the learned Sessions Judge Pakpattan Sharif for recovery of the minors. The said petition was, however, dismissed through order dated 16-3-2010.

3. Feeling aggrieved the petitioner has challenged the order dated 16-3-2010 and has also prayed that the minors be recovered from the illegal and improper custody of respondents Nos. 2 and 3 and may be handed over to the petitioner who is legally entitled to their custody.

4. Notices were issued in the first instance to respondents Nos. 3 and 4 for 30-3-2010. On the said date after hearing the preliminary submissions of the parties, respondents Nos. 3 and 4 were directed to produce the minors before the Court. On the date so fixed the parties requested that time be given to them for seeking an out of Court settlement. Thereafter the petition was adjourned from time to time for allowing the parties to effect a compromise but to no avail and on 28-4-2010 the parties learned counsel requested that the petition be decided on merits.

5. The learned counsel for the petitioner has reiterated the contents of the petition in support of his contentions and has assailed the order of the learned Sessions Judge, Pakpattan Sharif by submitting that the same has been passed against the law on the subject. It is contended that the learned Sessions Judge totally ignored the fact that the petitioner was the duly appointed guardian of the person and property of the minors and that the minors had been illegally removed from the lawful custody of the petitioner. It is further contended that respondents Nos. 3 and 4 who are the maternal grandfather and maternal uncle respectively of the minors have removed the minors from the custody of the petitioner primarily with a view to usurping the property of the minors (both movable and immovable) which the minors have inherited from their father. The said property is of immense value and, inter alia, consists of large tracts of land. It is further contended that the pendency of respondent No.3's (fresh) petition for his appointment as a guardian of the minors before the learned Guardian Judge, Pakpattan Sharif should not have detracted the learned Sessions Judge from passing an order in favour of the petitioner under section 491 of the Cr.P.C. He further contends that in any case respondent No.3's present petition before the learned Guardian Judge is for his appointment as the guardian of the minors. The said petition is not maintainable as the petitioner has already been appointed as the guardian of the person and property of the minors through order dated 25-3-2008. Respondent No.3 never challenged the said order. At best, without conceding, respondent No.3 could have filed an application

under section 39 of the Guardian and Wards Act, 1890, for removal of the petitioner as the minors guardian.

6. Relies on the judgments reported as Mst. Naziran Bibi v. Additional District Judge, Mianwali and 2 others (2006 MLD 493), Mst. Rehana v. Arshad Khan and 2 others (1991 MLD 1395), Mst. Nasim Akhtar v. Qazi Muhammad Zubair (1992 MLD 70), Musarat Waris v. Muhammad Afsar Khan and 4 others (2006 MLD 231), Ms. Louise Anne Fairley through Special Attorney v. Sajjad Ahmad Rana and 2 others (PLD 2007 Lahore 293), Marian Khan v. Mehryar Salim and another (2008 YLR 2647), Shaireen Abdullah v. Mehmood Akhtar (PLD 1993 Lahore 466) and Nisar Muhammad and another v. Sultan Zari (PLD 1997 SC 852).

7. During the pendency of the petition the paternal aunt of the minors became a party to the proceedings through C.M. No.1735 of 2010. The learned counsel for the minors' paternal aunt basically adopted the arguments advanced by the learned counsel for the petitioner and in support of his contentions has relied upon the judgments reported as 1997 PSC (Cr.) 839, PLD 1995 SC 633, 2005 SCMR 1410, PLD 1970 AJ&K 13, 2006 MLD 23 and 1995 SCMR 1283.

8. The learned counsel for the respondents has controverted the stance of the petitioner and submits that the minors have been in the custody of the respondents, ever since the death of the minors' father. He has called into question the character of the petitioner and has levelled serious allegations in this behalf. In this respect he has referred to the impugned order of the learned Sessions Judge, Pakpattan Sharif. In view thereof he submits that the petitioner is not a fit person to be given the custody of the minors. He has also contended that on 2-2-2010 the petitioner has remarried and is currently living with her new husband. The said husband is the widower of the minors' paternal aunt who had died sometime back. He has also alleged that it is apprehended that the petitioner and her new husband shall usurp/grab the property of the minors. It is from the point of view of safeguarding the minors' property that respondent No.3 has filed the present petition for his appointment as guardian of the minors before the learned Guardian Judge. He further submits that it is the court of the learned Guardian Judge which under the law has jurisdiction in matters of custody. Prays for dismissal of the petition. Relies on the judgments reported Mst. Ayisha Bibi v. Safdar Ali Shah and another (2005 CLC 894), Sughran Bibi v. Akhtar Hussain 2007 CLC 474, Ch. Nazir Ahmad v. Additional District Judge III, Sahiwal and others (1998 SCMR 1359), Muhammad Naeem Ahmad v. Asgeeri (2002 YLR 2854), Mst. Zubeda Khanum v. The District Judge,

Karachi Sought and 2 others (1988 CLC 556 (Karachi)) and Mst. Hamida Bibi v. Station House Officer and others (1998 PCr.LJ 140).

9. Arguments heard. Record perused.

10. I have also heard the views of the minors both in open Court and also in the privacy of my Chambers. I find that all minors are intelligent and well-behaved children. The elder two minors are around the age of 13 years. They are both mature for their age not only mentally but also physically. They have also unfortunately repeated the allegations against their mother vis-a-vis her moral character. They contend that they have been living with their maternal relatives since the death of their father. They have absolutely refused to reside with their mother especially as long as she is married to her new husband. The younger two minors have also refused to reside with the petitioner. The minors appear to be happy in the company of their maternal relatives including respondents Nos. 3 and 4.

11. From the contentions of the parties and also having heard the minors it appears that the bone of contention seems to be the re-marriage of the petitioner. The minors especially the elder boy is not happy about the same. From the opposing stands and contentions of the parties it cannot be established with exactitude as to when the minors were removed from the custody of the petitioner, if at all. From a perusal of the order of the learned Guardian Judge whereby the petitioner was appointed as their guardian, it is not clear if the minors were ever produced before that learned court.

12. Be that as it may, it is settled law that normally in constitutional petitions including those seeking a writ of habeas corpus this Court does not go into factual controversies nor a detailed inquiry is held. It is also settled law that normally in such like cases this Court can pass an order using its inherent jurisdiction in the larger interest and welfare of the minors. Reliance in this regard is placed on the judgments reported as Mst. Khalid Parveen v. Muhammad Sultan Mehmood and another (PLD 2004 SC 1) and Naziha Ghazali v. The State and another (2001 SCMR 1782).

13. The authorities cited at the bar by the parties are not attracted in the facts and circumstances of the case.

14. As to the petitioner's objection regarding maintainability of respondent No.3's petition for his appointment as the minors' guardian pending before the learned

Guardian Judge, Pakpattan Sharif, suffice it to say that the petitioner has objected to the maintainability of the petition before the said learned Court and the petitioner would have ample opportunity to substantiate her case. Needless to add that the said learned Court is bound to decide this question in accordance with law.

15. Under the circumstances and especially given the view of the minors I do not feel inclined to interfere in the matter in the extraordinary constitutional jurisdiction of this Court. Moreover, the matter is sub judice before the learned Guardian Judge, Pakpattan Sharif. This petition is, there-fore, dismissed with no order as to costs.

16. It is, however, observed that whilst deciding respondent No.3's guardian petition the Guardian Judge seized of the matter shall proceed strictly in accordance with law and shall decide the petition on merits without being influenced by any observation made in this order. He shall also ensure that the property of the minors (both movable and immovable) is adequately safeguarded. In this respect it is added that detail of the immovable property of the minors was provided by the parties during pendency of the petition and is part of the record.

H.B.T./A-222/L Petition dismissed.

2011 Y L R 125

[Lahore]

Before Mamoon Rashid Sheikh, J

SHUMAILA RAZA---Petitioner

Versus

DISTRICT OFFICER and others---Respondents

Writ Petition No. 4151 of 2010, decided on 11th May, 2010.

Muslim Family Laws Ordinance (VIII of 1961)---

----S. 9(2)---General Clauses Act (X of 1897), S.24-A---Constitution of Pakistan, Art.199---Constitutional petition---Maintenance, grant of---Review---Revision---Scope---Chairman of Arbitration Council had no power of review, only remedy of revision was provided under S.9(2) of Muslim Family Laws Ordinance, 1961---Where the Chairman of Arbitration Council had passed an illegal and undated order of review

behind the back of petitioner without providing her with an opportunity of hearing, same was nullity in the eye of law---Revisional order which was a non-speaking order and violative of S.24-A, General Clauses Act, 1897 and was patently time-barred was also not sustainable.

Mst. Hajran Bibi v. Khalid Abbas and others 1991 CLC 831; M. Javed Iqbal v. Mst. Tahira Naveed 2002 CLC 1748 and Razi Ahmad v. Mst. Saima Shafi and others 2004 CLC 637 ref.

Siraj Uz Zaman Taimuri for Petitioner.

ORDER

MAMOON RASHID SHEIKH, J.--No one has entered appearance on behalf of respondent No.3 despite service. Respondent No.3 is, therefore, proceeded against ex parte.

2. This petition assails the undated review order passed by respondent No.2 (Chairman, Arbitration Council-Nazim, Union Council No.92, Lahore) and the revisional; order dated 22-6-2009 passed by respondent No.1 [District Officer (Revenue), Lahore] upon the applications of respondent No.3.

3. The brief facts giving rise to this petition are that the petitioner was married to respondent No.3 on 3-5-2003. Out of this wedlock two daughters were born now aged about 6 and 5 years respectively. During the year, 2005 respondent No.3 turned the petitioner out of the matrimonial home when she was pregnant with the second child. On 9-1-2006 the petitioner filed an application for maintenance before respondent No 2 under section 9 of the Muslim Family Laws Ordinance, 1961. The said application of the petitioner was accepted and through an order dated 5-5-2006 the maintenance of the petitioner was fixed at the rate of Rs.5,000 per month from June, 2005 to April. 2006 or till the subsistence of marriage between the petitioner and respondent No.3. The delivery expenses of both minors amounting to Rs.5,000 each were also awarded to the petitioner. Consequent thereto respondent No.3 divorced the petitioner and the Talaq effectiveness certificate was issued on 5-6-2006. In the meanwhile, respondent No.3 filed a review petition before respondent No.2 who reviewed his order/ decree dated 5-5-2006 through an undated order without notice to the petitioner. The monthly maintenance allowance awarded to the petitioner through the order dated 5-5-2006 was

reduced to Rs.4,000 per month from June, 2005 till the subsistence of marriage. The delivery expenses, however, of both minors amounting to Rs.5,000 each were awarded to the petitioner.

4. Feeling aggrieved by the review order respondent No.3 filed a revision petition on 7-4-2007 before respondent No.1 challenging the decree dated 5-5-2006 after a lapse of almost ten months. Respondent No.1 accepted the revision petition and reduced the monthly maintenance of the petitioner to Rs.3,000 per month w.e.f. 3-7-2005 to 25-2-2006 and awarded only Rs.5,000 as delivery expenses for both minor.

5. The petitioner has assailed the undated review order as also the revisional order dated 22-6-2009, inter alia, on the grounds that the review order was passed in absence of the petitioner, hence, she has been condemned unheard, the revision petition was patently time barred but this fact was not adverted to by respondent No.1. the revisional order as also the review order have been passed in oblivion of the provisions of section 24-A of the General Clauses Act, 1897 as under the Muslim Family Laws Ordinance, 1961 no power of review is provided and even otherwise under section 24-A of the General Clauses Act the review of the order dated 5-5-2006 was not warranted. The impugned order dated 22-6-2009 has been passed by neglecting the fact that the Talaq between the parties became effective on 5-6-2006 and the Iddat period lasted till 4-9-2006. The petitioner has been deprived of maintenance even for the Iddat period. Moreover, the quantum of maintenance has been reduced arbitrarily from Rs.5,000 to Rs.3,000 without any cogent reason.

6. The learned counsel for the petitioner relies on the judgments reported as Mst. Hajran Bibi v. Khalid Abbas and others (1991 CLC 831), M. Javed Iqbal v. Mst. Tahira Naveed (2002 CLC 1748) and Razi Ahmad v. Mst. Saima Shafi and others (2004 CLC 637) to contend that the delivery expenses should have been awarded to the petitioner. Moreover, also contends that respondents Nos. 1 and 2 have acted illegally and with material irregularity in passing the impugned orders. Indeed, respondent No.2 had denied the petitioner the very right of hearing which is even otherwise violative of the provisions of Article 10-A of the Constitution of Islamic Republic of Pakistan. 1973. Further submits that the impugned orders have been passed in derogation of the provisions of section 24-A of the General Clauses Act, 1897, inasmuch as the impugned orders are non-speaking orders and have been passed in a mechanical manner without application of a judicial mind.

7. I have gone through the record of the case with the assistance of the learned counsel for the petitioner. Respondents Nos.1 and 2 have filed their parawise comments which are basically a repetition of the impugned orders. No reason has been given as to why the petitioner was not given a right of hearing by respondent No.2 whilst passing the undated impugned review order nor has any explanation been given regarding violation of the provisions of section 24-A of the Act ibid, whilst passing the impugned revisional order. Respondent No.3 despite service has not entered appearance and has, therefore, been proceeded against ex parte.

8. I find that there is force in the contentions of the learned counsel for the petitioner. It is settled law that the power of review is a statutory right. The Muslim Family Laws Ordinance, 1961 and the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961, do not provide the power of review to the Chairman of an Arbitration Council. The legislature in its wisdom has, however, provided the remedy of a revision under section 9(2) of the Ordinance, ibid. In the instant case respondent No.2 eventually did exercise that right before respondent No.1. The impugned undated review order is a nullity in the eye of the law not only for the reason mentioned above but also for the reason that it was passed behind the petitioner's back without providing her with an opportunity of hearing. As to the revisional order the same is also not sustainable for being firstly a non-speaking order and being violative of the provisions of section 24-A of the General Clauses Act, 1897, and secondly on the ground that the revision petition was patently time-barred.

9. I, therefore, accept this petition and set aside both the impugned orders with the result that the order dated 5-5-2006 of respondent No.2 stands revived. It is, however, added that the petitioner shall be also entitled to recover maintenance at the rate of Rs.5,000 per month for the period of her Iddat which amount has not been awarded to her through the order dated 5-5-2006.

M.A.K./S-236/L Petition allowed.

2011 Y L R 348

[Lahore]

Before Mamoon Rashid Sheikh, J

NADEEM IQBAL---Petitioner

Versus

MUHAMMAD KABIR KHAN and 2 others---Respondents

Writ Petition No. 14089 of 2010, decided on 1st July, 2010.

Constitution of Pakistan---

----Art. 199---Constitutional petition seeking issuance of a writ in the nature of habeas corpus in case of custody of minor---High Court, in the exercise of its extraordinary constitutional jurisdiction, normally does not go into disputed question of facts and declines holding a detailed inquiry---High Court, in its inherent jurisdiction, can and does pass order in the welfare and best interest of the minor---Where a minor was of tender/suckling age, in the absence of her mother (who had died), the maternal grandmother had a preferential right to the minor's custody.

Section 353 of D.F. Mulla's Principles of Mohemedan Law and Mst. Khalida Parveen v. Sultan Mahmood and others PLD 2004 SC 1 ref.

Shabbir Ahmad Khan for Petitioner.

Mian Ghulam Rasool Mujahid along with Respondents Nos. 1 and 2.

Kalim Ilyas, Assistant Advocate-General Punjab.

Waheed Shahid, Inspector/S.H.O., Police Station Sadar Jhang.

ORDER

MAMOON RASHID SHEIKH, J.--The brief facts giving rise to this petition are to the effect that the petitioner was married to one Mst. Parveen Akhtar about 3-1/2 years back. Out of this wedlock a daughter was born who is now aged about 2 years (i.e. the alleged detenue and hereinafter referred to as "the minor"). The said Mst. Parveen Akhtar was the daughter of respondents Nos. 1 and 2. She died about a year back. The minor had been in the custody of the petitioner, even after the death of Mst. Parveen Akhtar i.e. the minor's mother. On 1-6-2010 the minor was forcibly removed from the custody of the petitioner by respondent No.1 some time in the evening. Respondents Nos. 1 and 2 thereafter filed a suit

for permanent injunction against the petitioner and obtained an ad interim injunction restraining the petitioner from removing the minor from their custody. A suit for recovery of the minor's Maintenance has also been filed against the petitioner by the minor with respondent No.2 as her next friend. Feeling aggrieved the petitioner filed a petition under section 491 of the Cr.P.C. before the learned Sessions Judge, Jhang, for production and handing over of the minor to the petitioner from the alleged illegal custody of respondents Nos. 1 and 2. The said petition was dismissed through order dated 11-6-2010, hence, this petition.

2. Through order dated 28-6-2010 respondent No.3/S.H.O. Police Station Sadar Jhang, was directed to recover and produce the minor before this Court. Today the minor has been produced and has been identified by the petitioner.

3. Respondents Nos. 1 and 2 are present in Court in person and are also represented through counsel.

4. The learned counsel for the petitioner contends that the custody of the minor was with the petitioner since her birth and even after the death of the minor's mother. This fact is borne out from the plaint in the suit filed by respondent No.2 on 6-2-2010 for recovery of the minor's mother's dowry. A copy of the plaint has been appended to the petition as Annexure-C. The learned counsel has referred to. paras 3 and 5 of the plaint wherein it has been stated that the custody of the minor is with the petitioner. It is contended that the minor was snatched from the lawful custody of the petitioner who is the father and natural guardian of the minor by respondent No.1 on 1-6-2010. Thereafter respondents Nos.1 and 2 on 2-6-2010 filed a suit for permanent injunction against the petitioner seeking to restrain him from snatching the minor from the said respondents' custody and on 8-6-2010 a suit for recovery of maintenance of the minor was also filed. It is contended that the stance of respondents Nos.1 and 2 is belied by the contents of the plaint referred to hereinabove. It is prayed that the custody of the minor be handed over to the petitioner.

5. The learned counsel for respondents Nos. 1 and 2 has controverted the stance of the petitioner and submits that the petition has been filed by deliberate concealment of material facts. The parties are .related to each other. .The marriage of the petitioner with respondents Nos. 1 and 2,'s daughter was a Watta Satta marriage. There is enmity between the parties inasmuch as the petitioner's father died in an accident, however, it has been alleged that he had been murdered by the nephews of respondent No.1 and thereafter the petitioner murdered respondent No.1's son by poisoning him. Further submits that it is in this context that the petition has been filed by concealment of facts. Contends that the minor has been in the custody of respondent No.2 since the death of the minor's mother. Respondent No.2 being the maternal grandmother of the minor, in the absence of the

minor's mother, has a preferential right to the custody of the minor. Refers to section 353 of D.F. Mulla's Principles of Muhammadan Law in aid of his contention. Prays that the petition be dismissed.

6. Arguments heard. Record perused.

7. From the contradictory stands of the parties it cannot be established with any degree of certainty as to whether the minor was in the custody of the petitioner or not after the death of the minor's mother nor can it be established that if the custody was with the petitioner then as to when she was forcibly removed from the petitioner's custody. This Court in the exercise of its extraordinary constitutional jurisdiction normally does not go into disputed question of facts. Moreover, this Court normally in petitions seeking issuance of a writ in the nature of Habeas Corpus does not hold a detailed inquiry. This Court, however, in exercise of its inherent jurisdiction can and does pass orders in the welfare and best interest of the minors. Reliance is placed on the judgment of the Hon'ble Supreme Court of Pakistan reported as Mst. Khalida Parveen v. Sultan Mahmood and others (PLD 2004 SC 1).

8. Under the circumstances I am not persuaded to intervene in the matter especially given the fact that the minor is of tender/suckling age and in the absence of her mother, the maternal grandmother i.e. respondent No.2 has a preferential right to the minor's custody. Section 353 of D.F. Mulla's book (supra) refers. This petition is accordingly dismissed.

9. Needless to add that the parties shall be at liberty to approach the Court of the learned Guardian Judge concerned for redress of their grievance, if so advised. It is, however, clarified that such Court, if so approached, shall proceed in the matter strictly in accordance with law without being influenced by any observation made in this order.

M.A.K./N-99/L Petition dismissed.

2011 Y L R 2396

[Lahore]

Before Mamoon Rashid Sheikh, J

Mst. SHARIFAN BIBI and others---Petitioners

Versus

MUHAMMAD ABID RASHEED--- Respondent

C.R. No.1540 of 2010, decided on 7th July, 2010.

Specific Relief Act (1 of 1877)---

----Ss. 42 & 54---Civil Procedure Code (V of 1908), O.XXXIX, Rr.1, 2---Transfer of Property Act (IV of 1882), S.52---Suit for declaration and permanent injunction---Grant of temporary injunction---Setting aside of order of temporary injunction--Lis pendens, principle of---Applicability---Plaintiffs not only had concealed material facts, but had not impleaded necessary parties, without any satisfactory reason for non-impleading necessary parties---Order setting aside of order could not be interfered with, especially when principle of lis pendens, was attracted in the case.

Muhammad Aslam and 8 others v. Rehmat Ali and 8 other 2000 MLD 1459; Mirza Muhammad Sharif and 2 others v. Mst. Nawab Bibi and 4 others 1993 SCMR 462; Auqaf Department v. Javed Shuja and others 1995 CLC 1173 and Karam Din through L.Rs. and others v. Muhammad Idrees 2010 CLC 246 ref.

Aslam Riaz for Petitioners.

Ch. Irshad Ahmed for Respondent.

ORDER

MAHMOON RASHID SHEIKH, J.---Through this petition the petitioners have assailed the order dated 13-1-2010 passed by the learned Additional District Judge, Faisalabad whereby the temporary injunction granted to the petitioners by the learned Civil Judge, Faisalabad through order dated 12-12-2008, has been set aside.

2. The brief facts giving rise to the petition are to the effect that the petitioners filed a suit for declaration and perpetual injunction in respect of the property in dispute, fully described in the petition, against the respondents before the Civil Courts at Faisalabad. The suit has

been brought on the grounds that the predecessor-in-interest of the parties has died leaving behind a vast business. Petitioner No.1 is the mother of petitioners Nos.2 to 4 and the respondent. Out of the business/property inherited by the parties and other sources of income mentioned in the plaint the property in dispute was bought by the parties. The respondent was given the responsibility of completing the formalities of sale as the petitioners had full faith and trust in him. The petitioners were given to understand by the respondent that the sale-deed of the property in dispute had been registered in the name of the parties. It, however, transpired later on that the respondent had maneouvered to have the sale-deed registered in his name alone. Hence the suit. The learned trial Court through order dated 12-12-2008 granted a temporary injunction to the petitioners in respect of the property in dispute. On appeal, however, by the respondent the said order was set aside on 23-1-2010 by the learned Additional District Judge, Faisalabad.

3. The respondent has entered appearance through counsel. At the very outset the learned counsel for the respondent has challenged the maintainability of the petition and also the suit by, inter alia, submitting that in order to obtain a temporary injunction a party has to establish three ingredients namely existence of a prima facie case, balance of convenience and irreparable loss. Further contends that the relief of injunctions is discretionary in its nature. In order to seek discretionary relief a party has to come to Court with clean hands. In the instant case none of the above three ingredients is present in the petitioners' case nor have the petitioners approached the Court with clean hands. In this respect submits that the predecessor-in-interest of the parties had in fact undergone two marriages. The first of such marriages was with petitioner No.1. Petitioners Nos. 2 to 4, one Muhammad Tahir Rasheed and the respondent are the surviving children out of the said wedlock. The predecessor-in-interest of the parties has another son from his second marriage. The said son (namely Amjad) and his mother have not been made parties to the suit nor to the petition. Moreover, petitioners Nos.2 to 4's and the respondent's full brother namely Muhammad Tahir Rasheed has also not been made a party to the proceedings. The said Muhammad Tahir Rasheed had earlier brought a suit against the respondent in respect of the property in dispute claiming to be a sharer therein with the respondent to the exclusion of the petitioners. The said suit was dismissed as having been withdrawn on 2-5-2008. The learned counsel during the course of his submissions has presented uncertified copies of the said order(s) dated 2-5-2008. Further submits that all these facts have been deliberately concealed by the petitioners. Indeed, the present proceedings have been initiated by the petitioners at the behest of Muhammad Tahir Rasheed. Further contends that the property in dispute has been purchased by the respondent out of his own pocket. The sale-deed in question is a registered instrument and is in the name of the respondent. Relies on the

judgments reported as Muhammad Aslam and 8 others v. Rehmat Ali and 8 other (2000 MLD 1459), Mirza Muhammad Sharif and 2 others v. Mst. Nawab Bibi and 4 others (1993 SCMR 462) and Auqaf Department v. Javed Shuja and others (1995 CLC 1173) to contend that the sale-deed in question being a registered document a presumption of correctness is attached to the same. Also contends that the principle of lis pendens applies to the case. Prays that the petition may be dismissed.

4. The learned counsel for the petitioners controverts the stance of the respondent's counsel. He has assailed the impugned order by submitting that the written statement filed by the respondent is evasive in nature. No proof of any income has been given by the respondent therein to show that he has purchased the property out of his own sources. This fact has been overlooked by the learned appellate Court below. Also submits that the respondent is trying to drive his mother out of the property in dispute. Relies on Karam Din through L.Rs. and others v. Muhammad Idrees (2010 CLC 246).

5. The learned counsel for the petitioners when confronted with the objections regarding the concealment of facts and non-impleadment of the said Muhammad Tahir Rasheed; and Amjad and his mother, had no satisfactory answer. When questioned that if at all the property in dispute has been bought out of the estate left by the parties' predecessor-in-interest then should the above-mentioned persons c not have been made parties to the suit or should they not get a share in the property in dispute, the learned counsel has nothing to add.

6. I, therefore, do not feel persuaded to interfere with the impugned order. Even otherwise, the principle of lis pendens is attracted to the case.

7. This petition is accordingly dismissed, with no order as to costs.

H.B.T./S-54/L?? Petition dismissed.

2011 Y L R 2449

[Lahore]

Before Mamoon Rashid Sheikh, J

FARRUKH AHMAD---Petitioner

Versus

Dr. FAZAL-UR-REHMAN and others---Respondents

Writ Petition No.2101 of 2006, decided on 24th December, 2010.

Civil Procedure Code (V of 1908)---

----O. IX, R.2 & O.XLVII, R.1---Specific Relief Act (I of 1877), Ss.39 & 42---Constitution of Pakistan, Art.199---Constitutional petition--- Suit for declaration and cancellation of documents was dismissed for non-deposit of process fee, was restored concurrently by the courts below on application of the plaintiff---Trial Court at no stage fixed the time period for depositing the process fee, which was mandatory requirement of law-Trial Court being not justified in of fixing time for deposit of process fee, plaintiff could not have been non-suited---Law favoured adjudication of cases on merits and technicalities should not be allowed to stand in the way of substantial justice---Suit having rightly been restored constitutional petition was dismissed, in circumstances.

Ayodyaprasad v. Secretary of State AIR 1924 Nagpur 298 and Pandu and another v. Rajeshwar and others AIR 1924 Nagpur 271 rel.

Sana Ullah Zahid for Petitioner.

Sh. Zameer Hussain for Respondent No.1.

Date of hearing: 2nd November, 2010.

ORDER

MAMOON RASHID SHEIKH, J.---With the consent of the parties this petition is being treated as a pacca matter and shall be disposed of on the basis of the available record.

2. The brief facts giving rise to this petition are that respondent No. 1 filed a suit for declaration and cancellation of documents against the petitioner and the pro forma respondents Nos. 4 to 6 in the Civil Courts at Attock. On 23-9-2003, the learned Civil Judge, Attock dismissed the suit for non-prosecution as also for non-deposit of the process

fee. On respondent No. 1's application the suit was restored. The suit was again dismissed on 18-10-2003 for non-deposit of process fee and "Talbana Form". Respondent No. 1 filed an application for recall of the order dated 18-10-2003 and restoration of the suit. On the said application, the learned Civil Judge, Attock directed that notice be issued to the defendants in the suit i.e. the petitioner and respondents Nos. 4 to 6. The petitioner and one Fayyaz Shah entered appearance and contested -the application for restoration of the suit. Respondent No.1's application was accepted and the suit was restored by the learned Civil Judge, Attock, through order dated 2-3-2006. Feeling aggrieved the petitioner challenged the order, dated 2-3-2006 by way of a civil revision. The revision petition of the petitioner was, however, dismissed by the learned Addl. District Judge, Attock on 13-7-2006, with the result that the order dated 2-3-2006 of the learned trial Court remained intact.

3. The petitioner has assailed the impugned orders dated 2-3-2006 and 13-7-2006, inter alia, on the grounds that the said orders are against the law and facts of the case; respondent No. 1 has been negligent, in pursuing his case hence he was not entitled to any discretionary relief; the application of respondent No. 1 for restoration of the suit was time-barred; the learned Courts below have ignored the provisions of law as enshrined in Order IX of the C.P.C; there is misreading and non-reading of the material available on the record; the learned Courts below have committed illegality and material irregularity in passing the impugned orders.

4. The learned counsel for the petitioner besides agitating the above grounds has argued that under the provisions of the High Courts Rules and Order's, Volume-V, Chapter 1-E, Paras 2 and 4 applications in which averment of facts is made is to be duly supported by an affidavit. Respondent No. 1 did not support his application for restoration of the suit with any affidavit; as such there was no application in the eye of the law. Further submits that the application was hopelessly time-barred as under Article 163 of the Schedule to the Limitation Act, 1908, only 30-days are provided to a party to have its suit restored in case of dismissal in default and/or dismissal for non-deposit of process fee. No application for condonation of delay as envisaged under section 5 of the Limitation Act, 1908, has been filed. Even otherwise, the application does not conform to the law on the subject no sufficient cause has been shown. The order of the learned trial Court was contingent in its nature. The suit of respondent No. 1 had been restored subject to payment of costs, respondent No. 1 to date has not paid the costs as such the order has lapsed hence question of restoring the suit does not arise.

5. The learned counsel for respondent No. 1 controverts the stance of the learned counsel for the petitioner. Submits that the order of the learned trial Court was void ab initio. It is

settled law that if the basic order is illegal then the superstructure built thereon automatically fails to submit that limitation does not run against void orders. Even otherwise no provision of the Limitation Act applies to the case. No vested right has accrued to the petitioner. Contends that since the suit was dismissed in default at the stage where the petitioner was yet to enter appearance hence it was a matter between the Court and respondent No. 1. The learned trial Court erred in giving notice to the petitioner at the time of restoration of the suit.

6. Contends that the orders whereby the suit of respondent No. 1 was dismissed was illegal and void also for the reason that the provisions of Order XLVIII, Rule 1 of the C.P.C. were not followed by the learned trial Court whilst ordering issuance of summons to the petitioner. The learned trial Court was required under the law to fix a time limit for deposit of the process fee. In the instant case it was not done. Contends that this is a mandatory provision as in case of failure of deposit of process fee penal consequences are to follow. As the learned trial Court has not followed the mandatory provision hence the order is void. Relies on AIR 1924 Nagpur 298 and AIR 1924 Nagpur 271.

7. The learned counsel for respondent. No. 1 defends the impugned orders on the above premise.

8. I have heard the arguments of the, learned counsel for the parties and have also examined the record with their able assistance. One fact is crystal clear that whilst ordering issuance of summons in the name of the petitioner the learned trial Court at no stage fixed the time period for depositing the process fee. The provisions of Order XLVIII, Rule 1 of the C.P.C. envisage that:--

> "1. **Process to be served at expense of party issuing**.---(1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.
>
> **Costs of service**--(2) The court fee chargeable for such service shall be paid within a time to be fixed before the process is issued."

I, therefore, agree with the arguments of the learned counsel for the respondents that fixation of time is a mandatory requirement of law. If the process fee is not deposited penal consequences follow under Order, IX Rule 2 of the C.P.C., in that the suit of a party is liable to be dismissed for no deposit of process fee. The learned counsel for the respondents has

relied on the judgments reported as "Ayadhyaprasad v. Secretary of State" A.R. 1924 Nagpur 298 and "Pandu and another v. Rajeshwar and others" AIR 1924 Nagpur 271, wherein it has been, inter alia, held that an order of a Court adjourning a case without fixing a time for depositing of process fee followed by an order of dismissal for want of prosecution is bad and would be liable to be set aside.

9. By following the above precedents I hold that the learned trial Court erred in not fixing a time for deposit of the process fee, respondent No.1, therefore could not have been non-suited. In view thereof the order of the learned trial Court dated 18-3-2003 being illegal and void, no limitation would run in the case. Even otherwise, the law favours adjudication of cases on merits and technicalities should not be allowed to stand in the way of substantial justice.

10. As to the contention of the learned counsel for the petitioner that no affidavit was appended to the application in question suffice it to say that in his reply the petitioner also did not file a counter affidavit.

11. Under the circumstances, I do not find any infirmity in the impugned orders. This petition, therefore, fails and is dismissed accordingly.

12. Before parting with the judgment, it is observed that the suit of the respondent No. 1 is still pending. The learned trial Court is directed to expeditiously dispose of the same but not later than 30-4-2011. Respondent No.1 is directed to pay the costs as determined by the learned Courts below before any further proceedings are held before the learned trial Court.

H.B.T./F-25/L Petition dismissed.

2012 M L D 95

[Lahore]

Before Mamoon Rashid Sheikh, J

ALLIED BANK LTD.---Petitioner

Versus

SECURITY ORGANIZATION SYSTEM PAKISTAN (PVT.) LTD.---Respondent

Civil Revision No.581 of 2011, decided on 13th July, 2011.

Arbitration Act (X of 1940)---

----S.20---Civil Procedure Code (V of 1908), S. 20(c)---Reference to arbitration---Territorial jurisdiction---Determination---Plaintiff filed application under S.20 of Arbitration Act, 1940, before court at place "M"---Defendant assailed the application on the ground that such application could only be filed at place "K"---Validity---Provision of S.20(c), C.P.C. provided that civil courts within whose territorial jurisdiction the cause of action wholly or partly had arisen could exercise jurisdiction in the matter---Agreement between the parties was executed at place "M" and plaintiff was to render services all over Pakistan including place "M"---Part of cause of action having arisen at place "M", civil courts at place "M" were vested with territorial jurisdiction to adjudicate upon the matter---High Court declined to interfere in the order passed by Lower Appellate Court---Revision was dismissed in circumstances.

Cementation Intrafor and others v. Indus Valley 1989 MLD 4906; Hitachi Limited and another v. Rupali Polyester and others 1998 SCMR 1618; Special Communication Organization through Director-General, Rawalpindi v. Messrs Ibeel (Pvt.) Ltd., Lahore 2007 CLC 248 and Baig and Co. v. The Province of West Pakistan and others PLD 1969 Lah. 453 **ref**.

Malik Muhammad Riaz Aora for Petitioner.

Ch. Abdul Sattar Goraya for Respondent.

ORDER

MAMOON RASHID SHEIKH, J.---This petition assails the judgment dated 26-3-2011 passed by the learned Additional District Judge, Multan whereby the respondent's appeal was accepted on the question of territorial jurisdiction and the respondent's application under section 20 of the Arbitration Act, 1940 was directed to be heard by the learned Civil Court at Multan.

2. The sole question of law which needs determination is to the effect that whether the Civil Courts at Multan have the territorial jurisdiction to adjudicate upon the petitioner's application under section 20 of the Arbitration Act, 1940.

3. It is contended by the learned counsel for the petitioner that the respondent was given the contract of providing security services to the petitioner through agreement dated 31-10-2010. The said agreement contained an arbitration clause whereby any dispute arising out of or in respect of the agreement was referable to the arbitration. The respondent's contract was cancelled through notice dated 30-11-2010 whereby the respondent was informed that its services would not be required w.e.f. 1-1-2011. Feeling aggrieved the respondent filed an application under section 20 of the Act, ibid, seeking filing of the arbitration agreement and reference of the dispute to arbitration as contemplated under the arbitration clause. The petitioner entered appearance and raised the preliminary objection as to the territorial jurisdiction of the Civil Courts at Multan by filing an application under Order VII, Rule 10 of the C.P.C. The learned trial Court through order dated 20-12-2010 accepted the petitioner's application and directed that the respondent's application under the Act, ibid, be returned for presentation to the competent Court at Karachi. The respondent's appeal against the order of the learned trial Court was accepted through the impugned order dated 26-3-2011, hence, the instant petition.

4. The learned counsel for the petitioner contends that the impugned order dated 26-3-2011 is bad in law inasmuch as the learned appellate Court failed to appreciate that the Civil Courts at Multan do not have the jurisdiction in the matter. Clause 17 of the agreement stipulates that in case of a dispute between the parties the matter shall be referred to mutual negotiations and upon failure of such negotiations the matter shall be referred to arbitration by two arbitrators, one arbitrator to be appointed by each party. The venue of the arbitration was to be at Karachi. On the basis of the same and the fact that the central office of the petitioner is based at Karachi the Civil Courts at Multan do not have the territorial jurisdiction in the matter.

5. The learned counsel for the respondent whilst defending the impugned order submits that the agreement between the parties was executed at Multan and services by the respondent were to be provided all over Pakistan including Multan, as such, the Civil Courts at Multan have the jurisdiction in the matter. Relies on section 20 of the C.P.C. and the judgments reported as Cementation Intrafor and others v. Indus Valley 1989 MLD 4906, Hitachi Limited and another v. Rupali Polyester and others (1998 SCMR 1618) and Special Communication Organization through Director-General, Rawalpindi v. Messrs Ibeel (Pvt.) Ltd., Lahore (2007 CLC 248).

6. I have considered the argument addressed at the bar and have also gone through the record.

7. The question of jurisdiction in the matter is to be determined on the basis of section 31(3) of the Act, ibid, read with section 20 of the C.P.C. Reliance in this regard is placed on a judgment of this Court reported as Baig and Co. v. The Province of West Pakistan and others (PLD 1969 Lahore 453) wherein it has been held that for purposes of determining the territorial jurisdiction of the Court in arbitration matters the rules of the C.P.C. are attracted. The judgments cited at the bar by the learned counsel for the respondent are also in the same vein. The contentions of the learned counsel for the respondent are supported by the judgments cited by him at the bar. Section 20(c) of the C.P.C. provides that Civil Courts within whose territorial jurisdiction the cause of action wholly or partly arises can exercise jurisdiction in the matter. In the instant case the agreement was admittedly executed at Multan and the respondent was to render services all over Pakistan including the city of Multan. Part of the cause of action has arisen at Multan. The civil Courts at Multan are, therefore, vested with the territorial jurisdiction to adjudicate upon the matter.

8. The petition is accordingly dismissed with no order as to costs.

M.H./A-217/L Petition dismissed.

2012 P L C (C.S.) 1101

[Lahore High Court]

Before Mamoon Rashid Sheikh, J

AZKAR AHMAD

Versus

SECRETARY, MINISTRY OF INFORMATION AND TECHNOLOGY (IT AND TELECOM DIVISION), ISLAMABAD and 2 others

Writ Petition No.4842 of 2010, decided on 6th December, 2010.

Constitution of Pakistan---

----Art. 199---Constitutional petition---Civil service---Implementation of judgment of Service Tribunal---Authorities partially implemented decision of reinstating the petitioner, but his salary/back benefits, were not released, despite he remained working after his reinstatement---Contention of counsel for the authorities was that petition had been filed before the Supreme Court against the judgment of Service Tribunal---Said petition had not come up for hearing nor any stay order had been granted to the authorities---Mere filing of petition by authorities before the Supreme Court against the decision of Service Tribunal would not automatically suspend the operation of judgment of Service Tribunal---High Court directed that pending final adjudication before Supreme Court, petitioner be paid his salary/emoluments, subject to final decision given by Supreme Court in the matter.

Executive Council, Allama lqbal Open University, Islamabad through Chairman and another v. M. Tufail Hashmi 2010 SCMR 1484; C.P.L.As. Nos.347-K and 348-K of 2002, Trustees of the Port of Karachi v. Lt. Cdr. (Retd.) Abdul Aziz Narejo and others; Civil Petition No. 753 of 2003, OPF and another v. Mazher Arif and another; C.P.L.A. No.1915 of 2002, Federation of Pakistan and another v. Gohar Riaz Civil Petition No.1603 of 2002, Chairman, WAPDA v. Salahuddin and another; C.P.L.A. No.272 of 2003, WAPDA through its Chairman v. Muhammad Qasim Jan and another; Civil Petition No.1405 of 2003 Pakistan State Oil Co. Limited and others v. Raja Ali Gul Mangi and another; Fazal Elahi v. Pakistan Telecommunication Company Ltd. and another 2004 PLC (C.S.) 655; Muhammad Siddique Detho v. State Life Insurance Corporation and others 2005 PLC (C.S.) 946; Muhammad Azeem v. F.D.A. and another 2006 PLC (C.S.) 95; Khan M. Mutiur Rahman and others v. Government of Pakistan through Secretary Ministry of Finance (Revenue Division) and others 2006 PLC (C.S.) 564; Muhammad Arshad Khan v. Director-General Agriculture (Water Management) Punjab, Lahore and 2 others 2010 PLC (C.S.) 71; Hafiz

Tariq Saeed, Ex-DE PTCL Gujranwala v. Federation through Secretary (IT and Telecom Division), Ministry of Information Technology, Islamabad and another 2010 PLC (C.S.) 997 and Muhammad Arif v. Government of Punjab and others 2007 PLC (C.S.) 428 ref.

Ghulam Farid Chaudhary for Petitioner.

Shabbir Mahmood Malik, Standing Counsel for Pakistan.

Abid Hassan for Respondent No.2.

Talib Baloch, Director Finance, PSEB.

ORDER

MAMOON RASHID SHEIKH, J.--- Through this petition the petitioner has sought implementation of the judgment dated 11-3-2010 of the learned Federal Service Tribunal, Islamabad, passed in Appeal No.346(R)CE of 2005 in favour of the petitioner. The prayer made by the petitioner is, inter alia, to the following effect:---

"(i) The instant writ petition be accepted with costs, the following relief may please be granted to the petitioner;

(ii) The impugned act of respondents of non-implementation of judgment of FST Islamabad and non release of salary from the reinstatement of petitioner to date may be set aside/quashed/ declared arbitrary/illegal/unlawful/mala fide and without lawful authority.

(iii) That by accepting the petition the respondents may kindly be directed to grant all the back benefits as per judgment of FST from 21-11-2004 to onward. The respondents be also directed to release the salary of the petitioner from the date of reinstatement i.e. 15-4-2010 to onward with consequential benefits as per judgments of honourable Tribunal.

(iv) It is further prayed that the de novo proceedings may kindly be declared null and void and against the orders of FST and be quashed in the interest of justice."

2. The learned counsel for the petitioner submits that respondents Nos.2 and 3 have, however, partially implemented the said decision by reinstating the petitioner through order dated 15-4-2010. The petitioner re-joined service and has been working ever since for the Pakistan Software Export Board (Guarantee) ("the Board") but respondents Nos.2 and 3

have failed to release the petitioner's salary/back-benefits. Moreover, the petitioner is being made to work without any pay since 15-4-2010.

3. The learned counsel for respondents Nos. 2 and 3 submits that the said respondents have filed C.P. No.1039 of 2010 before the Hon'ble Supreme Court of Pakistan against the judgment dated 11-3-2010 passed by the learned Federal Service Tribunal. The said C.P. has, however, not come up for hearing nor any stay order has been granted to respondents Nos.2 and 3.

4. Further submits that, even otherwise, the judgment in question of the learned Federal Service Tribunal is liable to be set aside due to the law as laid down by the Hon'ble Supreme Court of Pakistan in the judgment reported as "Executive Council, Allama lqbal Open University, Islamabad through Chairman and another v. M. Tufail Hashmi" (2010 SCMR 1484) and the unreported judgments of the Hon'ble Supreme Court of Pakistan in; "C.P.L.As. Nos.347-K and 348-K of 2002, Trustees of the Port of Karachi v. Lt. Cdr. (Retd.) Abdul Aziz Narejo and others Civil Petition No. 753 of 2003, OPF and another v. Mazher Arif and another C.P.L.A. No.1915 of 2002, Federation of Pakistan and another v. Gohar Riaz Civil Petition No.1603 of 2002, Chairman, WAPDA v. Salahuddin and another C.P.L.A. No.272 of -2003, WAPDA through its Chairman v. Muhammad Qasim Jan and another and Civil Petition No.1405 of 2003 Pakistan State Oil Co. Limited and others v. Raja Ali Gul Mangi and another. Contends that the instant petition is, therefore, not maintainable. Prays for its dismissal.

5. When confronted with the above, the learned counsel for the petitioner whilst relying on `Fazal Elahi v. Pakistan Telecommunication Company Ltd. and another 2004 PLC (C.S.) 655; Muhammad Siddique Detho v. State Life Insurance Corporation and others 2005 PLC (C.S.) 946; Muhammad Azeem v. F.D.A. and another 2006 PLC (C.S.) 95; Khan M. Mutiur Rahman and others v. Government of Pakistan through Secretary Ministry of Finance (Revenue Division) and others 2006 PLC (C.S.) 564; Muhammad Arshad Khan v. Director-General Agriculture (Water Management) Punjab, Lahore and 2 others 2010 PLC (C.S.) 71; Hafiz Tariq Saeed, Ex-DE PTCL Gujranwala v. Federation through Secretary (IT and Telecom Division), Ministry of Information Technology, Islamabad and another 2010 PLC (C.S.) 997 and Muhammad Arif v. Government of Punjab and others 2007 PLC (C.S.) 428 submits that mere filing of a petition by the respondents before the Hon'ble Supreme Court of Pakistan against the decision of the learned Federal Service Tribunal does not automatically suspend the operation of the judgment of the learned Federal Service Tribunal.

6. Further submits that, subject to the final decision of the respondents' C.P. No.1039 of 2010 pending before the Hon'ble Supreme Court of Pakistan, since the petitioner has been working for the Board from the date of his reinstatement (15-4-2010) without any salary/emoluments, respondents Nos.2 and 3 may be directed to at least pay the salary/emoluments of the petitioner from the said date until such time the Hon'ble Supreme Court of Pakistan finally decides the respondents' C.P. No.1039 of 2010 as it is the right of the plaintiff to receive salary/emoluments as compensation for work done.

7. The learned counsel for respondents Nos.2 and 3 has weakly tried to controvert the above contention and has reiterated that since the matter is sub judice before the Hon'ble Supreme Court of Pakistan, the petition may be dismissed.

8. Having heard the arguments of the parties and gone through the case-law cited at the bar I find force in the contention of the learned counsel for the petitioner that mere filing of a petition by the respondents before the Hon'ble Supreme Court of Pakistan against the decision of the learned Federal Service Tribunal does not automatically suspend the operation of the judgment of the learned Federal Service Tribunal.

9. It is an admitted fact that the petitioner is working for the Board since 15-4-2010 i.e. date of his reinstatement under the orders of the learned Federal Service Tribunal. It is also admitted that the petitioner has not been paid any salary/emoluments for the work done. In the facts and circumstances of the case, therefore, it is directed that the petitioner, pending the final adjudication of respondents Nos.2 and 3's C.P. No.1039 of 2010 before the Hon'ble Supreme Court of Pakistan, be paid his salary/emoluments w.e.f. 15-4-2010, subject to the final decision given in the matter by the Hon'ble Supreme Court of Pakistan.

10. This petition is accordingly disposed of in the above terms with no order as to costs.

H.B.T./A-57/L Order accordingly.

2013 C L C 444

[Lahore]

Before Mamoon Rashid Sheikh, J

ALI ASLAM MALIK----Petitioner

Versus

ASSISTANT DIRECTOR and others----Respondents

Writ Petition No.21902 of 2011 and C.M. Nos.295 and 3 of 2012, decided on 16th August, 2012.

Exit from Pakistan (Control) Ordinance (XLVI of 1981)---

----S. 3---Constitution of Pakistan, Art.199---Constitutional petition---Exit Control List---Interim relief---Grievance of petitioner was that authorities had placed his name on Exit Control List and denied him permission to travel abroad for treatment of his ailing son---Validity---Right to travel abroad of a citizen of Pakistan was a fundamental right---Petitioner had been denied such right ostensibly on the ground of his being a loan defaulter---High Court allowed one time permission to petitioner to travel abroad subject to furnishing of third party surety, as his son was seriously ill---Application was allowed accordingly.

Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others PLD 2010 Lah. 230; Mian Tahir Jahangir v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and another 2008 YLR 1857 and Muhammad Khyzer Yousuf Dada v. Federation of Pakistan through Secretary, Ministry of Interior and 5 others PLD 2011 Kar. 546 ref.

Syed Haseeb Azhar v. Mr. K.M. Siddiq Akbar and 2 others Crl. Org. No.1200-W of 2012 rel.

Shazib Masud for Petitioner.

Abdul Rahim for Applicant (in C.M. No.2951 of 2012).

Asad Ullah Malik for Respondent No.2.

Pervaiz Iqbal Gondal, Standing Counsel.

ORDER

MAIN CASE C.M. No.3 of 2012 C.M. No.2951 of 2012

MAMOON RASHID SHEIKH, J.--- The brief facts giving rise to the filing of the main petition and C.Ms. No.3 and 2951 of 2012 are that the petitioner is a director of the companies known as Messrs First National Equities Limited and Messrs First Pakistan Securities Limited. His business, inter alia, relates to consultancy in stock related services. On 29-4-2011 the petitioner filed an application before respondent No.1 for grant of a new passport. The passport at that time was, however, not issued and the petitioner was orally informed by respondent No.1 that the name of the petitioner has been placed on the Exit Control List ("ECL"), under the provisions of the Exit from Pakistan (Control) Ordinance, 1981, upon the request of respondent No.2 (the Bank of Punjab) as the petitioner is a loan defaulter. The petitioner (allegedly) did not receive any notice nor any order was served upon him in respect of his name having been placed on the ECL. The petitioner was therefore, constrained to file the main petition praying thereby that the action of respondent No.3 of placing the name of the petitioner on the ECL may be declared illegal, without lawful authority and of no legal effect. As consequential relief respondents Nos.2 and 3 may be directed to remove the petitioner's name from the ECL and the petitioner may be allowed to travel abroad freely. The petition was filed on 1-10-2011 and has been pending since then for filing of the report and parawise comments and/or replies of the respondents. In the meantime, the petitioner moved C.M.No.3 of 2012 and thereafter C.M.No. 2951 of 2012 praying through the former that the petitioner's passport may be issued to him whereas through the latter he submitted that his son namely Umar Ali aged about 16 years is suffering from lung disease and has been admitted for treatment in a hospital at Manchester in the U.K. As the petitioner's son is seriously ill the petitioner would like to be at his son's bedside, especially during the Eid holidays. It has, therefore, been prayed that the petitioner may be granted a one time permission to travel abroad. The petitioner undertakes to return as soon as his son's treatment is over. The petitioner is ready to furnish adequate security to ensure his return.

2. On 8-8-2012 notice was issued in C.M.No.2951 of 2012 and the main petition was also directed to be fixed for 10-8-2012. On the latter date the learned counsel for respondent No.2 vehemently opposed acceptance of C.M.No.2951 of 2012 and submitted that the main petition itself is liable to be dismissed as the same has been filed by concealment of material facts. He prayed for time to file parawise comments. The learned Standing Counsel submitted that the matter has been referred to the Ministry of Interior, Government of Pakistan who in turn has referred the matter to the Ministry of Finance and their advice is awaited. He submitted a letter to this effect which was placed on the record. The learned counsel for the petitioner opposed the adjournment on the ground that due to the serious illness of the petitioner's son the petitioner has to travel on an emergent basis, therefore,

C.M. No.2951 of 2012 may be heard and decided. The learned counsel in support of his contention submitted photocopies of the medical record of the petitioner's son which were placed on the record. However, in the interest of justice time was granted to the respondents and the matter was adjourned for today.

3. The matter has been taken up today. The learned counsel for the petitioner whilst repeating the above facts contends that the right to travel is part of human liberty as the ability to travel signifies freedom and liberty. The right to travel abroad is, therefore, a fundamental right guaranteed by Articles 2-A, 4, 9, 15 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973. This fundamental right cannot be abridged through a legislative or executive measure. Relies on the judgments reported as Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others (PLD 2010 Lahore 230), Mian Tahir Jahangir v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and another (2008 YLR 1857) and Muhammad Khyzer Yousuf Dada v. Federation of Pakistan through Secretary, Ministry of Interior and 5 others (PLD 2011 Karachi 546).

4. Further submits that the petitioner was neither informed nor a notice was served upon him regarding placing of his name on the ECL by respondent No.3 at the request of respondent No.2. The petitioner was, therefore, denied the right of filing a review petition under section 3 of the Exit from Pakistan (Control) Ordinance, 1981. It was only in the year 2011 when the petitioner applied for his passport that he came to know that his name has been placed on the ECL. The petitioner, therefore, filed the main petition challenging the actions of the respondents, however, the petition could not progress due to non-filing of replies and/or parawise comments. Repeated adjournments were obtained by the respondents in this respect but to-date the needful has not been done.

5. Contends that the petitioner's son is seriously ill. The petitioner being his father has a right to be at his bedside. Prays that the petitioner may be granted a one time permission to travel abroad i.e. to the U.K. The petitioner shall return to Pakistan within 3 to 4 weeks. The petitioner is ready to provide adequate security in this behalf. Further submits that the passport of the petitioner has since been issued to him.

6. The learned counsel for respondent No.2 has submitted comments on behalf of respondent No.2 which are placed on the record.

7. The learned counsel for respondent No.2 has vehemently resisted acceptance of C.M.No.2951 of 2012. The main thrust of his arguments has been directed towards the maintainability of the petition, inter alia, on the grounds that the petition has been filed by concealment of material facts. It is contended that the petitioner and his companies are defaulters of respondent No.2. The total amount due as at 31-7-2012 from Messrs First National Equities Limited is Rs.188.585 million; from Messrs First Pakistan Securities Limited is Rs.329.521 million; and from the petitioner it is Rs.432.811 million. Respondent No.2's two suits entitled "BOP v. Ali Aslam Malik" and "BOP v. Messrs First National Equities Limited" have been decreed against the petitioner and his companies. The above amounts are not secured by any tangible security. Indeed the petitioner's and his companies' total liability is Rs.950.917 million whereas the securities held by respondent No.2 are in the amount of Rs.30 million approximately. The petitioner obtained the financing on the basis of insufficient securities in connivance with the ex-management of respondent No.2 who misused their authority for benefiting the petitioner thereby causing loss to respondent No.2. A complaint has been filed by respondent No.2 under section 9 of the National Accountability Ordinance, 1999, against the petitioner and others on the allegations of corruption and corrupt practices. The matter is pending before the National Accountability Bureau ("NAB"). Further submits that the name of the petitioner was placed on the ECL in the year 2009 on the directions of the State Bank of Pakistan who through letter dated 7-12-2001 had directed all banks that the names of defaulters of Rs.100 million and above should be placed on the ECL. As the petitioner and his companies fell afoul of the directions of the State Bank of Pakistan, therefore, respondent No.2 requested respondent No.3 to place the name of the petitioner on the ECL. Also relies upon the provisions of the Ordinance, ibid, and Rule 2(e) of the Exit from Pakistan (Control) Rules, 2010. Further contends that the petitioner has not exhausted the statutory remedy before approaching this Court. The petition is even otherwise not maintainable as the State Bank of Pakistan has not been impleaded.

8. On the basis of the above the learned counsel for respondent No.2 prays that the petitioner's C.M.No.2951 of 2012 for one time permission to travel abroad may be dismissed along with the main petition.

9. The learned Standing Counsel whilst opposing C.M.No.2951 of 2012 submits that the petitioner is not entitled to the relief he is seeking. Prays for time to make further submissions as he has yet to receive instructions in the matter.

10. The learned counsel for the petitioner in rebuttal does not deny availing of the finance facilities by the petitioner and his companies from respondent No.2. He, however, submits that all facilities were fully secured through pledge of stocks and shares which were mainly shares in various cement companies including Pioneer Cement and D.G. Khan Cement. However, due to the crash in the stock market there was diminution in value of the pledged stockes/shares. Respondent No.2 was negligent in the matter and did not liquidate the stocks/shares in time and waited till the value of the pledged stocks/shares reached rock bottom. As the stocks/shares were pledged with respondent No.2 the petitioner could not sell the same at the relevant time. It, therefore, does not lie in the mouth of respondent No.2 to contend that the petitioner provided inadequate security for availing of finance facilities. Also does not deny that respondent No.2's two suits have been decreed against the petitioner and his companies. He, however, submits that the petitioner has challenged the decrees by filing appeals. Further contends that the petitioner is involved in the business of consultancy in stock related services. His companies are doing good business and he pays several million rupees towards income tax and sales tax etc. The learned counsel has shown paid invoices in support of his contention which after examination have been returned to the learned counsel. Contends that C.M.No.2951 of 2012 has been moved as the petitioner's son is seriously ill. The petitioner shall return within 3 to 4 weeks. Reiterates that it is the fundamental right of the petitioner to travel abroad. The main petition in these circumstances is liable to be accepted. However, in view of the medical emergency vis-à-vis his son the petitioner for the time being is only praying for being granted one time permission to travel abroad. Further submits that the petitioner is willing to furnish third party security supported by immovable property in the value of Rs.10 million to ensure his return.

11. The learned counsel for respondent No.2 despite having been given opportunity has been unable to satisfy the Court regarding the alleged inaction of respondent No.2 in selling the pledged stocks/shares at the relevant time.

12. Arguments heard. Record perused.

13. Admittedly the petition was filed on 1-10-2011. The petition has been fixed on a number of dates, however, the petition could not proceed for want of replies and/or parawise comments having been filed by the respondents and/or lack of instructions. Even today during the course of the arguments the respondents could not produce a copy of the instructions received from the State Bank relied upon by respondent No.2 nor a copy of the request made by respondent No.2 to respondent No.3 for placing the name of the petitioner on the ECL. Indeed, a copy of the order whereby the petitioner's name was placed on the ECL

in the year 2009 has also not been produced. The learned counsel for respondent No.2 besides relying on the instructions of the State Bank has also relied upon the Ordinance and Rules, ibid. He was, however, been unable to justify the applicability of Rule 2(e) of the Rules, ibid, as the name of the petitioner was admittedly placed on the ECL in the year 2009 and the Rules, ibid, came into force in the year 2010. The learned counsel for respondent No.2 tried to place reliance on the Exit from Pakistan (Control) Rules, 1984, which, however, do not contain any such provision.

14. On the basis of the judgments cited by the learned counsel for the petitioner at the bar it is evident that the right to travel abroad of a citizen of Pakistan is his fundamental right. The petitioner in the instant case is being denied that right ostensibly on the ground of his being a loan defaulter. The respondents have, however, been unable to place any material on the record to substantiate their stand. Indeed, the parawise comments filed today by the learned counsel for respondent No.2 neither address the issue comprehensively nor are they supported by any document.

15. There are several instances where the Courts during pendency of the main petition have allowed the petitioner permission to travel abroad subject to furnishing of surety. Reliance in this regard is placed on an unreported judgment of my learned brother Muhammad Khalid Mahmood Khan, J., passed in Crl. Org. No.1200-W of 2012 titled "Syed Haseeb Azhar v. Mr. K.M. Siddiq Akbar and 2 others".

16. The distinguishing feature, however, in the above case and instant case is that in the former the defaulted amount said to be fully secured whereas in the latter it is alleged that the security furnished by the petitioner and his companies is inadequate vis-a-vis the finance facilities availed of by them. The reason therefor according to respondent No.2 is the connivance of the petitioner with the ex-management of respondent No.2. The petitioner, however, contends that he had fully secured the finance facilities by way of pledge of stocks/shares, however, upon the crash of the stock market these stocks/shares were not sold in time by respondent No.2. If the same had been done the petitioner would not have been in the position he is today. As mentioned above the learned counsel for respondent No.2 has been unable to satisfy the Court on this score.

17. As the respondents despite repeated opportunities are yet to file an appropriate defence and/or documents in support of their contentions including but not limited to a copy of the order whereby the name of the petitioner has been placed on the ECL an

adjudication of the main petition at this stage would not serve the ends of justice. I, therefore, propose to keep the main petition pending.

18. However, in view of the serious illness of the petitioner's son a one time permission is granted to the petitioner to travel to the U.K. subject to furnishing of a third party surety within a fortnight in the sum of Rs.10 million supported by immovable property to the satisfaction of the Deputy Registrar (Judicial) of this Court. This one time permission is for the period of four weeks from the date of furnishing the surety. The petitioner, as undertaken by him, to return to Pakistan within the stipulated period.

19. C.M.No.2951 of 2012 is disposed of accordingly.

20. C.M.No.3 of 2012 has become infructuous as the petitioner's passport is stated to have been issued to him.

21. In view of the substantial questions of law raised by the learned counsel for the parties the main petition is admitted to regular hearing. However, in view of the nature of the dispute the petition is directed to be listed out in the 4th week of October, 2012.

22. The respondents are directed to file their respective written statements before the next date.

MH/A-167/L Order accordingly.

2013 C L C 454

[Lahore]

Before Mamoon Rashid Sheikh, J

Mst. SAEEDA----Petitioner

Versus

PROVINCE OF PUNJAB and others----Respondents

Civil Revision No.813 of 2011, decided on 11th April, 2012.

(a) Civil Procedure Code (V of 1908)---

----O. XXXIX, Rr.1 & 2---Interim injunction, grant of---Principles---Injunction is not to be granted only on the basis that prima facie case existed in favour of plaintiff---Courts are required to take into consideration whether question of balance of convenience or irreparable loss to party seeking such relief co-exists or not---Courts have also to take into consideration whether plaintiff has approached the court with clean hands or not; whether court has been approached promptly or not; whether grant of injunction to a party is against public interest/policy; whether grant of injunction to a party results into undue advantage being given to that party which may perpetuate injustice; and whether party approaching court for interim relief has concealed material facts and or acted in mala fide manner---In case the answer of any of the questions is in affirmative then relief of injunction being discretionary in nature can be declined.

Marghub Siddiqui v. Hamid Ahmad Khan and 2 others 1974 SCMR 519 and ATCO Lab. (Pvt.) Limited v. PFIZER Limited and others 2002 CLD 120 rel.

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

----S. 42---Civil Procedure Code (V of 1908), S.115, O.XXXIX, Rr.1 & 2---Suit for declaration---Interim injunction, denial of---Concealing of facts---Plaintiff was denied interim injunction by Trial Court and Lower Appellate Court---Validity---Filing of earlier suit was concealed by plaintiff not only in plaint but also in revision petition filed before High Court---Such concealment established that conduct of plaintiff was not above board and she approached the High Court with unclean hands---One who sought discretionary relief was, therefore, required to approach the court with clean hands---One who seeks equity must do equity---Plaintiff was in possession of land in excess of her share and her revision before Board of Revenue was time-barred---During post remand proceedings, plaintiff was given repeated opportunities to present her case but she failed to do so, and

consequently her defence was struck off---Plaintiff did not have prima facie case in her favour nor balance of convenience tilted in her favour, and similarly, factor of irreparable loss was also missing---High Court, in exercise of revisional jurisdiction, declined to interfere in concurrent orders passed by two courts whereby interim injunction was refused to plaintiff---Revision was dismissed in circumstances.

Marghub Siddiqui v. Hamid Ahmad Khan and 2 others 1974 SCMR 519; ATCO Lab. (Pvt.) Limited v. PFIZER Limited and others 2002 CLD 120; Syed Kamal Shah v. Government of N.-W.F.P. 2010 SCMR 1377 and Mst. Sharifan Bibi and others v. Muhammad Abid Rasheed 2011 YLR 2396 rel.

Muhammad Younas Sheikh for Petitioner.

Zafarullah Khan Khakwani, Asstt. A.-G., Punjab.

Ch. Saghir Ahmad for Respondents Nos.7 to 11.

ORDER

MAMOON RASHID SHEIKH, J.--- This petition calls into question the order dated 12-1-2011 passed by the learned Civil Judge, Khanewal and the order dated 24-5-2011 passed by the learned Additional District Judge, Khanewal, whereby the petitioner has been unsuccessful in obtaining a temporary injunction in her suit for declaration, etc, in respect of the property in dispute.

2. The brief facts giving rise to the petition are to the effect that the petitioner and respondents Nos.5-A to 34 are stated to be co-sharers in the land in dispute bearing Khewat No.30 measuring 165 kanals and 3 marlas and Khewat No.189 measuring 1046 kanals and 8 marlas (total 1211 kanals and 11 marlas), situated in Chak No.125/15-L Tehsil Mianchannu, District Khanewal. An application for partition of the land in dispute was made before the Tehsildar/Assistant Collector Grade-I, Mianchannu on 13-7-1993. During pendency of the proceedings a compromise was effected between the parties whereby land measuring 99 kanals and 14 marlas of the petitioner and one of the co-sharers was separated and the rest of the holding of the other co-sharers was kept intact. A deed of compromise in this respect was presented before the Tehsildar/AC-I, Mianchannu on 8-3-1994 and an order dated 9-3-1994 was passed thereon. As a consequence, Mutations No.1648 and 3082 were sanctioned on 29-3-1994. Feeling aggrieved some of the co-sharers preferred an appeal, inter alia, on the grounds that they

had not entered into any compromise with the petitioner, the whole exercise had been carried out by playing a fraud. The Assistant Commissioner/ Collector, Mianchannu, however, dismissed the appeal on 26-1-1997 on merits as well as being barred by time. The said co-sharers filed revision petitions before the Addl. Commissioner (Consolidation), Multan Division who through order dated 25-7-1998 dismissed the revision petitions. In the meantime some of the other co-sharers also filed a review petition seeking review of the order dated 9-3-1994. This review petition was dismissed by the Deputy Commissioner/District Collector on 7-7-1994. The revision petition against the order dated 7-7-1994 was dismissed by the Additional Commissioner (Consolidation) on 25-7-1998. The matter ultimately came up before the learned Member Board of Revenue in RORs No.1356, 1583, 1494 and 1495 of 1998. These RORs were allowed and the Senior Member Board of Revenue through order dated 2-8-1999 set aside the order dated 9-3-1994 and cancelled the consequential mutations. The matter was remanded to the Tehsildar/ Assistant Collector Grade-I, Mianchannu, for decision afresh in accordance with the law. Feeling aggrieved the present petitioner filed Writ Petitions Nos.11422 and 11531 to 11533 of 1999 which were dismissed by a learned Single Judge of this Court through judgment dated 9-12-2003. The petitioner filed C.Ps. Nos.385 to 388 of 2004 against the said judgment before the Hon'ble Supreme Court of Pakistan. The leave to appeal was, however, not granted to the petitioner and the C.Ps. were dismissed through judgment dated 17-1-2005. Upon remand the Tehsildar/AC-I, Mianchannu after summoning the parties and inspecting the site issued partition order dated 30-6-2005. The petitioner challenged the order before the Revenue Authorities and ultimately through order dated 1-2-2010 the petitioner's and one Asim Hassan's ROR No.1615/2009 and 2049/2007 were dismissed by the learned Member (Judicial-II), Board of Revenue, Punjab. The petitioner thereafter filed a civil suit challenging the various orders of the Revenue Authorities as also the order dated 1-2-2010. In the suit the petitioner, as said above, was unsuccessful in obtaining a temporary injunction, hence this petition.

3. At the outset the learned counsel for respondents Nos.7 to 11 has raised preliminary objections regarding the maintainability of the petition and also the suit of the petitioner by, inter alia, submitting that the order dated 30-6-2005 impugned in the suit was an order passed in post remand proceedings in compliance with the judgment of the Hon'ble Supreme Court dated 17-1-2005 passed in C.Ps. Nos.385 to 388 of 2004. The filing of the suit by the petitioner amounts to contempt of Court. The petitioner's suit is not maintainable. As a consequence, no prima facie case is made out. Hence, the question of grant of a temporary injunction in the petitioner's favour does not arise. Further submits that the petitioner has filed the suit by concealment of material facts inasmuch as prior to

filing of the present suit the petitioner had filed a civil suit against the present respondents. Through the said suit the petitioner had, inter alia, sought the declaration that the compromise effected between the parties on 6-3-1994 is effective and binding on the parties. The suit was resisted by the respondents and the plaint was rejected by the learned Civil Judge, Khanewal through order dated 2-7-1995, inter alia, on the grounds that the compromise deed dated 6-3-1994 had been set aside by the Hon'ble Supreme Court, therefore, a fresh suit on the basis of the compromise deed does not lie. The petitioner's appeal was dismissed by the learned Additional District Judge, Khanewal through judgment dated 14-3-2009. As the petitioner has failed to mention these facts in her present suit as also the instant petition she is not entitled to any discretionary relief.

4. The learned counsel for respondents Nos.7 to 11 has submitted certified copies of the above mentioned judgments/orders in support of his contentions. The said copies are made a part of the record.

5. The learned counsel further contends that the learned Courts below noted these factors whilst dismissing the petitioner's application for grant of a temporary injunction and the appeal arising therefrom. Indeed, the petitioner was unsuccessful before the learned Courts below for non-disclosure of material facts.

6. The learned Assistant Advocate-General whilst adopting the arguments of the learned counsel for respondents Nos.7 to 11 submits that this is the third round of litigation to which the petitioner has resorted to in respect of the land in dispute. In the first round the Hon'ble Supreme Court set aside the compromise deed dated 6-3-1994 and the subsequent order dated 9-3-1994. In the second round the petitioner filed a suit for declaration on the basis of the compromise deed. The petitioner's plaint was rejected and her appeal was dismissed. Both the learned Courts held that the matter had been finally decided by the Hon'ble Supreme Court, hence, the suit was barred under the law, therefore, the plaint was liable to be rejected. Now without disclosing the factum of filing of the earlier suit the petitioner has challenged the post remand proceedings before the Revenue Authorities. The suit of the petitioner is not maintainable. No prima facie case has been made out, hence, the question of balance of convenience and irreparable loss does not arise. Even otherwise, as held by the learned Member Board of Revenue the petitioner is in occupation of land in excess of her share, therefore, she is merely trying to prolong the litigation to perpetuate her illegal occupation. Prays for dismissal of the petition.

7. When confronted with the contentions of the learned counsel for respondents Nos.7 to 11 and the learned Assistant Advocate-General vis-a-vis the non-disclosure of the filing of the earlier suit, the learned counsel for the petitioner has tried to maintain that the non-disclosure of the filing of the earlier suit is not fatal to the petitioner's case. Contends that the earlier suit was not dismissed on merits. In fact only the plaint was rejected. As a consequence, there is no res judicata. Even otherwise the said suit did not challenge the order dated 1-2-2010 passed in ROR No.1619/2009 by the learned Member Board of Revenue but in effect sought a declaration vis-a-vis the compromise dated 6-3-1994 arrived at between the parties. Further contends that the petitioner has been able to make out a prima facie case and has also been able to establish that the balance of convenience lies in her favour and if the temporary injunction is not issued irreparable loss shall be caused to her. The learned Courts below failed to appreciate this aspect of the case.

8. I have considered the arguments of the learned counsel for the parties and I have also gone through the record.

9. It is well-settled law that an injunction is not to be granted only on the basis that a prima facie case exists in favour of the plaintiff. The Courts are required to take into consideration whether the question of balance of convenience or irreparable loss to the party seeking such relief co-exists or not. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court reported as Marghub Siddiqui v. Hamid Ahmad Khan and 2 others (1974 SCMR 519).

10. It is also a settled principle of law that besides the above factors the Courts in the facts and circumstances of a case have to take into consideration certain other factors such as whether the plaintiff has approached the Court with clean hands or not; whether the Court has been approached promptly or not; whether the grant of an injunction will be against public interest/policy; whether grant of an injunction to a party shall result into an undue advantage being given to him which would perpetuate injustice and whether a party approaching the Court for interim relief has concealed material facts and/or acted in a mala fide manner. In case the answer of any of the questions is in the affirmative then the relief of an injunction being discretionary in nature can be declined. Reliance in this regard is placed on a judgment reported as ATCO Lab. (Pvt.) Limited v. PFIZER Limited and others (2002 CLD 120).

11. In the instant case admittedly the petitioner is in possession of land beyond her entitlement/share. She has remained unsuccessful in the earlier rounds of litigation even up

to the level of the Hon'ble Supreme Court. Moreover, after the Hon'ble Supreme Court had in effect declared that the compromise dated 6-3-1994 did not exist between the parties, the petitioner through her earlier suit unsuccessfully tried to seek a declaration to the effect that the compromise existed and the land in dispute be partitioned accordingly. These factors as also the fact that the filing of the earlier suit has been concealed by the petitioner not only in the plaint of the present suit but also in the instant petition goes to establish that the conduct of the petitioner is not above board and she has approached the Court with unclean hands. On the touchstone of the judgments referred to above and the judgments reported as Syed Kamal Shah v. Government of N.-W.F.P. (2010 SCMR 1377) and Mst. Sharifan Bibi and others v. Muhammad Abid Rasheed (2011 YLR 2396), it can safely be said that one who seeks discretionary relief is, therefore, required to approach the Court with clean hands or in other words one who seeks equity must do equity. The petitioner is not only guilty of concealment of material facts but has also acted in a mala fide manner, therefore, on this ground alone I decline to interfere in the orders of the learned Courts below. Indeed, the learned appellate Court below has in part dismissed the petitioner's appeal for non-disclosure of material facts.

12. Even otherwise, the learned counsel for the petitioner has been unable to show the co-existence of a prima facie case, balance of convenience and irreparable loss in the instant case. The petitioner as noted by the learned Member Board of Revenue is in possession of land in excess of her share. Her ROR No.1619/2009 before the learned Member, Board of Revenue was time barred. During the post remand proceedings before the Revenue Authorities the petitioner was given repeated opportunities to present her case but she failed to do so, consequently her defence was struck off. All these factors go to show that the petitioner does not have a prima facie case in her favour nor does the balance of convenience tilt in her favour, similarly the factor of irreparable loss is also missing. Relying, therefore, on Marghub Siddiqi's case supra I find that the petition also fails on merits.

13. Dismissed accordingly.

MH/S-133/L Petition dismissed.

2013 C L C 1310

[Lahore]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

ALLIED BANK LTD. through Authorized person----Petitioner

Versus

INAM ULLAH KHAN and another----Respondents

Election Appeal No.21 of 2013, heard on 13th April, 2013.

Representation of the People Act (LXXXV of 1976)---

----Ss. 14(5A) & 99---Constitution of Pakistan, Arts.62 & 63---Loan defaulter---Liability of guarantor---Nomination papers filed by respondent candidate were accepted by Returning Officer during scrutiny---Appellant bank preferred direct appeal before High Court alleging that respondent candidate was wilful defaulter of loan---Plea raised by respondent was that he was guarantor and not principal debtor---Validity---Decree was passed against respondent and the same had been upheld by Supreme Court but it remained unsatisfied---Liability of guarantor was co-extensive with that of principal debtor, therefore, respondent was liable to pay decretal amount---Respondent did not disclose fact of passing of decree against him in his nomination papers---Respondent was not only adjudged defaulter in terms of S.14 (5A) of Representation of the People Act, 1976, but was also guilty of concealment of facts---Candidature of respondent was hit by provisions of Arts.62 & 63 of the Constitution read with S.14 (5A) of Representation of the People Act, 1976---Election Tribunal directed to delete name of respondent from list of validly nominated candidates of the constituency and his nomination papers were rejected---Appeal was allowed accordingly.

Rao Tariq Mehmood v. Election Tribunal, Punjab and another PLD 2003 Lah. 169; Dr. Shaukat Ilahi v. Ch. Mubashar Hussain and another 2008 CLC 341; Sardar Talib Hussain Nakai v. Returning Officer and another 1993 MLD 2485; Haji Ghulam Sabir Ansari v. Returning Officer 1993 MLD 2508; Ch. Muhammad Aslam Kaira v. Returning Officer, PP-96, Gujra-6 1994 MLD 424; Ghulam Mustafa Jatoi v. Additional District and Sessions Judge/Returning Officer, NA.158, Naushero Feroze and others 1994 SCMR 1299 distinguished.

Daewoo Corporation v. Messrs Platinum Insurance Company Limited 1997 CLC 1272; Rafique Hazquel Masih v. Bank Alfalah Ltd. and others 2005 SCMR 72 and Ch. Mubashar

Husssain v. Returning Officer, Kharian, District Gujrat and 3 others PLD 2008 Lah. 134 rel.

Ashar Elahi and Syed Iftikhar Hussain Shah for Appellant.

Dr. Babar Awan, Khalil Ahmad, Waseem Majid Malik and Shahid Ikram Siddiqui for Respondent No.1.

Date of hearing: 13th April, 2013.

JUDGMENT

JUSTICE MAMOON RASHID SHEIKH (MEMBER).--- This appeal under section 14(5A) of the Representation of the People Act, 1976, has been filed by Allied Bank Ltd., against one Inam Ullah Khan Niazi (respondent No.1) who has been declared as a validly nominated candidate to contest the election to the Constituency NA-71, Mianwali-I, through order dated 4-4-2013 passed by the learned Returning Officer, NA-71 (respondent No.2).

2. Briefly stated the facts giving rise to this appeal are to the effect that the appellant filed a suit for the recovery of Rs.77,304,000/ against Messrs Hura (Pvt.) Ltd. (the company) and 5 others before the Lahore High Court, Lahore, in its Banking jurisdiction. Respondent No.1 was arrayed as defendant No.2 in the suit in his capacity as a guarantor and customer within the meaning of the Financial Institutions (Recovery of Finances), Ordinance, 2001. The said suit was decreed in the sum of Rs.71.641 million through judgment and decree dated 24-7-2006. Respondent No.1 and the other defendants filed R.F.A. No.202 of 2008 against the decree. The R.F.A. was, however, dismissed being barred by time. As a consequence, respondent No.1 and the other defendants filed C.P. No.1167-L of 2011 and C.M.As No.281-L and 397-L of 2012 before the Hon'ble Supreme Court. However, through order dated 20-3-2013 C.P.No.1167-L of 2011 was dismissed and leave to appeal was refused. In the meantime, the election schedule for the 2013 General Elections was announced and respondent No.1 as per the schedule filed his nomination paper which was accepted through the order dated 4-4-2013. The appellant on the basis of the decree in its favour has filed the instant appeal to have the nomination paper of respondent No.1 rejected, inter alia, on the ground that the appellant is an adjudged defaulter and thus disqualified in terms of Article 62 of the Constitution of the Islamic Republic of Pakistan, 1973, to be elected or chosen as a member of the Majlis-e-Shoora (Parliament).

3. The learned counsel for the appellant has argued mainly in the terms of the facts given hereinabove. He contends that there is a decree against respondent No.1 passed by a Court of competent jurisdiction. The said decree is joint and several and remains unsatisfied. Respondent No.1 is, therefore, a defaulter. Respondent No.1 has concealed this factum whilst filing his nomination paper. Respondent No.1 is, therefore, not only a defaulter but he is also guilty of concealment. He is, therefore, not qualified to be chosen or elected as a member of the Majils-e-Shoora (Parliament). Relies on the judgments reported as "Rao Tariq Mehmood v. Election Tribunal, Punjab and another" (PLD 2003 Lahore 169) and "Dr. Shaukat Ilahi v. Ch. Mubashar Hussain and another" (2008 CLC 341) in support of his contentions.

4. The learned counsel for respondent No.1 at the outset has presented certified copies from the SECP to contend that respondent No.1 has neither been a shareholder nor a director of the company nor its chief executive at any point in time. Further submits that the appellant has deliberately tried to create the impression that respondent No.1 is the chief executive of the company. This information is false to the knowledge of the appellant.

5. The learned counsel for respondent No.1 further submits that the instant appeal is mala fide. The appellant never raised these objections before the learned Returning Officer at the time of scrutiny. This appeal is, therefore, not maintainable. Further submits that even otherwise no case is made out against respondent No.1 as firstly he is neither a shareholder nor a director of the company who is purported to have availed of the finance facility from the appellant. Respondent No.1 only stood as a guarantor and is not a beneficiary of the finance facility. In order to be adjudged a defaulter a candidate should hold shares of a company individually or along with his spouse and children or dependents equivalent to 51% or more of the company's shareholding. In the instant case the appellant does not even hold a single share in the company. He is only a guarantor and thus cannot be held liable for the default of the company, if any. Contends that section 12 read with sections 68 and 99 of the Act, ibid, clearly lay down that a guarantor is not included in the persons mentioned in section 12 of the Act, ibid, for the reasons that the words, "...in his own name or in the name of his spouse or dependent or any business concern mainly owned..." by a candidate rule out the inclusion of any other person who is to be designated as a person who has taken a loan and is in default thereof Relies on the judgments reported as "Sardar Talib Hussain Nakai v. Returning Officer and another" (1993 MLD 2485), "Haji Ghulam Sabir Ansari v. Returning Officer" (1993 MLD 2508), "Ch. Muhammad Aslam Kaira v. Returning Officer, PP-96, Gujra-6" (1994 MLD 424), "Ghulam Mustafa Jatoi v.

Additional District and Sessions Judge/Returning Officer, NA.158, Naushero Feroze and others (1994 SCMR 1299).

6. Further contends that none of the provisions of Articles 62 and 63 of the Constitution is an impediment to the candidature of respondent No.1. The primary liability is that of the company, its directors and shareholders and not of respondent No.1.

7. In response to the objection raised by the learned counsel for respondent No.1 that the appellant has mala fide tried to create the impression that respondent No.1 is the chief executive of the company, the learned counsel for the appellant submits that the said ground has been raised in the Memo of Appeal on the basis of a mistaken impression. Expresses his regret for the error and readily admits that the appellant was neither a shareholder nor a director of the company at the relevant time, respondent No.1, however, stood as a guarantor to the finance facility availed of by the company.

8. The learned counsel for the appellant further submits that the appeal has been filed under section 14(5A) of the Act, ibid, whereby the appellant has placed information before this Tribunal which information was concealed by respondent No.1 at the time of filing of his nomination paper. There is a decree against respondent No.1. He is a guarantor for repayment of the finance facility in question and his liability is co-extensive with that of the principal debtor. Relies on section 128 of the Contract Act, 1872.

9. Arguments heard. Record perused.

10. Admittedly, respondent No.1 is a guarantor to the finance facility having been availed of by the company. Admittedly, a decree in the sum of Rs.71.641 million, has been passed against the company and respondent No.1. We find that the decree is joint and several and is, therefore, executable against respondent No.1 also. The decree, however, remains unsatisfied to date even though it was passed on 24-7-2006 and was affirmed by the Hon'ble Supreme Court of Pakistan through its decision dated 20-3-2013.

11. The learned counsel for respondent No.1 has contended on the basis of Ghulam Mustafa Jatoi's case (supra) that since respondent No.1 is neither a shareholder nor a director of the company, which fact is admitted by the appellant, in order, therefore, for respondent No.1 to be adjudged a defaulter he should have a controlling share of the company with 51% shares or more either independently or along with his family or his dependents. On the basis of the same it has been contended that sections 12, 68 and 99 of

the Act, ibid, as also Articles 62 and 63 of the Constitution are not attracted in the case of respondent No.1. This argument does not come to the aid of the learned counsel for respondent No.1 inasmuch as the judgments relied upon by the learned counsel relate to cases where a decree has not been passed. The said judgments are, therefore, not attracted to the facts and circumstances of the case. In the instant case a decree has been passed against respondent No.1 and has been upheld by the Hon'ble Supreme Court. The decree as said above remains unsatisfied. Under the law the liability of a guarantor is co-extensive with that of the principal debtor. Reference is made to section 128 of the Contract Act, 1872, and the judgments reported as "Daewoo Corporation v. Messrs Platinum Insurance Company Limited" (1997 CLC 1272), "Rafique Hazquel Masih v. Bank Alfalah Ltd. and others" (2005 SCMR 72) and "Ch. Mubashar Husssain v. Returning Officer, Kharian, District Gujrat and 3 others" (PLD 2008 Lahore 134). Respondent No.1 is, therefore, liable to pay the decretal amount.

12. Respondent No.1 has admittedly not disclosed the fact of the passing of the decree against him in his nomination paper. Even if it were to be assumed that respondent No.1 is not liable to repay the finance facility availed of by the company still the factum of passing of the decree against him and it remaining unsatisfied to date should have been disclosed by respondent No.1 in his nomination paper. Respondent No.1 is, therefore, not only an adjudged defaulter in terms of section 14(5A) of the Act, ibid, but is also guilty of concealment of facts. The contentions of the learned counsel for respondent No.1 are, therefore, repelled.

13. The candidature of respondent No.1 is, therefore, hit by the provisions of Articles 62 and 63 of the Constitution read with section 14(5A) of the Act, ibid. Respondent No.1 's nomination papers are accordingly directed to be rejected and his name be deleted from the list of validly nominated candidates of NA-71.

14. Copies of this order be sent to the learned District Returning Office and the Returning Officer concerned for information and necessary action.

MH/A-62/L Appeal allowed.

2013 C L C 1323

[Lahore]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

AYAZ AMIR----Appellant

Versus

RETURNING OFFICER FOR NA-60, CHAKWAL and 2 others----Respondents

Election Appeal No.2 of 2013, decided on 10th April, 2013.

(a) Interpretation of document---

----Text has to be looked in totality---Words or phrases employed therein if looked at in isolation or out of context are always capable of being interpreted in a manner which does not convey actual meaning of full text.

(b) Representation of the People Act (LXXXV of 1976)---

----Ss. 14(5) & 99---Constitution of Pakistan, Arts.62 & 63---Nomination papers filed by candidate (a Journalist)---Disqualification---Injunctions of Islam, violation of---Proof---Column in newspaper by the candidate (appellant)---Interpretation---Returning Officer rejected nomination papers of appellant on the ground that in one of his column published in newspaper, it could be made out that he had tasted liquor and thus had violated Injunctions of Islam---Validity---Writings of appellant/candidate being in literary, metaphorical and allegorical style could not be narrowly interpreted---Even if it were not so, still one could not ignore the fact that individual words had more than one dictionary meaning and were, therefore, open to interpretation---No tangible proof was brought on record or any conviction of appellant for offences he was accused of by respondent from any court of competent jurisdiction to render appellant disqualified under Arts.62 & 63 of the Constitution---Proceedings of scrutiny of nomination papers were summary in nature and roving inquiry could not be conducted to establish if appellant had violated Injunctions of Islam or had called in question ideology of Pakistan---Returning Officer had erred while rejecting nomination papers of the appellant---Election Tribunal directed to place name of appellant in list of validly nominated candidates contesting election from the constituency and set aside order passed by Returning Officer---Appeal was allowed accordingly.

Khalil (Pvt.) Limited through Authorized Officer v. m.v. WALES II and 3 others 2012 CLD 276 ref.

(c) Administration of justice---

----Court, role of---Scope---Courts cannot assume the role of arbiter of morals.

Salman Akram Raja and Sameer Khosa for Appellant.

Khawaja Khalid Farooq and Nayyar Abbas for Respondent No.2.

ORDER

Through this appeal under section 14(5) of the Representation of the People Act, 1976, the appellant has challenged the order dated 4-4-2013 of the learned Returning Officer NA-60, PP-20 and PP-21 whereby the appellant's nomination papers for contesting the election to the National Assembly constituency/seat NA-60, Chakwal-I, have been rejected on the basis of the objections raised by respondents Nos.2 and 3.

2. The facts relevant for adjudication of the appeal are to the effect that the appellant is a freelance journalist by occupation and is also involved in local as well as national politics. The appellant has been elected from time to time to the Provincial as well as the National Assembly. The appellant filed his nomination paper for contesting the forthcoming election to the constituency/seat NA-60, Chakwal-I. During the process of scrutiny respondents Nos.2 and 3 raised objections against the candidature of the appellant by, inter alia, submitting that the appellant is not qualified under Article 62 and/or is disqualified under Article 63 of the Constitution of the Islamic Republic of Pakistan, 1973, to be elected or chosen as a member of Majlis-e-Shoora (Parliament). The objections were raised on the basis of the appellant's columns published in the various dailies including the Urdu language daily "Jang" and the English language daily "The News". The impugned order was passed on the basis of one particular column which was published under the appellant's name in the daily `Jang' of 1-12-2012 in the form of an obituary on the demise of Ardeshir Cowasjee, a renowned Pakistani who belonged to the Parsi Community. Respondent No.1 on the basis of the said column held that through the column it is established that the appellant has had a taste of liquor, that being so the appellant has violated the injunctions of Islam and his candidature is hit by the provisions of Article 62 of the Constitution. As a consequence, the appellant's nomination papers were rejected.

3. The learned counsel for the appellant contends that the appellant has written innumerable articles/columns in various newspapers/journals. The appellant writes his articles/columns in the English language and employs literary language and his articles/columns also contain metaphors and allegorical references. The column in question was an Urdu translation of one of the columns written by the appellant in the English language. Even though the appellant did not author the translation, however, he owns it as it was published under his name. Respondent No.1 has made a very narrow interpretation of the translated column. The 'offending' words used in the column are capable of many interpretations. Respondent No.1 has erred in using a subjective approach. Respondent No.1 has further erred in interpreting the column in the manner in which it has been done. There is no admission by the appellant of imbibing alcohol in the column but respondent No.1 has read a different meaning into the words used in the column. Assuming without conceding that the appellant has spoken of consumption of alcohol in the column then that would not amount to an admission rendering the appellant liable to being disqualified. It is settled law that an admission must be clear, unambiguous and unequivocal in order to have any effect in law. Relies on the judgment reported as Khalil (Pvt.) Limited through Authorized Officer v. m. v. WALES II and 3 others (2012 CLD 276).

4. Further submits that the words employed by the appellant were of a literary nature and are open to various interpretations/explanations. If the reasoning of respondent No.1 is to be accepted then one of the fundamental rights of the appellant which has been guaranteed by Article 19 of the Constitution i.e. freedom of speech and expression, would be circumscribed. Further contends that Article 62(1)(d) of the Constitution relates to a person who is commonly known as one who violates Islamic injunctions. Article 62(1)(d) clearly requires that there must be common knowledge of continuous repeated violations of Islamic injunctions by a candidate to render him disqualified. There is nothing on the record for establishing the same.

5. Further contends that the incident being referred to took place more than 30 years back and if an offence is alleged to have been made out then an F.I.R. should have been lodged for trial and conviction of the appellant rather than having him disqualified. Since there is no conviction of the appellant the objectors could not have had the appellant disqualified by using the backdoor.

6. The learned counsel for respondent No.2 has filed C.M.No.1-E of 2013 and C.M.No.2-E of 2013 whereby he has prayed that his C.M.No.1-E of 2013 may be treated as a cross-objection and he may also be allowed to place on record certain documents in support of his contentions. Notices were issued in the said C.Ms which have been accepted by the learned counsel for the appellant.

7. The learned counsel for respondent No.2 submits that respondents Nos.2 and 3 had raised a number of objections against the candidature of the appellant. Respondent No.1, through the impugned order, has, however, given a finding on only one objection raised by respondents Nos.2 and 3. The candidature of the appellant is hit by the provisions of Article 62(1)(d) as also Article 63(1)(g) of the Constitution inasmuch as not only is the appellant a person who is commonly known to be one who violates Islamic injunctions but he has also called into question the ideology of Pakistan. Further submits that the appellant has also outraged the sense of morality/religion of the citizens of Pakistan. Reference in this regard has been made to various columns published in the Urdu language in the Daily `Jang' and other publications and Verses 57 and 58 of Surah Maidah and Verse 9 of Surah Jumah of the Holy Quran. Further submits that after passing of the impugned order the appellant made certain disparaging remarks against respondent No.1 which tantamount to bringing the judiciary into ridicule. The appellant is, therefore, not qualified and/or is disqualified to contest the election for the seat in question.

8. Arguments heard. Record perused.

9. We would first of all advert to C.Ms Nos.1-E and 2-E of 2013 filed by respondent No.2. There is no provision under the Act, ibid, for filing of cross objections, however, since the learned counsel for the appellant has accepted notices in the C.Ms. we intend to consider the objections raised by respondent No.2 through the said C.Ms.

10. Admittedly the impugned order has been passed on the basis of only one column having been published in the Urdu language under the name of the appellant. The appellant owns

the column. The other objections raised by the learned counsel for respondent No.2 are in respect of various other columns of the appellant by virtue of which it has been contended by the learned counsel that the appellant has run afoul of the provisions of Articles 62(1)(d) and 63(1)(g) of the Constitution.

11. One of the cardinal principles of interpretation or appreciation of a text is to look at it in totality. Words or phrases employed therein if looked at in isolation or out of context are always capable of being interpreted in a manner which does not convey the actual meaning of the full text or as in this case the articles/columns.

12. It is also universally accepted that literary works are capable of being interpreted in a number of ways. This is exemplified by the fact that literature is taught as a subject at High School, College and University level all over the world in respect of almost all the written and spoken languages of the world. Students conduct research on the works of authors/poets and as a consequence are awarded masters as well as doctoral degrees. One can, therefore, safely say that literary works do not admit of a narrow interpretation.

13. We, therefore, tend to agree with the contention of the learned counsel for the appellant that the writings of the appellant being in the literary, metaphorical and allegorical style cannot be narrowly interpreted. Even if it were not so, still one cannot ignore the fact that individual words have more than one dictionary meaning and are, therefore, open to interpretation. The learned counsel for respondent No.2 has referred to selective sentences and/or words in the various columns purported to have been written by the appellant. If we were to agree with the learned counsel for respondent No.2 and accept that a narrow interpretation of the said sentences/words should be made and/or those sentences and words should be considered in isolation without reference to their context and/or their proper perspective then we would be falling into error.

14. Some of the columns referred to by the learned counsel for respondent No.2 are not from the original source and are purported reproductions of the appellant's columns. Reliance, therefore, cannot be placed on these columns.

15. No tangible proof has been brought on the record or indeed any conviction of the appellant for the offences he is accused of by respondent No.2 from any Court of competent jurisdiction to render the appellant disqualified under Articles 62 and 63 of the Constitution. The instant proceedings are summary in nature and we cannot conduct a roving inquiry to establish if the appellant has violated the injunctions of Islam or called into question the ideology of Pakistan.

16. Even otherwise, Courts cannot assume the role of arbiter of morals.

17. As to the other contentions of the learned counsel for respondent No.2 they are mainly based on newspaper reports which are not normally relied upon by Courts.

18. We, therefore, find that respondent No.1 has erred whilst passing the impugned order. It is accordingly set aside and it is directed that the appellant's name be placed forthwith in

the list of validly nominated candidates contesting the elections to the National Assembly constituency/seat NA-60, Chakwal-I.

19. Copies of the order be sent to the learned District Returning Officer and the Returning Officer for information and necessary action.

MH/A-61/L Appeal allowed.;

2013 C L C 1406

[Lahore]

Before Rauf Ahmad Sheikh and Mamoon Rashid Sheikh, JJ

Mst. GHAZALA YASMEEN and 3 others----Appellants

Versus

SARFRAZ KHAN DURRANI----Respondent

Regular First Appeal No.511 of 2011, heard on 10th May, 2012.

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

----S. 12---Contract Act (IX of 1872), S.55---Suit for specific performance of sale agreement---Sale agreement found mention that suit property was standing in name of defendant's predecessor, which he was bound to transfer in his name by stipulated date i.e. 30-4-2007; and that in case plaintiff failed to pay balance amount on or before stipulated date, then earnest money would stand forfeited and agreement would stand cancelled---Defendant's plea was that time was essence of the contract, thus, he was not bound by agreement after failure of plaintiff to pay balance amount by stipulated date---Validity---Suit agreement was based on principle of reciprocity as both parties had to fulfil certain conditions---Evidence on record showed that transfer of property in defendant's name from his predecessor was effected on 28-3-2007, but he had not given notice thereof to plaintiff before 30-4-2007 for completing contract by paying him balance money and executing sale-deed in plaintiff's favour---Plaintiff had shown his readiness to perform his part of agreement by depositing balance amount as per order of court---Time was not essence of suit agreement---Suit was decreed in circumstances.

Malik Tanvir Ali and another v. Sardar Ali Imam and 2 others 2010 YLR 1799; Ghulam Nabi and others v. Seth Muhammad Yaqoob and others PLD 1983 SC 344; Mst. Amina Bibi v. Mudassar Aziz PLD 2003 SC 430; Muhammad Nawaz Khan and another v. Mst. Farrah Naz PLD 1999 Lah. 238 and Haji Barkat Ali v. Tariq Mahmood 2002 YLR 3096 ref.

(b) Contract Act (IX of 1872)---

----S. 55---Contract for sale of immovable property---Time as essence of such contract or not, determination of---Test stated.

Normally in cases other than commercial contracts, that is to say, in contracts relating to immovable property even when a date is mentioned for the performance of the contract, time is not of the essence of the contract. In determining whether time is of the essence of the contract or not, the intention of the parties in this behalf has to be gathered from the contents of the contract itself and the facts and circumstances of the case.

Seth Essa Bhoy v. Saboor Ahmad PLD 1973 SC 39; Abdul Hamid v. Abbas Bhai-Abdul Hussain Soda Water Wala PLD 1962 SC 1; rel.

(c) Pleadings---

----Plea not raised in pleadings---Effect---Evidence beyond pleadings could neither be led by a party nor could be allowed by Court---Evidence beyond pleadings if was brought on record, then same could neither be read nor considered---Party could not be allowed to improve his case through evidence, if such fresh stance had not been set up in pleadings---Illustration.

Muhammad Iqbal v. Ali Sher 2008 SCMR 1682 and Irshad Begum v. Muhammad Rafique PLD 2010 Lah. 649 rel.

Ahsan Shahzad for Appellants.

Ibrar Ahmad for Respondent.

Date of hearing: 10th May, 2012.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- The brief facts giving rise to this appeal are to the effect that the appellants entered into an agreement to sell dated 19-1-2007 ("the agreement") with the respondent in respect of a plot of land measuring 11 kanals, 2 marlas and 40 sq. ft. and the house/superstructure constructed thereon commonly known as House No.162-N, Model Town (Extension), Lahore ("the property"), for a total consideration of Rs.1,00,00,000/-. At the time of the agreement the respondent paid Rs.20,00,000/- to the appellants, out of which amount Rs.1,00,000/- was paid as token money whereas Rs.19,00,000/- was paid as earnest money. The said amounts were paid by the respondent to the appellants through two cheques dated 19-1-2007 drawn on the Bank of Punjab, Model Town Branch, Lahore. The balance consideration in the sum of Rs.80,00,000/- was to be paid on or before 30-4-2007. It was further agreed that the sale-deed would be executed upon payment of the balance consideration. This was, however, subject to completion of the necessary formalities/documents by the appellants for transfer of the

property with a clear and marketable title as the property was in the name of the appellants' predecessor-in-interest. The sale-deed was, however, not executed and on 23-5-2008 the respondent filed a suit for specific performance of the agreement, permanent injunction, recovery of possession and damages against the appellants. Thereafter, on 8-7-2008 the appellants filed a suit for "cancellation of the agreement to sell with consequential relief". Both suits were resisted by the respective defendants. However, as common questions of facts and law were involved therein, on 20-6-2009, both suits were consolidated and the following consolidated issues were framed:

(1) Whether the plaintiffs are entitled to the cancellation of the agreement to sell on the ground as agitated in the plaint? OPP Faisal Waheed etc.

(2) Whether the plaintiff Sarfraz Khan Durrani is entitled to specific performance of the agreement and recovery of possession along with permanent injunction as asked for in the plaint? OPP Sarfraz Khan Durrani.

(3) Whether the plaintiffs have no cause of action to file the present instant suit? OPD

(4) Whether the plaintiffs are estopped by their own conduct to file the instant suit? OPD

(5) Whether the suit of the plaintiffs Faisal Waheed etc. being not maintainable is liable to be dismissed with special costs? OPD

(6) Whether the suit of the plaintiffs, Sarfraz Khan Durrani being not maintainable is liable to be dismissed with special costs? OPD

(7) Relief.

2. The parties led their respective evidence and on the basis of the same the learned trial Court through a consolidated judgment dated 2-5-2011 decided Issues Nos.1 to 4 and 6 against the appellants whereas Issue No.5 was decided against the respondent. As a consequence, the respondent's suit for specific performance was decreed whereas the appellants' suit for cancellation of the agreement was dismissed.

3. Through the instant appeal the appellants have only challenged the decree dated 2-5-2011 in favour of the respondent whereby his suit for specific performance has been decreed.

4. The learned counsel for the appellants submits that the impugned judgment and decree dated 2-5-2011 has been passed by the learned trial Court by misappreciation of facts and misapplication of law. The impugned judgment is based on misreading and non-reading of evidence. Further submits that the learned trial Court failed to appreciate that by virtue of the provisions of sections 22(11) and 28(b) of the Specific Relief Act, 1877, the respondent's suit could not have been decreed. Also contends that the learned trial Court failed to appreciate that time was of the essence of the contract. Indeed, the main thrust of the learned counsel's

arguments is based on this premise. The terms of the agreement relating to failure on the part of the respondent in performing his part of the contract (agreement) were quite clear in that in case the respondent did not pay the balance consideration in the sum of Rs.80,00,000/- on or before 30-4-2007 then the token money and the earnest money paid by him in the sum of Rs.1,00,000/- and Rs.19,00,000/- respectively was liable to be forfeited and as a consequence the agreement would stand cancelled. The respondent failed to pay the balance consideration within the stipulated period, therefore, the agreement stood cancelled. The learned trial Court has erred in holding otherwise. Further contends that the learned trial Court failed to appreciate that subsequent to entering into the agreement with the respondent the appellants on 12-2-2007 entered into an agreement to sell with one Mian Abdul Karim for purchase of his House No.9-E, Punjab Cooperative Housing Society, Lahore, for a consideration of Rs.95,00,000/- and paid Rs.16,00,000/- to him as token money out of the sum of Rs.20,00,000/- the appellants had received from the respondent as token/earnest money under the agreement. The transaction under the subsequent agreement to sell was to be completed by the appellants on or before 30-4-2007. As the respondent did not pay the balance amount to the appellants in time, therefore, the subsequent deal made by the appellants fell through, with the result that the appellants suffered loss.

5. The learned counsel for the respondent controverts the stance of the learned counsel for the appellants. Contends that time was not of the essence of the contract. Indeed, the agreement was conditional inasmuch as the balance payment was to be made only when the appellants had completed the formalities/documentation re-transfer of the property. At the time of entering into the agreement i.e. on 19-1-2007 the property did not stand in the name of the appellants. As per the record of the Lahore Development Authority (LDA) (which is the controlling Authority of the property) the property still stood in the name of the predecessor-in-interest of the appellants. The property was subsequently transferred in the name of the appellants on 28-3-2007. As per the agreement the appellants were duty bound to inform the respondent that the formalities/documentation regarding transfer of the property had been completed as this was the basic stipulation contained in the agreement. The appellants, however, did not give any notice to the respondent in this respect nor did they demand that the balance payment be made. Further contends that the factum of the appellants having entered into a subsequent agreement to purchase the property from Mian Abdul Karim is an afterthought. The respondent was never informed by the appellants that they had entered into any such agreement. Even otherwise, the agreement between the parties has no nexus with the agreement entered into by the appellants with Mian Abdul Karim. Moreover, in the plaint filed by the appellants in their own suit and the written statement filed by the appellants in the respondent's suit no mention of the subsequent agreement has been made. Any evidence led by the appellants in this behalf could not have

been read or considered by the learned trial Court which in fact it did not. It is a cardinal principle of law that evidence oral or documentary led by the parties beyond their pleadings cannot be read or considered by the Courts. Further contends that it has been established on the record that the respondent was ready and willing to perform his part of the agreement, however, the appellants kept on delaying the matter on one pretext or the other primarily with a view to extracting a higher price of the property from the respondent. Relies on the judgments reported as Malik Tanvir Ali and another v. Sardar Ali Imam and 2 others (2010 YLR 1799), Seth Essa Bhoy v. Saboor Ahmad (PLD 1973 SC 39), Ghulam Nabi and others v. Seth Muhammad Yaqoob and others (PLD 1983 SC 344), Abdul Hamid v. Abbas Bhai-Abdul Hussain Soda Water Wala (PLD 1962 SC 1), Mst. Amina Bibi v. Mudassar Aziz (PLD 2003 SC 430) and Muhammad Nawaz Khan and another v. Mst. Farrah Naz (PLD 1999 Lahore 238) in support of his contentions.

6. Arguments heard. Record perused.

7. The basic Issues which required determination for adjudication of the suits between the parties were Issues Nos.1 and 2 as quoted in para 1 above. The learned trial Court has decided both Issues against the appellants. The learned trial Court has based its decision partly on the contents of the agreement and partly on the oral evidence led by the parties.

8. The basic document, therefore, which requires examination for deciding the appeal is the agreement between the parties. The agreement is an admitted document and the original thereof has consequently been adduced in evidence as Exh.D/1. Both parties in support of their contentions have placed reliance on the terms and conditions contained in the agreement which are, inter alia, to the effect that the appellants agreed to sell and the respondent agreed to purchase the property for a total consideration of Rs.1,00,00,000/-. At the time of signing of the agreement on 19-1-2007 the respondent paid a sum of Rs.20,00,000/- to the appellants by way of token/earnest money. The balance consideration in the sum of Rs.80,00,000/- was to be paid on or before 30-4-2007. It was further mentioned in the agreement that the property is in the name of the predecessor-in-interest of the appellants and they have been declared as his legal heirs through a declaratory decree dated 18-12-2006 passed by the Civil Court, Lahore. The property is being sold by the appellants in their capacity as the legal heirs of their predecessor-in-interest. It was further stipulated that the appellants are bound to complete the formalities and/or documentation in respect of the transfer of the property including but not limited to transfer of the property in their names in the record of the LDA on or before 30-4-2007. At the same time it was stipulated that if the respondent does not pay the balance consideration on or before 30-4-2007 then the token/earnest money would stand forfeited and the agreement shall stand cancelled.

9. Appellants Nos.2 and 3 entered into the witness-box as P.W.-1 and P.W.-2. They deposed that as the respondent had not completed the transaction by the cut-off date i.e. 30-4-2007, therefore, the appellants were no longer bound by the agreement. The appellants were within their rights to forfeit the token/earnest money as per the terms of the agreement and as a result the agreement was liable to be cancelled. However, during the course of cross-examination they admitted that at the time of entering into the agreement i.e. on 19-1-2007 the property still stood in the name of their predecessor-in-interest in the record of the LDA. They had been declared the legal heirs of their predecessor-in-interest through a declaratory decree. It was, however, only on 28-3-2007 that the property was transferred in the record of the LDA from the name of their predecessor-in-interest in the names of the appellants. It was further admitted that the appellants did not give any notice to the respondent in respect of the transfer of the property nor did they give any notice to the respondent before 30-4-2007 for completion of the contract and/or payment of the balance consideration and execution of the sale-deed on/or before 30-4-2007. The evidence of the appellants also reveals that the appellants did not complete the other formalities for transfer of the property in the names of the appellants as stipulated in the agreement before the cut-off date. The learned trial Court has considered all these aspects whilst passing the decree against the appellants.

10. It is a well-settled principle of law that normally in cases other than commercial contracts that is to say in contracts relating to immovable property even when a date is mentioned for the performance of the contract time is not of the essence of the contract. It is also a settled principle of law that in determining whether time is of the essence of the contract or not the intention of the parties in this behalf has to be gathered from the contents of the contract itself and the facts and circumstances of the case. Reliance in this regard is inter alia placed on the judgments reported as Abdul Hamid v. Abbas Bhai-Abdul Hussain Soda Water Wala (PLD 1962 SC 1) and Seth Essa Bhoy v. Saboor Ahmad (PLD 1973 SC 39).

11. The terms and conditions of the agreement have been given in some detail hereinabove. As will be evident the agreement is based on the principle of reciprocity. Both parties were to fulfil certain conditions. The appellants were responsible for completing all formalities for passing on a marketable title to the respondent. Admittedly at the time of entering into the agreement the property did not stand in the names of the appellants. It was after a passage of two months that the names of the appellants were entered into the record of the LDA as the owners of the property in place of their predecessor-in-interest. The appellants admittedly did not give any notice of this fact to the respondent. The appellants similarly failed to give any notice to the respondent for due performance of the agreement by 30-4-2007. The respondent on the other hand has shown his readiness to

perform his part of the agreement by depositing the balance consideration in the amount of Rs.80,00,000/- in the Government Treasury albeit on the direction dated 8-7-2009 of the learned trial Court.

12. We, therefore, tend to agree with the learned counsel for the respondent that in the facts and circumstances of the case time is not of the essence of the contract. The contention, therefore, of the learned counsel for the appellants that the learned trial Court failed to appreciate that time was of the essence of the contract is repelled.

13. The learned counsel for the appellants placed reliance on sections 22(11) and 28(b) of the Specific Relief Act, 1877, to contend that the impugned judgment and decree could not have been passed in the facts and circumstances of the case. In order to appreciate the contention of the learned counsel the provisions of the said sections are being reproduced hereunder for ease of reference:

Section 22 of the Specific Relief Act, 1877

"22. Discretion as to decreeing specific performance.--- 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 principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

Illustrations

A, tenant for life of certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell that interest. Before the contract is completed, A receives a mortal injury from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact, and C did not. Specific performance of the contract should be refused to B.

A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth noting. In fact, the value of C's interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. The indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(c) A contracts to sell and B contracts to buy certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A.

(d) A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to complete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations

(e) Omitted by the Specific Relief (Amendment) Ordinance, XXII of 1983, S.3.

(f) A and B, trustees, join their beneficiary, C, in a contract to sell the trust-estate to D, and personally agree to exonerate the estate from heavy encumbrances to which it is subject. The purchase-money is not nearly enough to discharge those encumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(g) A, the owner of an estate, contracts to sell it to B, and stipulates that he, A, shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claims to the unknown property.

(h) A contracts with B to sell him certain land, and to make a road to it from, a certain railway station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(i) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(j) A contracts to buy certain land from B. The contract is silent as to success to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

(k) A contracts with B to buy from B's manufactory and not elsewhere all the goods of a certain class used by A in his trade. The Court cannot compel B to supply the goods, but if he does not supply them, A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

The following is a case in which the Court may properly exercise a discretion to decree specific performance:

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustrations

A sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

Section 28 of the Specific Relief Act, 1877

"28. What parties cannot be compelled to perform: Specific performance of a contract cannot be enforced against a party thereto in any of the following cases:

(a) ……..……..

(b) if his assent was obtained by the misrepresentation (whether willful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;

(c) ……"

As will be clear section 22 of the Act, ibid, confers a discretionary power on the Court to decree a suit for specific performance, however, the discretion of the Court is not arbitrary and has to be exercised on sound and reasonable grounds guided by judicial principles. Section 22 of the Act, ibid, then goes on to give instances of Cases, which are two in number, where specific performance may be refused; and an instance of one case where a decree for specific performance may be granted. So far as the Cases for refusal are concerned the first one is where the plaintiff has an unfair advantage over the defendant and the second case which is relevant to the instant appeal, as urged by the learned counsel for the appellants, is where the performance of the contract would create some hardship to the

defendant. The hardship contemplated by Case-II in section 22 of the Act, ibid, is to be of such a nature which cannot be foreseen by the parties at the time of entering into the contract. Although the learned counsel for the appellants has laid great stress on the provisions of Case-II of section 22 of the Act, ibid, yet he has been unable to establish from the record that performance of the agreement would give an unfair advantage to the respondent or indeed involves some hardship to the appellants which they had not foreseen at the time of entering into the agreement. The reliance, therefore, placed by the learned counsel for the appellants on the provisions of Case-II of section 22 of the Act, ibid, does not come to the aid of the appellants. We are fortified in our view on the basis of the judgment reported as Haji Barkat Ali v. Tariq Mahmood (2002 YLR 3096).

As to the applicability of section 28(b) of the Act, ibid, suffice it to say that the learned counsel for the appellants has similarly been unable to establish from the record any instances of misrepresentation, concealment, circumvention or unfair practice attributable to the respondent. The contention of the learned counsel is, therefore, repelled.

14. As to the contention of the learned counsel for the appellants that due to the breach having been committed by the appellants the subsequent agreement entered into by the appellants for purchase of the property from one Mian Abdul Karim fell through thereby causing loss to the appellants suffice it to say that these facts have not been pleaded by the appellants in their pleadings in both suits. They have, however, led evidence in this behalf but the same can neither be read nor considered as it is a settled principle of law that a party cannot lead evidence beyond its pleadings. In the first place the trial court should not allow such evidence to be led, however, if such evidence is brought on the record the same is neither to be considered nor read. Similarly a party cannot be allowed to improve its case through evidence if its (fresh) stance has not been set up in the pleadings. Reliance in this regard is placed on the judgments reported as Muhammad Iqbal v. Ali Sher (2008 SCMR 1682) and Irshad Begum v. Muhammad Rafique (PLD 2010 Lahore 649). The contention of the learned counsel is, therefore, repelled being misconceived.

15. Another factor which is worth noting is that although the appellants' suit for cancellation of the agreement was dismissed through the consolidated judgment and decree dated 2-5-2011 yet the appellants have not filed an appeal against the decree whereby the suit was dismissed. The learned counsel for the appellants has not been able to give a plausible explanation for non-filing of the said appeal by the appellants. This factor in itself goes to further weaken the appellants' case.

16. Under the circumstances, the appeal fails and is dismissed accordingly. The parties are left to bear their own costs.

SAK/G-21/L Appeal dismissed.

2013 C L C 1439

[Election Tribunal Punjab]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

ATTA UL MUSTIFA JAMIL----Appellant

Versus

CHIEF ELECTION COMMISSIONER and others----Respondents

Election Appeal No.108 of 2013, decided on 17th April, 2013.

Representation of the People Act (LXXXV of 1976)---

----Ss. 12 & 14---Constitution of Pakistan, Arts.62 & 63---Appellant impugned the order whereby nomination papers of the respondent were accepted by the Returning Officer---Contention of the appellant was inter alia that the respondent had misdeclared and concealed facts and information relating to his assets and liabilities and that according to information available with the State Bank of Pakistan, the respondent was a defaulter as well---High Court called for a report from the Regional Office of the State Bank of Pakistan, and Chief Manager of the State Bank of Pakistan presented a certificate in the court which stated that the respondent had returned the full amount that was overdue before filing his nomination papers---On basis of said certificate, case of candidate was not hit by the Arts.62 and 63 of the Constitution, appeal was dismissed.

Muhammad Farooq Bedar for Appellant.

Muhammad Siddique Awan and Syed Abu Zar Pirzada for Respondent No.3.

Abdul Ghafoor, Accounts Officer, State Bank of Pakistan, Rawalpindi. Obaid-ur-Rehman, Assistant Director, State Bank of Pakistan, Rawalpindi.

ORDER

MAMOON RASHID SHEIKH, J.--- Through this appeal the appellant has challenged the order dated 6-4-2013 of the learned Returning Officer, NA-58, Attock-II, whereby the nomination paper of respondent No.3 has been accepted.

2. The learned counsel for the appellant submits that the candidature of respondent No.3 is hit by the provisions of Articles 62 and 63 of the Constitution of the Islamic Republic of Pakistan, 1973, inter alia for the reasons that respondent No.3 has concealed facts as also misdeclared information regarding his assets, liabilities and government dues. Further submits that respondent No.3 is admittedly the owner of 845 kanals agricultural land but he has not made the requisite declaration regarding his agricultural income and the

agricultural income tax paid thereon. Respondent No.3 has not disclosed the correct details of the foreign trips and the expenditure incurred thereon in respect of himself, his spouse and dependants. Respondent No.3 has further mentioned that he does not owe any amount/loan to any bank or financial institution. According to the information obtained by the appellant from the website of the State Bank of Pakistan respondent No.3 is a defaulter. Refers to Page 44 of the appeal.

3. The learned counsel for the appellant contends that in view of the above concealment and misdeclaration the candidature of respondent No.3 is not only hit by the provisions of Article 62(1)(f) of the Constitution but also by sections 12, 13, 14 and 99 of the Representation of the People Act, 1976. Prays that the nomination paper of respondent No.3 may be rejected.

4. The learned counsel for respondent No.3 controverts the stance of the learned counsel for the appellant and submits that respondent No.3 has made full disclosure in his nomination paper and has appended the requisite documents therewith. In view thereof it is evident that respondent No.3 is neither guilty of concealment nor withholding of information nor is he a defaulter of any bank or Government Department. The learned counsel for respondent No.3 has presented certificates from the Al-Baraka Bank, Askari Bank and MCB Bank Ltd. in support of his contentions. He has also referred to the certificates dated 25-3-2013 issued by the Tehsildar, Pindi Gheb which are available at Pages 102 to 104 of the record of the learned Returning Officer, to contend that no amount is due from respondent No.3 in respect of agricultural tax. Further submits that respondent No.3 is Income Tax assessee and has paid millions of rupees by way of Income Tax which fact is very much clear from the copies of the Income Tax Returns filed by respondent No.3 along with his nomination paper. Further contends that the reliance placed by the learned counsel for the appellant on the record of the State Bank of Pakistan is erroneous as respondent No.3 placed on record the latest report of the State Bank of Pakistan which shows that respondent No.3 does not owe any amount to any bank/financial institution.

5. We have heard the arguments of the learned counsel for the parties and have gone through the record.

6. On the basis of the submissions made before us as also the record of the learned Returning Officer we find substance in the contentions of the learned counsel for respondent No.3. However, we were not satisfied as to the status of the reports of the State Bank of Pakistan vis-a-vis respondent No.3 being a defaulter or not. We, therefore, called

for a report from the Regional Office of the State Bank of Pakistan and today the Chief Manager, State Bank of Pakistan, Rawalpindi, has issued a certificate which has been submitted before us by the Assistant Director, State Bank of Pakistan, Rawalpindi. The said certificate reads as under:---

"It is humbly submitted on behalf of the State Bank of Pakistan that:

"We have provided report of the candidates to ECP who have defaults/write-off of Rs.2 million and above for last one year. In the attached report, Malik Sohail is defaulter of 1.7 million as on Feb. 28, 2013. As per attached report subsequent payment was also made by the candidate of 1.7 million overdue amount on March 6, 2013 and March 26, 2013."

7. In view of the above, we find that the instant appeal lacks merit and is dismissed accordingly.

8. Copies of this order be sent to the learned District Returning Officer and the Returning Officer concerned for information and necessary action.

KMZ/A-88 Appeal dismissed.

2013 C L C 1570

[Lahore]

Before Rauf Ahmad Shaikh and Mamoon Rashid Sheikh, JJ

SHAUKAT ULLAH KHAN BANGASH----Appellant

Versus

ADIL TIWANA and others----Respondents

Regular First Appeal No.17 of 2006, heard on 4th April, 2013.

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

----S. 12---Contract Act (IX of 1872), S.55---Suit for specific performance of agreement to sell---Time as essence of contract or not---Scope---Time would not be essence of contract in absence of any clause therein providing penalty for its non-performance by vendee---Illustration.

Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala PLD 1962 SC 1; Ghulam Nabi and others v. Seth Muhammad Yaqub and others PLD 1983 SC 344; Mst. Gulshan Hamid v. Kh. Abdul Rehman and others 2010 SCMR 334; Muhammad Taj v. Arshad Mehmood and 3 others 2009 SCMR 114; Attaullah alias Qasim v. The State PLD 2006 Kar. 206; Sandoz Limited and another v. Federation of Pakistan and others 1995 SCMR 1431; Fmt. Chand Rani (dead) by L.R. v. Fmt. Kamal Rani (dead) by L.Rs. AIR 1993 SC 1742; Messrs Imperial Builders through Managing Partner and another v. LINES (Pvt.) Ltd. through Chief Executive and 3 others PLD 2006 Kar. 593; Mst. Batul and others v. Mst. Razia Fazal and others 2005 SCMR 544 and Mst. Mehmooda Begum v. Syed Hassan Sajjad and 2 others PLD 2010 SC 952 ref.

(b) Contract Act (IX of 1872)---

----S. 55---Immovable property, agreement relating to---Time as easence of contract---Determining factors stated.

Normally in cases other than commercial contracts that is to say in contracts relating to immovable property, even when a specific date is mentioned for performance of the contract, time is not reckoned to be of the essence of the contract. In determining whether time is of the essence of the contract or not, the intention of the parties in this behalf has to be gathered from the contents of the contract itself and the attending circumstances.

Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala PLD 1962 SC 1 and Seth Essa Boy v. Saboor Ahmad PLD 1973 SC 39 rel.

(c) Administration of justice---

----Courts can and do take notice of subsequent events.

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

----S. 22---Specific performance of contract, relief of---Discretion of Court---Scope---Court in order to grant such relief would have to exercise its discretion in accordance with settled and fixed principles of law---Party seeking equity must have to do equity himself, even if contract was unobjectionable in nature.

Syed Zulfiqar Abbas Naqvi for Appellant.

Syed Ishtiaq Haider Sherazi for Respondents.

Date of hearing: 4th April, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- This appeal under section 96 of the Code of Civil Procedure, 1908, has been filed against the judgment and decree dated 20-2-2006 passed by the learned Senior Civil Judge, Rawalpindi, whereby the appellant's suit for specific performance of contract has been dismissed.

2. The facts relevant for the present purposes are to the effect that on 13-7-1995, at Rawalpindi, the appellant entered into an agreement to sell ("the Agreement") with the father of the respondents in respect of the lease hold rights (Old Grant) of Plot No.288, measuring 1.36 acres, together with the superstructure thereon, bearing Khasra No.435 situated at Peshawar Road, Rawalpindi Cantt. (hereinafter referred to as "the Property"), for a total consideration of Rs.1,25,00,000/-. At the time of execution of the Agreement the appellant paid Rs.25,00,000/- (through a cheque) as advance money to the father of the respondents. Pursuant to Clause-2 of the Agreement, through a Registered General Power of Attorney ("the GPA"), of even date, the father of the respondents appointed the appellant as his General Attorney in respect of the Property empowering him to sell the Property with the stipulation, however, that the GPA would become operative once the balance consideration was paid and till such time the GPA would remain in the custody of the father of the respondents. Clause-3 of the Agreement stipulated that the balance consideration in the sum of Rs.100,00,000/- was to be paid by the appellant on or before 31-12-1995 and upon payment of the balance consideration the sale-deed was to be executed and/or the GPA was to become operative in connection with the transfer of the Property. The appellant subsequently deposited a sum of Rs.10,00,000/- in the bank account of the father of the respondents before the cut-off date i.e. 31-12-1995, however, the remaining balance consideration was not paid by the said date. In the month of January, 1996, the appellant through his father contacted the father of the respondents for execution of the sale-deed. The appellant's father was informed that the respondents' father who was resident at Lahore would visit the appellant around the 15th or 20th of January, 1996, for completion of the contract. However, the respondents' father failed to turn up on the said dates. The appellant, therefore, contacted the respondents' father telephonically on 3-2-1996 but was informed by the mother of the respondents that the respondents' father was in Islamabad. The appellant, therefore, contacted the respondents' father at his cousin's residence at Islamabad and requested that the Sale-deed be executed at the earliest. On 6-2-1996 the respondents' father visited the appellant at his residence and promised that on 7-2-1996 he would return with all the original documents and NOCs etc. for purposes of completion of the deal. However, the respondents' father failed to turn up. As a consequence, on 8-2-1996

the appellant sent a legal notice to the respondents' father through registered post acknowledgement due. The respondents' father on 14-2-1996 revoked the GPA through a registered Deed of Revocation. On 12-3-1996 the appellant filed a suit for specific performance of the Agreement in the Civil Courts at Rawalpindi, against the father of the respondents. Soon after filing of the suit i.e. in the month of July, 1996, the respondents' father died whereafter the respondents were brought on the record as his legal heirs. The respondents resisted the suit and on 23-6-1998 on the basis of the divergent pleadings of the parties eight (8) Issues were framed. Subsequently, the paternal grandmother of the respondents was also made a defendant in the suit in her capacity as one of the L.Rs of the respondents' father.

The grandmother of the respondents was initially arrayed as respondent No.4 in the instant appeal but upon her demise during pendency of the appeal the present respondents being her legal heirs were brought on the record as the legal heirs of their father as well as their paternal grandmother.

Upon being impleaded as a defendant in the suit the grandmother of the respondents filed her separate written statement. As a consequence, Additional Issues (7-A and 7-B) were framed by the learned trial Court on 5-7-2000. The Issues in the suit, the Original as well as the Additional ones, are to the following effect:

1. Whether the suit is not maintainable in its present form? OPD

2. Whether the suit is bad for non-joinder of Mst. Sarwat Rana as prayed? OPD

3. Whether the plaintiff has no cause of action to file the present suit? OPD

4. Whether the time was the essence of the contract? OPD

5. Whether the plaintiff failed to make the payment within the stipulated time? OPD

6. Whether the plaintiff is entitled to specific performance of agreement dated 13-7-1995? OPP

7. Whether the plaintiff deposited a sum of Rs.10,00,000/- in the bank account of the predecessor-in-interest of the defendants without knowledge and consent of the deceased? If so, with what effect? OPD

7-A Whether the suit is liable to be dismissed in view of preliminary objection No.1 of the written statement filed by the defendant No.4? OPD.4

7-B. Whether the plaintiff is entitled to the discretionary relief of specific performance? OPD.4

8. Relief.

The parties led their respective evidence oral as well as documentary and on the basis of the evidence so led the learned trial Court decided Issues Nos.1, 2 and 7 against the respondents whereas Issues Nos.3, 4, 5, 6, 7-A and 7-B were decided against the appellant, inter alia, on the grounds that time was of the essence of the contract inasmuch as the balance consideration had to be paid on or before 31-12-1995 and the appellant having failed to pay it was not entitled to the specific performance of the Agreement.

3. The learned counsel for the appellant has assailed the impugned judgment and decree, inter alia, on the grounds that the learned trial Court has misappreciated the facts and misapplied the law. The learned trial Court has erred in holding that time was of the essence of the contract. It is settled law that in contracts involving immovable property time is not of the essence of the contract. Relies on the judgments reported as Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala (PLD 1962 SC 1) and Ghulam Nabi and others v. Seth Muhammad Yaqub and others (PLD 1983 SC 344). Contends that the question whether time is of the essence of the contract or not is to be determined by the attending circumstances of each case. In the instant case albeit 31-12-1995 has been stipulated as the date for payment of the balance consideration and execution of the Sale-deed and/or for the GPA to become operative yet no penal consequences have been stipulated in the Agreement in case of non-payment of the balance consideration by the appellant by or before 31-12-1995. Refers to Clauses (2) and (3) of the Agreement. Further submits that the bona fides of the appellant are established by the fact that he filed a suit for specific performance within two months of the stipulated date and also deposited the balance consideration with the learned trial Court. Contends that in case a time frame has been given for the performance of a contract then for time to be of the essence of the contract the consequences for non-performance are also to be enumerated or stipulated in the contract itself. However, in the Agreement no such consequences have been stipulated. In fact the Agreement is silent as to the consequences which the appellant would have to face in case of non-performance of the Agreement by the stipulated date. Reiterates that

time is not of the essence of the Agreement. Relies on the judgment reported as Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334).

4. Further submits that the learned trial Court has further erred in holding that the GPA was in favour of the appellant and he could have used it for execution of the sale-deed in case the father of the respondents failed to execute the sale-deed. The learned trial Court failed to appreciate that the GPA was admittedly in the possession of the father of the respondents and had never been handed over to the appellant. Further submits that the appellant was at all times ready and willing to perform his part of the contract. Indeed, on 23-5-1996 the appellant deposited the balance consideration in the sum of Rs.90,00,000/- in the form of WAPDA Bonds with the learned trial Court which bonds were later replaced with a bank guarantee.

5. Further contends that even if the GPA had been in the possession of the appellant he could not have executed a sale-deed in his own favour by virtue of the GPA without the express permission of the father of the respondents. Relies on the judgment reported as Muhammad Taj v. Arshad Mehmood and 3 others (2009 SCMR 114).

6. Also contends that the Deed of Revocation (Exh.D-3) does not mention the reason why the GPA had been revoked. This goes to strengthen the appellant's case.

7. The learned counsel for the respondents submits that whilst there is no cavil with the proposition of law that time is not of the essence in a contract relating to immovable property. This principle of law is well-enshrined in our jurisprudence as is evident from the judgments cited at the bar by the learned counsel for the appellant i.e. Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala (PLD 1962 SC 1) and Ghulam Nabi and others v. Seth Muhammad Yaqub and others (PLD 1983 SC 344). However, in order to determine whether time is of the essence of the contract or not the facts and circumstances of each case have to be seen in their proper perspective. The appellant was required to conclude the contract on or before 31-12-1995. The appellant did not deposit Rs.1,00,00,000/- by the said date. Had the appellant deposited Rs.1,00,00,000/- the sale-deed would have been executed and/or the GPA would have become operative. The appellant had been acting all along through his father for negotiation of the contract and also allegedly the appellant's father contracted the respondents' father for completion of the deal in the month of January, 1996. The appellant, however, failed to produce his father as a witness in order to establish this fact. A negative inference has, therefore, rightly been drawn by the learned trial Court in terms of Article 129 of the Qanun-e-Shahadat Order, 1984. The best evidence was withheld by the appellant, therefore. the negative

inference, flows therefrom. Relies on the judgment reported as Attaullah alias Qasim v. The State (PLD 2006 Karachi 206) to contend that since the appellant's father did not appear in person to give evidence, therefore, any event attributed to the appellant's father and/or any evidence led in respect thereof is nothing more than hearsay. Further submits that as the respondents' father died soon after filing of the suit, therefore, the respondents' attorney appeared on behalf of the respondents' father to give evidence. The reliance placed by the learned counsel for the appellant on the evidence of the respondents' attorney is, therefore, misplaced as the attorney could only lead evidence on the facts which were within his knowledge. Further contends that the appellant failed to perform his part of the contract within the stipulated period, hence, the revocation of the Agreement as well as the GPA.

10. The learned counsel also refers to a partnership agreement dated 22-6-1996 purportedly having been entered into by the father of the appellant and the respondents' father, the photo-copy whereof has been brought on the record as Exh.D-4, to contend that as per the partnership agreement which was entered into in June, 1996, it was agreed between the father of the appellant and the father of the respondents that the Property would be sold to the Army Welfare Trust and the differential of the sale proceeds would be divided equally between the parties. Once the agreement of partnership dated 22-6-1996 was entered into novation of the (original) Agreement took place, therefore, the Agreement in any case cannot be specifically performed. Relies on the judgments reported as Sandoz Limited and another v. Federation of Pakistan and others (1995 SCMR 1431), Fmt. Chand Rani (dead) by L.R. v. Fmt. Kamal Rani (dead) by L.Rs. (AIR 1993 SC 1742), Messrs Imperial Builders through Managing Partner and another v. LINES [Pvt.) Ltd through Chief Executive and 3 others (PLD 2006 Karachi 593) and Mst. Batul and others v. Mst. Razia Fazal and others (2005 SCMR 544).

11. In rebuttal the learned counsel for the appellant submits that the appellant's father was not authorized by the appellant to enter into the so-called agreement of partnership. If indeed there was an agreement it was not binding on the appellant firstly for the reason that it was executed after filing of the suit and secondly the appellant was not a party thereto. If the respondents have any grievance in respect of the said agreement they should have filed a separate suit. As to the non-appearance of the appellant's father as a witness, submits that the appellant led the evidence himself and discharged the burden placed upon him.

12. Arguments heard. Record perused.

13. A perusal of the record reveals that there are a number of admitted facts: that the Agreement (Exh.P-1) was entered into between the parties on 13-7-1995, that the GPA (Exh.P-2) was executed by the father of the respondents in favour of the appellant, that the GPA was retained by the father of the respondents and that the legal notice dated 8-2-1996 was served upon the father of the respondents. It is, therefore, established that the Agreement was executed and thereafter for one reason or the other the execution of the sale-deed did not take place within the stipulated period. The father of the respondents does not appear to have filed a written statement. The written statement filed on behalf of the respondents does not mention the fact of entering of the agreement of partnership by the father of the appellant and the father of the respondents. This fact was brought on the record for the first time by the grandmother of the respondents who was arrayed as respondent No.4 in the suit. She took the stand of novation for the first time and as a consequence Additional Issues Nos.7-A and 7-B were framed.

14. From the above resume of facts it stands established that the Agreement was the governing document between the parties. Clauses (2) and (3) of the Agreement are material for determination of the controversy between the parties. The said Clauses are being reproduced hereunder for ease of reference:---

"2. That the party of the first part, this day by a deed of general power of attorney appointed to the party of the second part as his general attorney in respect of aforestated property and the party of the first part hereby declares that he will not revoke, amend or alter the said deed of general power of attorney without the consent of the party of the second part. However, after execution of said deed of general power of attorney, the original shall remain in possession of party of the first part and the party of the second part will keep the duplicate copy and will not utilize the said deed of general power of attorney as far the powers contained therein till the full remaining sale consideration is paid off to the party of the 1st part by the party of the second part.

3. That for the purpose of remaining sale consideration amounting to RUPEES ONE CRORE by the party of the 2nd part to the party of the first part and for the purpose of execution of sale-deed/deeds or to bring the power of attorney operative in connection with the transfer of afore-stated property, the period is agreed to be ending 31st December, 1995 or earlier with the consent of both the parties, is agreed between above named parties. That on the payment of remaining sale consideration the party of the first part will hand over the vacant and physical possession of the said property to the party of the second part."

15. A perusal of the above Clauses would go to show that in case of non-performance of the Agreement by the appellant no penalty has been stipulated and/or no penal consequences have been spelt out in case of non-performance of the Agreement by the appellant by the stipulated date. This fact lends support to the contention of the learned counsel for the appellant that since no penal consequences for non-performance of the Agreement by the appellant have been stipulated in the Agreement, therefore, time was not of the essence of the contract. On the other hand, the respondents have not been able to show or establish that in case of non-performance what was the liability which the appellant had to incur. Indeed, the impugned judgment is also silent as to the sum of Rs.35,00,000/- having been paid by the appellant to the father of the respondents. This sum has neither been ordered to be returned to the appellant nor has it been forfeited in favour of the respondents.

16. Another factor which goes in favour of the appellant is the fact that upon failure of the respondents' father to execute the sale-deed the appellant gave him a legal notice on 8-2-2006. The legal notice was followed by filing of the suit for specific performance of the Agreement and also of depositing the balance consideration with the learned trial Court albeit the money so deposited was withdrawn by the appellant and replaced with the bank guarantee with permission of the learned trial Court.

17. It is a well-settled principle of law that normally in cases other than commercial contracts that is to say in contracts relating to immovable property even when a specific date is mentioned for performance of the contract time is not reckoned to be of the essence of the contract. It is similarly well-settled that in determining whether time is of the essence of the contract or not the intention of the parties in this behalf has to be gathered from the contents of the contract itself and the attending circumstances. Reliance in this regard is, inter alia, placed on the judgments reported as Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala (PLD 1962 SC 1) and Seth Essa Bhoy v. Saboor Ahmad (PLD 1973 SC 39).

18. We, therefore, find that in the facts and circumstances of the case time was not of the essence of the contract. The contention, therefore, of the learned counsel for the respondents that time was of the essence of the contract is, therefore, repelled. The learned trial Court erred in holding otherwise.

19. As to the question of novation of the Agreement by virtue of the father of the respondents having entered into a partnership agreement with the appellant's father as canvassed by the learned counsel for the respondents it is worth noting that the written statement of the respondents is silent in this respect. This issue was raised for the first time

by the grandmother of the respondents who was arrayed as defendant/respondent No.4. If indeed novation took place, that was subsequent to filing of the suit. Courts can and do take notice of subsequent events but in the instant case the respondents were unable to establish that the partnership agreement had been entered into by the appellant himself. The original partnership agreement was never brought on the record nor was it proved in accordance with the law. The photo-copy of the partnership agreement (Exh.D-4) was, however, brought on record. It shows that it was purportedly executed by the appellant's father and the father of the respondents. There is no Clause therein showing that it was entered into by the appellant's father with authorization from the appellant. We, therefore, do not find force in the contention of the learned counsel for the respondents that novation of the Agreement took place by virtue of the partnership agreement. The contention of the learned counsel is, therefore repelled.

20. Having held as above we, however, cannot ignore the fact that the discretion to grant specific relief has to be exercised in accordance with the settled and fixed principles of law and if the contract is unobjectionable in its nature then, a person seeking equity must do equity himself. The appellant having exercised his option to purchase the Property as per terms of the Agreement was required to deposit the balance consideration with the learned trial Court. He initially did so but he withdrew the same, therefore, the appellant has been earning profit on the balance consideration from the year 1996 to-date. In the meantime, prices of properties have also appreciated. A similar situation arose in a case which was decided by the Hon'ble Supreme Court and has been reported as Mst. Mehmooda Begum v. Syed Hassan Sajjad and 2 others (PLD 2010 SC 952). The Hon'ble Supreme Court whilst considering the principles of law relating to time being of the essence of the contract and whether specific performance should be allowed in terms of section 22 of the Specific Relief Act, 1877, after going through the case-law on the subject directed that an additional amount be paid to the sellers to compensate for the differential in the prices as also the loss of profit.

21. We, therefore, whilst accepting the appeal set aside the impugned judgment and decree dated 20-2-2006 of the learned trial Court and decree the appellant's suit for specific performance subject to payment of the balance consideration of Rs.90,00,000/- plus Rs.75,00,000/- as additional consideration. The total amount of Rs.1,65,00,000/- to be deposited by the appellant before 15-5-2013 in the learned trial Court otherwise the instant appeal shall stand dismissed.

22. There is no order as to costs.

SAK/S-70/L Appeal dismissed.

2013 C L C 1612

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD ATIF HANIF----Petitioner

Versus

GOVERNMENT OF THE PUNAJB and another----Respondents

Writ Petition No.11924 and C.M. No.2 of 2013, decided on 20th May, 2013.

(a) Public Procurement Regulatory Authority Ordinance (XXII of 2002)---

----S. 2(1)(n)---Public Procurement Rules, 2004, Rr.3 & 4---Punjab Procurement Regulatory Authority Act (VIII of 2009), S.2(1)(n)---Punjab Procurement Rules, 2009, Rr.3 & 4---Contract Act (IX of 1872), S.23---Public procurement of goods and services, method of---Scope---Such procurement must be through public advertisements and open bidding---Parties could not contract out of statute---No provisions existed for negotiation or award of procurement contract by way of private negotiation.

Mujahid Muzaffar and others vs. Federation of Pakistan and others 2012 SCMR 1651 rel.

(b) Contract Act (IX of 1872)---

----S. 23---Parties could not contract out of statute.

Haji Khalid Rehman for Petitioner.

Muhammad Javed Munawar for Respondent No.2.

Muhammad Azeem Malik, Addl. A.-G., Punjab.

ORDER

Main Case

C.M.No.2 of 2013

MAMOON RASHID SHEIKH, J.--- The brief facts giving rise to this petition are to the effect that in the year 2007 respondent No.2 invited bids for award of contract for collection of parking fee in respect of the Car Park in its premises w.e.f. 16-3-2007 to 15-3-2010.

2. The petitioner participated in the bidding process and was declared successful. As a consequence, he was awarded Contract No.6469/AHF/2007 dated 15-3-2007 by respondent No.2. As per the terms of the contract the petitioner was liable to pay Rs.11,05,000/- per annum to respondent No.2 for the said period with 10% yearly enhancement. The petitioner was further required to deposit 1/4th of the annual contract amount plus Income Tax in advance within three days of the contract date. The petitioner was also required to deposit Rs.200,000/- as security in the form of CDRs which was refundable upon successful completion of the contract. Clause 3 of the contract further envisaged that the petitioner shall deposit a sum of Rs.500,000/- in the shape of CDRs for renovation of the Car Park within two weeks of the award of the contract. The petitioner deposited the security in the sum of Rs.200,000/- as also Rs.4,65,000/- towards renovation of the Car Park. The renovation is stated to have been done. In the meantime the then Chief Minister/Government of the Punjab (respondent No.1) implemented a policy through Notification No.S.O.(PII) 1-10/2008 dated 30-7-2008 by virtue of which free parking was introduced in all Government Health Institutions/Hospitals. As a consequence, the petitioner's contract was cancelled by respondent No.2 w.e.f. 8-8-2008 i.e. 19 months short of 15-3-2010 (the expiry date). As the tenure of the petitioner's contract had not expired and he had spent Rs.4,65,000/- for renovation of Car Park the petitioner agitated the matter before respondent No.2. A committee was formed by respondent No.2 to look into the matter and certain decisions were taken. Thereafter, in the year 2011 the petitioner again agitated the matter. As a consequence an Inquiry Committee ("the Committee") was constituted by the Finance and Planning Committee of respondent No.2 for inquiring into the matter and making its recommendations. After deliberating on the petitioner's case the Committee found that the contract amount from 14-3-2007 to 7-8-2008 was Rs.15,50,069/- while the petitioner deposited Rs.1215,834/-, therefore, an amount of Rs.334,235/- was outstanding against the petitioner as at 7-8-2008. The renovation of the Car Park was undertaken and a sum of Rs.10,50,000/- was spent by the civil contractor. Out of the amount Rs.465,000/- was paid by the petitioner as against the required amount of Rs.500,000/-. It was further found that the petitioner had spent the amount of Rs.465,000/- for the period of three years whereas the contract was cancelled w.e.f. 8-8-2008 i.e. 19 months short of the contract period. It was, therefore, recommended that the sum of Rs.134,235/- be recovered from the petitioner on account of short payment and an amount of Rs.245,416/- he refunded to him for the period for which he had not received the benefit of the investment made by him for renovation of the Car Park. It was further recommended that in view of the fact that Rs.111,181/- (i.e. Rs.245,416/- Rs.134,235/-) was liable to be refunded to the petitioner, therefore, the said amount may either be refunded to the petitioner or he may be allowed to complete the remaining 19-months of his

contract period if at any later stage respondent No.1 decides to change its policy of free parking in Government Health Institutions/Hospitals. The matter remained pending and now the Caretaker Government of the Punjab has decided that parking fee be collected in Government Health Institutions/Hospitals and collection rights of parking fee be auctioned strictly in accordance with the Punjab Procurement Rules, 2009. The said policy decision has been implemented through Notification No.S.O.(PH)1-10/2008 dated 16-4-2013.

3. Grievance is made out that respondent No.2 has not refunded the said amount to the petitioner and now in pursuance of the latest policy decision of 'respondent No.1 respondent No.2 has decided to award the parking fee collection rights of the Car Park through public auction without discharging its liability towards the petitioner and/or permitting the petitioner to complete its unexpired period (19 months) of contract.

4. The learned counsel for the petitioner whilst reiterating the facts narrated above submits that the petitioner has a vested right to be given the contract for the collection of parking fee vis-à-vis the Car Park for the unexpired 19 months period of his original contract. The petitioner as a concession is willing to take the contract for one year according to the rates notified by the Lahore Parking Company as mentioned in Notification dated 16-4-2013.

5. The report and parawise comments have been filed by respondent No.2 wherein whilst not denying the factum of award of the contract to the petitioner and the cancellation thereof in pursuance of the policy decision of respondent No.1, it is, however, maintained that in view of the instructions contained in the Notification dated 16-4-2013 and the provisions of the Rules, ibid, the contracts for parking fee in Government Health Institutions/Hospitals can only be awarded through public auction.

6. It is further maintained that the petitioner remained silent for refund of the amount in question for a number of years, therefore, not only the petitioner's claim for refund but also the contract cannot be awarded to him for the balance period as of right.

7. It is further submitted that the petitioner may participate in the impugned auction and his bid shall be considered on merits.

8. The learned counsel for respondent No.2 whilst reiterating the contents of the report and parawise comments has questioned the maintainability of the petition by, inter alia, submitting that the petitioner is guilty of concealment of material facts. Further submits

that the recommendation of the Committee for refunding the amount in question or awarding the contract to the petitioner for the unexpired 19-months period as and when the policy of respondent No.1 was changed was not at any time approved by the Board of Management of respondent No.2. As such the petitioner does not have a vested right to claim the relief prayed for in the petition.

9. Further submits that the petitioner's claim has become barred by time. Contends that the petition is even otherwise liable to be dismissed as the petitioner at no point in time challenged the 2008 Policy Decision of respondent No.1 before any Court of law. Further contends that the matter is beyond the control of respondent No.2 as neither it nor the petitioner can ignore the provisions of the Rules, ibid, which are mandatory in nature.

10. The learned counsel for the petitioner in rebuttal controverts the stance of respondent No.2 and submits that at no point in time did respondent No.2 deny the petitioner's right.

11. The learned Addl. A.-G. submits that the petition is hit by laches inasmuch as the petitioner did not challenge the decision of respondent No.2 for cancellation of its contract at the relevant time nor did the petitioner file a suit for recovery of the amount in question. Moreover, the petitioner did not challenge the Notification dated 30-7-2008 at the relevant time and even not through the instant petition. The claim of the petitioner has, even otherwise, become barred by time. Further submits that parties cannot contract out of statute. In the instant case they are bound by the provisions of the Rules, ibid. Moreover, respondent No.2 has acted in pursuance of the Policy Decisions of respondent No.1. Policy Decisions cannot be challenged by way of constitutional petitions.

12. I have considered the arguments of the learned counsel for the parties and the learned Addl. A.-G., and have also gone through the record. It is an admitted fact that the contract for collection of parking fee vis-a-vis the Car Park was awarded to the petitioner for a period of three years i.e. from 16-3-2007 to 15-3-2010. On 30-7-2008 respondent No.1 promulgated a new policy through Notification No.S.O.(PH)1-10/2008 whereby a direction was issued to all Government Health Institutions/ Hospitals (including respondent No.2) to have adequate parking facilities for the general public/visitors to Hospitals and to ensure that free parking is provided and the parking stands should be duly maned and guarded by the Hospital staff. The Government Health Institutions/Hospitals were further directed to coordinate with the Local Traffic Police Authorities for ensuring smooth flow of traffic in and around the health facilities. As a consequence respondent No.2 took steps to provide free parking to the general public/visitors to the Hospital (respondent No.2). In this respect

a Committee was formed and in its meeting held on 12-8-2008 the Committee discussed the modalities for ensuring free parking to the general public. The contract of the petitioner also came under discussion and in view of the fact that the petitioner had invested, the sum of Rs.4,65,000/- for renovation of the Car Park, it was felt that the petitioner should be accommodated by way of adjustment of the contract price. Thereafter the matter seems to have gone into cold storage. However; in the year, 2011 the petitioner agitated the matter again. As a consequence the Committee was constituted by the Finance and Planning Committee of respondent No.2 in its meeting held on 8-8-2011. The Committee after going through the facts of the case came to the following conclusion and recommended as under:--

"1. The contract of Car Parking was cancelled w.e.f. 8-8-2008 and the contractor deposited Rs.1,415,834/- (including amount of security) as contract money against due amount of Rs.1,550,069/- from 14-3-2007 to 7-8-2008, the amount less deposited Rs.134,235/- may be recovered from the contractor.

2. .....

3. The contractor of Car Parking has invested Rs.465,000/- for three years but he obtained benefit of investment for one years and five months. An amount of Rs.245,416/- is refundable to the contractor for the period he had not obtained the benefit of his investment which to be refunded or he may be allowed to complete his remaining contract period if at later stage government decided to auction Car Parking with charges of parking...."

13. In the year 2012 the Finance and Planning Committee of respondent No.2 reviewed the above mentioned recommendations of the Committee and in its meeting held on 3-10-2012 decided as under:---

"Agenda Item No.13 of Finance and Planning Committee meeting dated 8-11-2010 regarding Contract of Car Parking and Cycle Stand.

The matter was discussed in detail. It was decided that the amount of Rs.5,93,795/- as finalized in the report of the Inquiry Committee may after due verification, be paid to the Contractor from Receipts of Allied Hospital. His request to allow him to complete the remaining contract period of one year and seven months at a later stage when Government might decide to resume auctioning of Car Parking on payment basis was not deemed tenable. However, if such an eventuality does ever occur in future, his request might be considered on merit."

14. It is, however, not clear from the record whether these recommendations were accepted by the Board of Management of respondent No.2 or not. The fact, however, remains that the amount in question (Rs.111,181/-) was not refunded to the petitioner and since the policy of respondent No.1 for providing free parking to the general public/visitors to hospitals remained unchanged no progress was made in the matter.

15. Subsequently, due to the National Elections of 2013 when the Caretaker Government of the Punjab was formed it changed the policy of providing free parking to hospital visitors. Consequently, through Notification No.S.O.(PH)1-10/2008 dated 16-4-2013, Government Health Institutions/Hospitals were directed as under:---

"The competent Authority has been pleased to withdraw facility of free car/motorcycle/cycle parking in all the Government Hospitals as circulated by the Government vide Notification of even number dated July, 30, 2008, September, 25, 2008, December, 18, 2008, March 11, 2009 and February 22, 2010.

2. All Hospital administrations are directed to immediately take necessary action for auction of the parking stands/lots available in the premises of hospitals / medical colleges strictly in accordance with the PPRA Rules.

3. The competent authority has further been pleased to approve the parking rates as notified by the Lahore Parking Company from time to time for car/motorcycle/cycle parking in all Government Hospitals/Medical Colleges with immediate effect.

4. All measures for safety of the vehicles in lieu of the service charges be taken."

16. Upon coming to know of the change in respondent No.1's Policy the petitioner contends that he re-agitated the matter with respondent No.2 and demanded that he may be allowed to complete the remaining 19 months of his contract. Respondent No.2, however, declined to do so and has advertised the auction of the rights of collection of parking fee of Car Park through the impugned advertisement published in various dailies including the daily "Nawa-i-Waqt" of 8-5-2013. The impugned auction is scheduled to be held on 22-5-2013.

17. The petitioner has contended that he has a vested right to be awarded the contract so that he can complete the unexpired period of his earlier contract as per the recommendations of the Committee. It is the case of the petitioner that he has been denied the benefits of investment for a number of years and a promise was held out to him that as soon as the policy of respondent No.l changes he would be awarded the contract for the remaining period.

18. On the other hand it is the case of respondent No.2 that they are bound by the provisions of the Rules, ibid, which provisions are mandatory. Respondent No.2 is, therefore, required to award the rights of collection of parking fee only by way of calling for fresh tenders by public auction. No contract can, therefore, be awarded to the petitioner. It has been further contended that since the petitioner remained silent for a number of years and did not agitate the matter, therefore, his claim has become barred by time.

19. The controversy pertains to procurement of goods and services in the public sector. The Federal as well as the Provincial Governments in order to ensure transparency and accountability in matters of public procurement of goods as well as services have promulgated various laws viz the Public Procurement Regulatory Authority Ordinance, 2002 and the Public Procurement Rules, 2004 at the Federal level and the Punjab Procurement Regulatory Authority Act, 2009, and the Rules, ibid, in the Province of the Punjab. All Procuring Agencies as defined by section 2(1) of the Act, ibid, are required to follow the Act and the Rules, ibid for Public procurement as defined under section 2(n) of the Act, ibid. To better appreciate the position both provisions of law are being reproduced hereunder:---

"2(1)"Procuring Agency" means---

(i) A department or office of the Government;

(ii) A district government; or

(iii) An authority, corporation, program, project, body or organization established by or under a Provincial law or which is owned or controlled by Government of the Punjab."

2(n) "Public procurement" means acquisition of goods, services or rendering of works financed wholly or partly out of the Public Fund, unless excluded by the Government;"

20. Rules 3 and 4 of the Rules, ibid, provide as under:---

"3. Scope and applicability.--- Save as otherwise provided, these rules shall apply to all procurements made by all procuring agencies of the Government of the Punjab whether within or outside the Punjab.

4. Principles of procurements.--- Procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the

object of procurement brings value for money to the agency and the procurement process is efficient and economical."

21. As will be evident respondent No.1 is a Procuring Agency within the meaning of section 2(1) of the Act, ibid. The provisions of the Act and the Rules, ibid, are mandatory in nature for all Procuring Agencies. Respondent No.2 is, therefore, bound to follow the procedure as laid down in the Act and the Rules, ibid, in matters of Public procurement. The method of procurement has been spelled out in great detail in the Rules, ibid, which inter alia provide for public advertisement and envisage a process of open bidding. There is no provision for negotiation or award of contract by way of private negotiations. Reliance in this regard is placed on a judgment of the Hon'ble Supreme Court reported as "Mujahid Muzaffar and others vs. Federation of Pakistan and others" (2012 SCMR 1651).

22. Even otherwise, it is settled law that parties cannot contract out of statute. Moreover, there is nothing on the record to show that the recommendations of the Committee or the Finance and Planning Committee of respondent No.2 were approved by the Board of Management of respondent No.2.

23. In view of the above, the petitioner's claim for award of the contract for collection of parking fee in respect of the Car Park for the balance 19 months of his earlier contract is neither sustainable nor tenable.

24. This Court, however, cannot ignore the fact that the petitioner has been out of pocket for a number of years to the extent of Rs.111,181/-. Respondent No.2 has not refunded this amount to the petitioner, therefore, whilst holding that the petitioner is not entitled to be given the contract for collection of parking fee in respect of the Car Park for the balance 19 months of his earlier contract, as of right, it is directed that respondent No.2 shall refund the amount of Rs.111,181/- to the petitioner, after due verification, plus mark-up at the bank rate forthwith.

25. It is, however, observed that the petitioner may participate in the impugned auction, if so advised, and respondent No.2 shall not reject the petitioner's bid in view of his past history.

26. The petition is accordingly disposed of in the above terms with no order as to costs.

SAK/M-182/L Order accordingly.

2013 C L C 1653

[Election Tribunal Punjab]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

NADEEM KHADIM----Appellant

Versus

RETURNING OFFICER, PP-26, JHELUM-III and another----Respondents

Election Appeal No.77 of 2013, heard on 15th April, 2013.

Representation of the People Act (LXXXV of 1976)---

----Ss. 14 & 12---Constitution of Pakistan, Arts.62 & 63---Disqualification for membership of Majlis-e-Shoora (Parliament)---Rejection of nomination papers on ground of being a dual national---Appellant's nomination papers were rejected on the ground that he had concealed that he was a dual national of both United Kingdom and Pakistan, and as a result of said concealment, the appellant could not be considered as sagacious, righteous, honest and "ameen" in terms of Art.62(1)(f) of the Constitution---Validity---Appellant's Declaration of Renunciation of his British citizenship was accepted by United Kingdom Border Agency/Home Office on 17-8-2012, therefore, at the time of filing his current nomination papers, the appellant did not hold British citizenship---In absence of a declaration by a court of law that the appellant could not be held otherwise than sagacious, righteous, non-profligate, honest and "ameen" person---High Court set aside impugned order and directed that the name of the appellant be placed on the list of validly nominated candidates for his constituency---Appeal was allowed, in circumstances.

Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others PLD 2009 SC 644; Nawabzada Iftikhar Ahmad Khan Bar v. Chief Election Commissioner, Islamabad and others PLD 2010 SC 817; Rana Aftab Ahmad Khan v. Muhammad Ajmal and another PLD 2010 SC 1066; Ch. Nisar Ali Khan v. Ghulam Sarwar Khan and 3 others 2003 CLC 442 and Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others PLD 2012 SC 1054 and ref.

Rizwan Zouq v. Returning Officer NA-162 SWL-III, Sahiwal and another 2013 CLC 271 rel.

Gohar Ali Khan for Appellant.

Date of hearing: 15th April, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- This appeal is directed against the order dated 5-4-2013 of the learned Returning Officer PP-26, Jhelum-III, whereby the nomination paper of the appellant has been rejected, inter alia, on the ground that at the time of filing of his nomination paper for the General Elections of 2008 the appellant had concealed the fact of his being a dual national of Pakistan and the United Kingdom. The appellant had thus made a false declaration on oath in his nomination form as to the status of his citizenship. As a consequence, the learned Returning Officer held that the appellant cannot be considered sagacious, righteous, non-profligate, honest and `ameen' as provided under Article 62(1)(f) of the Constitution of the Islamic Republic of Pakistan, 1973.

2. The learned counsel for the appellant submits that the appellant did indeed hold British citizenship in 2008. However, the appellant renounced his British citizenship through the requisite declaration. The appellant's Declaration of Renunciation of British Citizenship was accepted by the Home Office/UK Border Agency on 17th of August, 2012. This fact is established from a copy of the appellant's Declaration of Renunciation presented before the learned Returning Officer. As such, at the time of filing of his nomination paper the appellant was not a British citizen. The learned Returning Officer has erred in holding otherwise.

3. Further submits that as per the law laid down by the Hon'ble Supreme Court of Pakistan unless there is a declaration by a Court of law to that effect, a person cannot be declared to be guilty of corruption or corrupt practices or for that matter that he is not sagacious, righteous, non-profligate, honest and `ameen'. There is no declaration by any Court of law against the appellant rendering him disqualified to contest the elections to the seat in question. Relies on the judgments reported as Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others (PLD 2009 SC 644), Nawabzada Iftikhar Ahmad Khan Bar v. Chief Election Commissioner, Islamabad and others (PLD 2010 SC 817), Rana Aftab Ahmad Khan v. Muhammad Ajmal and another (PLD 2010 SC 1066), Ch. Nisar Ali Khan v. Ghulam Sarwar Khan and 3 others (2003 CLC 442), Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1054) and Rizwan Zouq v. Returning Officer NA-162 SWL-III, Sahiwal and another (2013 CLC 271) in support of his contentions.

4. Having considered the arguments of the learned counsel for the appellant and gone through the record as also the judgments cited at the bar we find that the appellant's Declaration of Renunciation of his British citizenship was accepted by the UK Border Agency/Home Office on 17-8-2012, therefore, at the time of filing of his current nomination paper the appellant did not hold British citizenship. We, therefore, find force in the arguments of the learned counsel for the appellant and hold that in absence of a declaration by a Court of law the appellant cannot be held otherwise than a sagacious, righteous, non-profligate, honest and `ameen'. Reliance is placed on Rizwan Zouq's case (supra).

5. Under the circumstances, this appeal succeeds and the impugned order dated 5-4-2013 is set aside.

6. It is accordingly directed that the name of the appellant be placed on the list of validly nominated candidates for the constituency of PP-26, Jhelum-III.

7. Copies of the order be sent to the learned District Returning Officer and the Returning Officer concerned for information and necessary action.

KMZ/N-39/L Appeal allowed.

2013 C L C 1667

[Election Tribunal Punjab]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

AMMIR SOHAIL----Appellant

Versus

RETURNING OFFICER (PP-20) and another----Respondents

Election Appeal No.123 of 2013, decided on 16th April, 2013.

Representation of the People Act (LXXXV of 1976)---

----Ss. 12 & 14---Constitution of Pakistan, Arts.62 & 63---Acceptance of nomination papers---Appellant impugned acceptance of respondent's nomination papers on the ground that the respondent had in election held in the year 1996 declared himself to have passed the intermediate level of education, however, he had in the current year, declared himself to be

Matriculate, and was therefore not sagacious, righteous, honest and ameen in view of Art.62(1)(f) of the Constitution---Validity---Appellant had been unable to show any declaration/ conviction/order of any court of law against the respondent in relation to the allegations that had been levelled against him---Appellant had also been unable to show that the Retuning Officer had passed an order by exercise of excess jurisdiction or that the same was perverse---Appeal was dismissed, in circumstances.

Rizwan Zouq v. Returning Officer NA-162 SWL-III, Sahiwal and another 2013 CLC 271 rel.

Malik Qamar Afzal for Appellant.

Malik Muhammad Kabir and Sakhi Muhammad Kahot for Respondent No.2.

ORDER

MAMOON RASHID SHEIKH, J.---This appeal calls into question the order dated 1-4-2013 whereby the learned Returning Officer PP-20, Chakwal-I, accepted the nomination paper of respondent No.2.

2. The learned counsel for the appellant submits that in the year 1996 respondent No.2 submitted his nomination paper for contesting the election of PP-16, Chakwal-I, and in the said nomination paper respondent No.2 declared himself to be F.A. However, in the nomination paper filed by respondent No.2 to contest the present election, he has declared himself to be a Matriculate. This on the face of it establishes that respondent No.2 is a dishonest person and had made misstatements in the nomination paper filed by him in the year 1996. Respondent No.2, therefore, cannot be termed as sagacious, righteous, honest and ameen in terms of Article 62(1)(f) of the Constitution of the Islamic Republic of Pakistan, 1973. Further submits that respondent No.2 is a defaulter of Government dues.

3. At the outset, the learned counsel for respondent No.2 has questioned the maintainability of the appeal by inter alia maintaining that the appellant is not an elector in the constituency in question, therefore, he cannot file the instant appeal. Further submits that there is no declaration or conviction from a Court of law to the effect that respondent No.2 is guilty of the allegations being levelled against him by the appellant. In such circumstances, respondent No.2 cannot be held to be not sagacious, righteous, honest and ameen as contended by the learned counsel for the appellant.

4. In rebuttal the learned counsel for the appellant submits that the instant appeal is competent inasmuch as it has been filed under section 14(5A) of the Representation of the

People Act, 1976, whereby any person can lay information before this Tribunal regarding disqualification of a candidate.

5. Having considered the arguments of the learned counsel for the parties and gone through the record, we find force in the submissions of the learned counsel for respondent No.2 inasmuch as the appellant has been unable to show us any declaration/conviction/order of any Court of law against respondent No.2 vis-a-vis the allegations being levelled against him. The learned counsel for the appellant has similarly been unable to show us that the order of the learned Returning Officer has been passed by exercise of excess of jurisdiction or that it is perverse. Reliance is placed on the judgment reported as "Rizwan Zouq v. Returning Officer NA-162 SWL-III, Sahiwal and another" (2013 CLC 271).

7. Under the circumstances, this appeal fails and is dismissed accordingly.

8. Copies of this order be sent to the learned District Returning Officer and the Returning Officer concerned for information and necessary action.

KMZ/A-87/L Appeal dismissed.

2013 C L C 1796

[Lahore]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

MUHAMMAD NADEEM----Appellant

Versus

MUHAMMAD MUMTAZ AKHTER KAHLOON and others----Respondents

Election Appeals Nos.104 and 105 of 2013, heard on 15th April, 2013.

Representation of the People Act (LXXXV of 1976)---

----Ss. 14 & 12---Constitution of Pakistan, Arts. 63(1)(d)(e) & 63(1)(k)---Disqualification for membership of Majlis-e-Shoora (Parliament)---Person in service of Government of Pakistan and/or a statutory body wholly owned or controlled by the Government of Pakistan---Scope---Appellants impugned the acceptance of the nomination papers filed by the respondent on the ground that the respondent was appointed as the Chairman of the

National Vocational and Technical Training Commission ("NAVTTV"), which was a statutory body and wholly owned or controlled by the Government, and was therefore disqualified to be elected or chosen as a member of Majlis-e-Shoora by virtue of sub-Articles (d),(e) and (k) of Art.63 of the Constitution---Validity---Decisive test to determine whether a person was in the service of Pakistan and/or was in the service of a body wholly owned or controlled by the Government, was such a person's subordination to that body---Power of authority of appointment to the office and the power of removal and dismissal of the holder of the office and not remuneration, was also the decisive factor---Respondent, in the present case, was appointed to the post in question by the Government of Pakistan, and his resignation was also accepted by the Government of Pakistan, therefore, it could be safely held that he was in the service of Pakistan and/or a body wholly owned or controlled by the Government of Pakistan---For a person who was so adjudged, under provisions of Art.63(1)(k) of the Constitution, a period of two years had to lapse from the time that such a person's service ceased, for such a person to become eligible to contest elections---Resignation of the respondent was accepted on the date of notification, which was 12-4-2013---Candidature of the respondent was therefore hit by provisions of Arts.63(1)(d) & 63(1)(e) of the Constitution---High Court set aside impugned order and directed that the name of the respondent be deleted from the list of validly nominated candidates in the constituency---Appeal was allowed, accordingly.

Mrs. Neelam Yasmin Abbasi v. Returning Officer and 2 others 2010 MLD 527 ref.

Mubashir Kamal Abbasi v. The R.O. NA-50 District Rawalpindi and another E.A. No.24 of 2013 and Mirza Muhammad Tufail v. District Returning Officer and others PLD 2007 SC 16 rel.

Ch. Zahid Imran for Appellant.

Mian Abdul Rauf and Afzal Hussain for Respondent No.1.

Date of hearing: 15th April, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- Through this single judgment we propose to decide E.A. No.104 of 2013 and E.A. No.105 of 2013 as common questions of facts and law arise therein.

2. Both appellants challenged the order dated 5-4-2013 whereby the nomination paper of respondent No.1 was accepted by the learned Returning Officer NA-66 Sargodha-III. The learned counsel for the appellant submits that the candidature of respondent No.1 is hit by the provisions of Articles 62(1)(f), 63(1)(d) and (e) read with Article 63(1)(k) of the Constitution of the Islamic Republic of Pakistan, 1973.

3. It is contended that respondent No.1 has concealed his assets whilst filing his nomination paper. Respondent No.1, therefore, cannot be considered to be sagacious, righteous, honest and ameen as envisaged by Article 62(1)(f) of the Constitution.

4. It is further contended that admittedly respondent No.1 was appointed as the Chairman of the National Vocational and Technical Training Commission (NAVTTC), which is a statutory body formed under the National Vocational and Technical Training Commission Act, 2011 and wholly owned or controlled by the Government of Pakistan. Respondent No.1 continues to function as the Chairman NAVTTC, therefore, since he is still in the service of Government of Pakistan and/or a body wholly owned or controlled by the Government of Pakistan he is disqualified to be elected or chosen as a member of the Majlis-e-Shoora (Parliament) by virtue of the provisions of Article 63(1)(d) and (e) read with Article 63(1)(k) of the Constitution.

5. The learned counsel for respondent No.1 submits that respondent No.1 has made full disclosure of his assets and liabilities and other particulars in the nomination paper, however, nomination of respondent No.1 has been withheld. As to the contention that respondent No.1 is the Chairman of NAVTTC submits that respondent No.1 tendered his resignation on 21-3-2013. The said resignation was accepted w.e.f. 21-3-2013 through Notification dated 12-4-2013 issued by the Government of Pakistan Ministry of Education & Training Islamabad. Submits that the factum of respondent No.1 being the Chairman of NAVTTC is not an impediment to the candidature of respondent No.1 firstly for the reason that the post of Chairman NAVTTC does not admit of remuneration and the post in any event was purely honourary in nature. Respondent No.1 had resigned from the post of Chairman of NAVTTC and at the time of filing of his nomination paper respondent No.1 was no longer the Chairman of NAVTTC. Further contends that since respondent No.1 was not receiving any remuneration from NAVTTC, he cannot be held to be in service of Pakistan and / or any body wholly owned or controlled by any Government. Respondent No.1 is, therefore, not disqualified by virtue of any of the provisions of Article 62 and/or 63 of the Constitution.

6. The learned counsel for the appellants submits that the date of resignation of a person is to be reckoned from the date of its acceptance. In the instant case the date is to be reckoned from 12-4-2013 i.e. the date of the Notification regarding acceptance of respondent No.1's resignation was issued. Resignations are not accepted retrospectively. Relies on the judgment reported as "Mrs. Neelam Yasmin Abbasi v. Returning Officer and 2 others (2010 MLD 527). Further contends that respondent No.1 was receiving remuneration from the Government of Pakistan and was also enjoying perks and other benefits of the department. Refers to sections 3, 4, 6, 7, 11 and 12 of the NAVTTC, Act. It, therefore, cannot be said that respondent No.1 was not in. the service of Pakistan and / or a body wholly owned and controlled by the Government.

7. We have considered the arguments of the learned counsel for the parties and have also gone through the record. In a similar appeal E.A. No.24 of 2013, titled "Mubashir Kamal Abbasi v. The R.O. NA-50 District Rawalpindi and another", through our judgment of even date we have held on the strength of the judgment of the Hon'ble Supreme Court of Pakistan reported as "Mirza Muhammad Tufail v. District Returning Officer and others" (PLD 2007 SC 16) that the decisive test to determine whether a person is in the service of Pakistan and/or in the service of a body wholly owned or controlled by the Government is his subordination to that body. The power of authority of appointment to the office and the power of removal and dismissal of the holder of the office and not remuneration is the decisive factor. In the instant case respondent No.1 was appointed to the post in question by the Government of Pakistan and his resignation was also accepted by the Government of Pakistan, therefore, on the basis of the above test it can safely be held that he was in the service of Pakistan and / or a body wholly owned or controlled by the Government. If a person is so adjudged then under the provisions of Article 63(1) (k) of the Constitution a period of two (2) years has to elapse since the person's service has ceased for him to become eligible to contest elections. In the instant case admittedly, on the basis of "Mrs. Neelam Yasmin Abbasi's case (supra) the relevant date would be 12-4-2013 when the resignation of respondent No.1 was accepted by the Government of Pakistan. We, therefore, find that as at the relevant date respondent No.1 was still the Chairman of NAVTTC and as we have also held that being the Chairman of NAVTTC amounts to be in service of Pakistan and/or a body wholly owned or controlled by the Government, therefore, respondent No.1 is disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament). In other words the candidature of respondent No.1 is hit by the provisions of Article 63(1)(d) and (e) read with Article 63(1)(k) of the Constitution.

8. In view of the above we do not deem it necessary to dilate upon the other contentions raised by the learned counsel for the appellants.

9. Under the circumstances, these appeals succeed and the impugned order dated 5-4-2013 is set aside. The name of respondent No.1 be accordingly deleted from the list of validly nominated candidates for NA-66 Sargodha-III.

10. Copies of this order be sent to the learned District Returning Officer and the Returning Officer concerned for information and necessary action.

KMZ/M-181/L Appeal allowed.

2013 C L D 323

[Lahore]

Before Mamoon Rashid Sheikh, J

LEO PHARMACEUTICAL PRODUCTS---Appellant

Versus

SHAIGAN PHARMACEUTICAL (PVT.) LTD.---Respondent

R.F.A. No.110 of 2002, decided on 31st January, 2011.

(a) Trade Marks Ordinance (XIX of 2001)---

----Ss. 43 & 77---Civil Procedure Code (V of 1908), O.VII, R.11, O.XXXIX, RR.1 & 2---Specific Relief Act (I of 1877), S. 54---Infringement of trade mark---Suit for injunction---Rejection of plaint---Principle---Suit of plaintiff was fixed for arguments on application for grant of temporary injunction but Trial Court proceeded to reject the plaint---Validity---Trial Court erred in law in having done so, as the suit of plaintiff was not only confined to infringement of trade mark but also alleged passing off which necessarily entailed detailed inquiry and recording of evidence, therefore, plaint could not have been rejected---High Court set aside order rejecting the plaint and remanded the case to Trial Court for decision afresh in accordance with law---Appeal was allowed in circumstances.

Qazi Muhammad Tariq v. Hasin Jahan and 3 others 1993 SCMR 1949 rel.

Lipha Lyonnaise Industrielle Pharmaceutique through Authorized Signatory v. Registrar of Trade Marks and another 2009 CLD 1289 and Bayer A.G. and another v. Macter International (Pvt.) Ltd. 2003 CLD 794 ref.

(b) Administration of justice---

----Law favours cases to be decided on merits and technicalities should be avoided.

Maulana Atta-ur-Rehman v. Al-Hajj Sardar Umar Farooq and others PLD 2008 SC 663 rel.

Moeen Qamar for Appellant.

Muhammad Shakeel Abid for Respondent.

Date of hearing: 21st January, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.---This regular first appeal arises out of the judgment and decree dated 17-5-2002 passed by the learned Additional District Judge, Rawalpindi whereby the plaint in the appellant's "suit for injunction against infringement of trade mark, passing off, damages and account of profit" against the respondent was rejected. The suit had been filed by the appellant against the respondent in respect of the antibiotic cream manufactured by the appellant under the registered trade mark "Fucidin". It was alleged that the respondent is manufacturing an antibiotic cream which it is marketing as "FUDIC" and is not only infringing the appellant's trade mark but is also to trying of pass off its product as the appellant's.

2. The precise question which needs adjudication in this appeal is that whether in the facts and circumstances of the case when the suit of the appellant was fixed for arguments on its application under Order XXXIX, Rules 1 and 2 of the C.P.C. for grant of a temporary injunction the learned trial court was competent to reject the plaint.

3. The learned counsel for the appellant has argued that under the law as laid down by the Hon'ble Supreme Court of Pakistan in the judgment reported as Qazi Muhammad Tariq v. Hasin Jahan and 3 others (1993 SCMR 1949) when a suit is fixed for arguments on an application for grant of a temporary injunction the court should only decide the said application and should not proceed to reject the plaint. At best the learned trial court should have dismissed the application for grant of a temporary injunction, the plaint could not have been rejected. Further contends that the principles for deciding an application for the grant

of a temporary injunction are separate and distinct from the principles for rejection of a plaint. Whilst rejecting a plaint a court has to only consider the plaint and if it fails to disclose a cause of action or is barred by/under a law then and only then the plaint can be rejected. The defence of the defendant or any document presented by the defendant cannot be taken into consideration especially when it is contested by the plaintiff. The learned trial court ignored the facts of the case and these provisions of the law and has erred by rejecting the plaint in the appellant's suit. He, therefore, prays that it is a fit case for remand.

4. The learned counsel for the respondent has controverted the stance of the learned counsel for the appellant. He submits that the products of the parties are medicines. In such like cases when the generic name of the medicine is the same then where only prefix of a trade mark (generic in nature) was similar and suffixes were largely different then the question of confusion does not arise. In the instant case the products of both parties have the same generic prefixes but the suffixes are different, hence, no case of infringement of trademark is made out by the appellant. Submits that in any event the suit of the appellant is liable to be dismissed and/or the plaint is liable to be rejected. The learned trial court passed the impugned judgment and decree in accordance with the law. Relies on the judgments reported as LIPHA LYONNAISE INDUSTRIELLE PHARMACEUTIQUE through Authorized Signatory v. Registrar of Trade Marks and another (2009 CLD 1289) and BAYER A.G. and another v. MACTER INTERNATIONAL (Pvt.) Ltd. (2003 CLD 794). Further contends that even if the case was to be remanded the result would ultimately be the same. Prays for dismissal of the appeal.

5. The learned counsel for the appellant in rebuttal whilst reiterating his earlier arguments contends that the suit of the appellant is not only a suit for infringement of trade mark but is also a suit for passing off which requires recording of evidence as there is dishonest deception by the respondent.

6. I have gone through the record with the able assistance of the learned counsel for the parties who have also taken me through the various principles of law involved in the matter. I find that on the fateful day (17-5-2002) the suit of the appellant was indeed fixed for arguments on the appellant's application for grant of a temporary injunction. The learned trial Court, however, proceeded to reject the plaint. In my view the learned trial court erred in law in having done so. I am fortified in my view on the basis of the judgment passed by the Hon'ble Supreme Court in Qazi Muhammad Tariq's case (supra) cited at the bar by the learned counsel for the appellant. Even otherwise, there is also force in the contention of the learned counsel for the appellant that the suit of the appellant was not only confined to infringement of trademark but also alleged passing off

which necessarily entailed detailed inquiry and recording of evidence. The plaint, therefore, could not have been rejected.

7. In view thereof, the arguments advanced by the learned counsel for the respondent are repelled. Moreover, the law favours that cases should be decided on merits and technicalities should be avoided. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court of Pakistan reported as Maulana Atta-ur-Rehman v. Al-Hajj Sardar Umar Farooq and others (PLD 2008 SC 663).

8. Under the circumstances, this appeal succeeds and the matter is remanded to the learned trial court for decision afresh in accordance with the law. The parties are directed to appear before the learned District Judge, Rawalpindi, on 22-2-2011 for entrustment of the case to the learned court having jurisdiction in the matter. The office is directed to remit the record.

9. There is no order as to costs.

MH/L-14/L Case remanded.

2013 C L D 1802

[Lahore]

Before Rauf Ahmad Sheikh and Mamoon Rashid Sheikh, JJ

SHAHBAZ A. KHOKHAR---Appellant

Versus

HABIB BANK LIMITED---Respondent

R.F.A. No.231 of 2007, heard on 21st May, 2013.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 9 & 10---Suit for recovery of amount for loss suffered by customer due to delayed encashment of his US Dollars by Bank and difference of its conversion rate on relevant dates---Subsequent suit for recovery of finance by Bank against customer---Filing of leave applications by both parties in suit filed against each other---Banking Court dismissed customer's leave application and decreed Bank's suit, while dismissed customer's suit---Validity---Findings of Banking Court were erroneous to the effect that customer had failed

to substantiate his objections to statement of accounts filed by Bank and competence of its attorney to institute subsequent suit---Banking Court had accepted Bank's leave application by observing that questions raised therein would require determination on basis of evidence---When there were triable issues in one suit as per such observations of Banking Court, then same would hold true for other suit---Banking Court had erred in law by dismissing customer's suit---High Court set aside impugned judgment and decree and remanded case to Banking Court for its decision afresh while deeming customer's leave application as pending.

Messrs Ali Match Industries Ltd. and 3 others v. Industrial Development Bank of Pakistan 1997 SCMR 943; Faisal Bank Limited v. Badin Board Mills and 6 others 2010 CLD 442; United Bank Limited v. Messrs Ilyas Enterprises through Proprietor Mr. Ilyas Malik and 2 others 2004 CLD 1338; Messrs Ittefaq Industries (Regd.) through Managing Partner and 2 others v. Bank of Punjab through Duly Constituted Attorney 2004 CLD 1356; United Bank Limited v. Tanvir Khalid 2003 CLD 291; Muhammad Ramzan and 4 others v. Agricultural Development Bank of Pakistan through Manager 2004 CLD 1376 and Messrs Al-Kashmir Traders and 6 others v. United Bank Limited through Muhammad Jarar 2005 CLD 1116 ref.

Appollo Textile Mills Ltd. and others v. Soneri Bank Ltd. PLD 2012 SC 268 and Habib Bank Ltd. (Foreign Exchange Branch) v. Dost Muhammad Cotton Mills Ltd. and others PLD 1997 Kar. 331 rel.

Shahid Ikram Siddiqui for Appellant.

Ahmed Pervaiz and Zain Ghaffar for Respondent.

Date of hearing: 21st May, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.---This appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, is directed against the judgment and decree dated 4-4-2007 passed by the learned Judge Banking Court-III, Lahore, whereby the suit of the respondent for the recovery of Rs.4,449,575 was decreed against the appellant with costs and cost of funds minus the principal sum already deposited by the appellant.

2. The brief facts necessary for the purposes of deciding the appeal are to the effect that the appellant is a customer of the respondent and on 12-7-2002 the appellant filed a suit,

against the respondent for the recovery of Rs.5,762,225 on the premise that the appellant availed of finance facility from the respondent against his U.S.$ deposits with the respondent and the respondent issued NDRP Certificates valuing US $ 370,000 which were under lien of the respondent. After the incident of destruction of the World Trade Centre in the USA on 11-9-2001 the value of the US $ started declining. The appellant, therefore, requested the respondent to encash his US $ and to liquidate the appellant's liability. The respondent, however, delayed the matter and by the time the respondent encashed the US $ the rate of the US $ vis-a-vis Pak Rupee had further declined resulting in loss to the appellant. Had the respondent encashed the US $ in time a surplus of Rs.424,938 would have remained to the credit of the appellant. The suit was therefore filed to recover the alleged monetary loss suffered by the appellant. The respondent filed its PLA and whilst the same was pending the respondent on 2-6-2003 filed a suit for recovery of Rs.4.440 million against the appellant. On 14-7-2003 the appellant filed his PLA in the respondent's suit. The learned trial Court heard arguments on the PLAs in both suits on the same day and through a consolidated order/judgment dated 4-4-2007 whilst granting leave to defend to the respondent in the appellant's suit dismissed the appellant's PLA and decreed the respondent's suit against the appellant.

3. The learned counsel for the appellant submits that the basic question which the learned trial Court identified for determination in both suits was that there existed a variance between the parties on the question of delay and encashment of US $ and the difference in the rate of US $ prevailing on the date of request and the date of encashment. The learned trial Court whilst identifying this triable issue proceeded to decree the suit of the respondent against the appellant without recording any evidence and at the same time granted leave to defend to the respondent in the appellant's suit. In so doing the learned trial Court erred in law for if there were triable issues in one suit then the same held true in the other suit. The leave to defend, therefore, should also have been granted to the appellant.

4. The learned counsel has also raised questions regarding the competence of the attorney of the respondent in instituting and filing the suit against the appellant. Contends that according to the copy of the power of attorney executed by the respondent in favour of its attorney who filed the suit the attorney could only act jointly with another attorney of the respondent. The respondent's suit was, however, filed by the said attorney singularly. The question of the competence of the attorney to file the suit could, therefore, not have been determined without recordal of evidence. He has further called into question the, statement of accounts appended to the plaint and has also raised questions regarding the repetitive "transfer entries" therein. Contends that these entries are not substantiated and

are in fact entries in respect of markup which have been disguised as "transfer entries". Relies on the judgments reported as Messrs Ali Match Industries Ltd and 3 others v. Industrial Development Bank of Pakistan (1997 SCMR 943), Faisal Bank Limited v. Badin Board Mills and 6 others (2010 CLD 442), United Bank Limited v. Messrs Ilyas Enterprises through Proprietor Mr. Ilyas Malik and 2 others (2004 CLD 1338) and Messrs Ittefaq Industries (Regd.) through Managing Partner and 2 others v. Bank of Punjab through Duly constituted Attorney (2004 CLD 1356).

5. Further contends that had the respondent acted on time and encashed the US $ the appellant's liability would have been discharged and his account would have been in credit to the tune of Rs.424,938. These aspects were ignored by the learned trial Court whilst decreeing the suit against the appellant. Further contends that the impugned judgment is not based on any reasoning. Even otherwise, if the PLA of the respondent was to be rejected then the suit of the respondent could not have been decreed straight away without requiring the respondent to prove its case. Further submits that in the PLA the appellant had mentioned that it had written a letter dated 17-9-2001 to the respondent for encashment of US $, this letter was duly received by the respondent on 22-9-2001. The respondent denies having received this letter. As the very question of timely encashment of US $ was the crux of both suits the learned trial Court erred in not granting leave to defend to the appellant as this question required determination by way of framing of issues and recordal of evidence.

6. The learned counsel for the respondent controvert the stance of the learned counsel for the appellant. At the outset they submit that the suit filed by the appellant for the recovery of Rs.5,762,225 has since been dismissed as the appellant failed to produce his evidence. This goes to show the falsity of the appellant's suit/claim.

7. On merits contend that the impugned judgment and decree was passed by considering the facts and circumstances obtaining in both suits. The appellant had failed to set up a triable case in its PLA, therefore, he was rightly denied leave to defend by the learned trial Court. The appellant failed to comply with the provisions of section 10 of the Ordinance, ibid, inasmuch as he did not set out the required details therein. His PLA was, therefore, liable to be summarily rejected. Further submit that the provisions of section 9(1) of the Ordinance, ibid, envisage that a suit can be filed by the Branch Manager of the Bank. The suit was filed by the attorney of the Bank who happened to be its Branch Manager, therefore, the requirements of section 9(1), ibid, were fulfilled. On the question of statement of accounts submit that each and every entry in the statement of accounts was fully substantiated and explained. Further contend that the basic foundation of the appellant's case that he suffered financial loss by the delayed encashment of US $ by the

respondent vanished with the dismissal of his suit. The instant appeal, therefore, merits dismissal. Rely on United Bank Limited v. Tanvir Khalid (2003 CLD 291), Muhammad Ramzan and 4 others v. Agricultural Development Bank of Pakistan through Manager (2004 CLD 1376) and Messrs Al-Kashmir Traders and 6 others v. United Bank Limited through Muhammad Jarar (2005 CLD 1116).

8. Arguments heard. Record perused.

9. We find that through the impugned judgment the learned trial Court has narrowed down the controversy between the parties to the question of the alleged delay having been committed by the respondent in encashment of US $ and the consequential alleged monetary loss suffered by the appellant due to the difference in the conversion rate of the US $ on the relevant dates. Having once done so the learned trial Court on the one hand proceeded to dismiss the appellant's PLA and decreed the respondent's suit and on the other hand by stating that the respondent has raised substantial questions of law and facts which required determination by recordal of evidence proceeded to accept the respondent's PLA. We find that the learned trial Court erred in law in having done so for the reason that if on the same basic premise there were triable issues in one suit then the same holds true for the other suit. We further find that the observation of the learned trial Court that the appellant was unable to substantiate his objections regarding the statement of accounts and the competence of the Bank's attorney to institute/file the suit are also based on an erroneous view of the law. Reliance in this regard is placed on the judgments reported as Appollo Textile Mills Ltd and others v. Soneri Bank Ltd. (PLD 2012 SC 268) and Habib Bank Ltd. (Foreign Exchange Branch) v. Dost Muhammad Cotton Mills Ltd. and others (PLD 1997 Karachi 331).

10. Under the circumstances the appeal is accepted and the impugned judgment and decree dated 4-4-2007 is set aside. The matter is remanded to the learned trial Court for decision afresh, in accordance with the law, on the appellant's PLA which shall be deemed to be pending.

11. The learned trial Court is further directed to proceed in the matter expeditiously and decide the case strictly on its merits without being influenced by any observation having been made in this order.

12. The record of the case be remitted forthwith.

13. There is no order as to costs.

SAK/S-71/L Case remanded.

2013 M L D 1631

[Lahore]

Before Mamoon Rashid Sheikh, J

Mst. ALIYA FAZIL and another---Petitioners

Versus

Mirza FARHAN RUBBANI and another---Respondents

Writ Petition No.2626 of 2012, decided on 28th June, 2013.

Guardians and Wards Act (VII of 1890)---

----Ss.12 & 25---Constitution of Pakistan, Art. 199---Constitutional petition---Contest for custody of minor daughter between father and mother---Welfare of minor, paramount consideration---Dismissal of father's petition by Guardian Judge for having a second wife with children while allowing him to meet minor at specified time---Dismissal of mother's appeal by District Judge after modifying schedule of minor's meetings with father---Mother's plea was that minor's meeting with father in presence of step mother and step brother sisters would not be conducive---Validity---Welfare of minor would be of paramount consideration in guardianship matters---Father could not be denied minimum right of access to his minor children nor, would he be considered alien enemy qua them---Child would need love, affection, care and attention of mother as well as love, affection, company and guiding hand of father---Depriving father of his right to meet his children would lead to emotional deprivation on both sides---Nothing on record to show that step mother had either mistreated minor or was likely to do so---Children of step mother were younger than minor daughter; and that nothing on record to show that their presence had, adversely affected minor---Acrimony existed between husband and first wife, but any amount of acrimony between ex-spouses should not be allowed to stand in way of welfare of minor---Father and minor should have access to each other and spend time in each other's company also during minor's vacation---High Court dismissed mother's constitutional petition in circumstances.

Mst. Imtiaz Begum v. Sheikh Azmat Ullah PLD 1959 (W.P) Lah. 750; Mst. Rasheedan Bibi v. Additional District Judge and 2 others 2012 CLC 784; Muhammad Zaman and 2 others v. Ameer Hamza 2009 CLC 230; Razia Bibi v. Additional District Judge, Sargodha and 2 others 2009 YLR 222; Muhammad Ali v. Rehmat Bibi and 2 others 2006 YLR 4; Saad Amanullah Khan v. IVth-Senior Civil Judge, (South), Karachi and 3 others PLD 2008 Kar.

499 and Mrs. Seema Chaudhry and another v. Ahsan Ashraf Sheikh and others PLD 2003 Supreme Court 877 ref.

Mst. Maryam Masood v. Mughisuddin Mirza and 2 others 2009 CLC 1443 and Altaf Akhtar Alvi v. Mst. Sadaf Ara and others 2008 SCMR 527 rel.

Haroon Irshad Janjua for Petitioners.

Karim-ud-Din Malik for Respondent No.1.

ORDER

MAIN CASE

C.M. No.1 of 2012

C.M. No.1057 of 2012

MAMOON RASHID SHEIKH, J.---The brief facts giving rise to this petition are to the effect that petitioner No.1 and respondent No.1 were married to each other on 21-1-2006. They have one daughter (the minor) who was born on 18-12-2006 and has been arrayed as petitioner No.2. The relationship between petitioner No.1 and respondent No.1, however, deteriorated resulting in the petitioners living apart from respondent No.1. As a consequence, litigation ensued between the parties which included respondent No.1's petition, against the petitioners, under section 25 of the Guardians and Wards Act, 1890, for custody of the minor.

2. The petition was resisted by petitioner No.1

3. Issues were framed and the parties led their respective evidence. On the basis of the evidence so led respondent No.1's petition was dismissed by the learned Guardian Judge, Rawalpindi, through judgment dated 19-3-2012 inter alia on the grounds that since respondent No.1 had taken a second wife and also has children from her it would not be in the welfare of the minor to hand over her custody to respondent No.1. Respondent No.1 was, however, granted visitation rights in the following terms:--

"In view of my findings on above issues, custody petition in hand is hereby dismissed. Meeting schedule of minor daughter is formulated as follows:-

(1) First 15-days of Summer vacations

(2) 2nd days of every Eid, from 9-00 am till 6-00 p.m.

(3) Other days

Every second and forth Sunday of each month from 9.00 a.m. to 6.00 pm

No order as to costs. Memo of cost be prepared. File be consigned to the record room after its due completion."

4. Respondent No.1 did not file an appeal against the judgment of the learned Guardian Judge, however, the petitioners feeling aggrieved of the visitation rights having been granted to respondent No.1 filed an appeal before the learned District Judge, Rawalpindi. The said appeal was accepted by the learned Additional District Judge, Rawalpindi, through judgment dated 25-6-2012 in the following terms:-

"10. Admittedly the applicant/respondent father is residing and working at Lahore. Copy of Nikah Nama dated 21-1-2006 which is on the file shows that applicant was residing at Rawalpindi and Nikah was performed at Satellite Town Rawalpindi. He also has contracted second marriage. It would be harsh for the minor aged about 5-1/2 years to travel from Rawalpindi to Lahore on second day of Eid or on second Sunday and fourth Sunday of each month and then to return to Rawalpindi. The schedule of 15 days of first spell of summer vacations also appears harsh. It would be difficult for minor to live away from her mother for fifteen days consecutively. Under these circumstances this schedule appears unjust and against the circumstances of the parties as well as minor, therefore, same is set aside and following schedule is fixed.

The minor shall remain in custody of father for second week and second last of week of summer vacation and for three mid days of winter vacations. The father/respondent would visit the minor also on every last Saturday of the month for 2 hours from 9-00 a.m. to 11-00 a.m. in the court of learned Guardian Judge, Rawalpindi/trial Court. The schedule for vacations shall take effect from coming winter vacation of this year because when appellant left house of respondent on 19-12-2007 the age of minor was only one year. Due to schedule

monthly visits minor would become well familiar with father and it would become easy for her to pass vacations with her father at Lahore away from her mother."

5. Still feeling aggrieved the petitioners have filed the instant petition whereby they have challenged the schedule of visitation as amended by the learned Additional District Judge. Respondent No.1 has, however, not filed a petition against the judgment of the learned Additional District Judge.

6. At the outset the parties were provided with an opportunity to reconcile their differences but without success.

7. It is submitted by the learned counsel for the petitioners that both learned Courts below have erred in allowing visitation rights to respondent No.1 in the terms referred to above. Admittedly respondent No.1 has taken a second wife and he has children from his second marriage. The custody of the minor was not granted to respondent No.1 primarily for the reason that it would not be in the interest of the minor to live with her step-mother. Contends that if the presence of the step-mother was not in the welfare of the minor for the purposes of granting custody of the minor to respondent No.1 then the same holds true for the prolonged periods of time the minor is to be handed over to respondent No.1 during the minor's summer and winter (school) vacation. Further submits that the learned Courts below have failed to appreciate that the atmosphere in respondent No.1's house is not conducive for the minor to even spend one day thereat what to talk of a week to ten days' at a stretch. Prays that the schedule fixed by respondent No.2 may be set aside.

8. The learned counsel for the petitioners relied upon Mst. Imtiaz Begum v. Sheikh Azmat Ullah (PLD 1959 (W.P) Lahore 750), Mst. Rasheedan Bibi v. Additional District Judge and 2 others (2012 CLC 784) and Muhammad Zaman and 2 others v. Ameer Hamza (2009 CLC 230).

9. The learned counsel for respondent No.1 submits that the good faith of respondent No.1 is manifest from the fact that he neither filed an appeal nor a constitutional petition against the decisions of the learned Courts below. Respondent No.1 being the father of the minor has a right to meet and visit her. The schedule as fixed by respondent No.2 is in accordance with the law. Further submits that the presence of the step-mother should not be used as a tool to deprive respondent No.1 of his rights as a father. Further submits that it would not be in the welfare of the minor if respondent No.1 is kept away from her as this would lead to emotional deprivation and loss of love and affection which a father can shower upon his child. Relies on Mst. Maryam Masood v. Mughisuddin Mirza and 2 others

(2009 CLC 1443), Altaf Akhtar Alvi v. Mst. Sadaf Ara and others (2008 SCMR 527), Razia Bibi v. Additional District Judge, Sargodha and 2 others (2009 YLR 222), Muhammad Ali v. Rehmat Bibi and 2 others (2006 YLR 4), Saad Amanullah Khan v. IVth-Senior Civil Judge, (South), Karachi and 3 others (PLD 2008 Karachi 499) and Mrs. Seema Chaudhry and another v. Ahsan Ashraf Sheikh and others (PLD 2003 Supreme Court 877).

10. I have considered the arguments addressed at the bar and have also gone through the record.

11. The learned counsel for the petitioners has submitted that respondent No.1 has taken a second wife and has children from her, therefore, the learned Guardian Judge did not consider it to be in the welfare of the minor to hand over her custody to respondent No.1. If the presence of the step-mother and the step-brothers/sisters is not conducive for the custody of the minor being handed over to respondent No.1 then the same holds true vis-a-vis handing over of the custody of the minor to respondent No.1 during the minor's school vacation. It has, therefore, been contended that the impugned schedule of visitation has been made in derogation of the reasoning for dismissal of respondent No.1 's petition. I am afraid I am unable to accept this argument of the learned counsel for the petitioners for the reason that a father cannot be denied the minimum right of access to his minor children nor is he to be considered like an alien enemy qua them. This has been so held in Altaf Akhtar Alvi's case (supra), cited by the learned counsel for respondent No.1. Moreover, a father cannot be deprived of his right to meet his children as this would lead to emotional deprivation on both sides. There is no denying the fact that a child needs love, affection, care and attention of a mother but at the same time the child also needs the love, affection, company and guiding hand of a father. The contention of the learned counsel for the petitioners that in the presence of the step-mother the minor would be put at risk or at a disadvantage is not borne out from the record. There is nothing to show that the second wife of respondent No.1 has mistreated the minor or is likely to do so. Admittedly the children of respondent No.1 are younger than the minor and there is nothing on the record to show that their presence has adversely affected the minor. As has been held in Maryam Masood's case (supra), cited by the learned counsel for respondent No.1, a step-mother is not a lady Macbeth or a witch and it cannot be always presumed that she would mistreat her step-child or harbour, malice or hatred towards her step-child unless there is strong evidence in this regard. It has further been held in the said judgment that a minor should be allowed to spend time with his father during school vacation as during the vacation the minor has more time and is not preoccupied with his/her studies, therefore, time can be better utilized for establishing and maintaining father child relationship. In view of the foregoing I deem it to be in the welfare of the minor that respondent No.1 and the minor should have access to each other and spend time in each

other's company also during the minor's vacation. The contention of the learned counsel for the petitioners is, therefore, repelled.

12. Even otherwise, the bona fide of respondent No.1 is established from the fact that admittedly he did not challenge the decision of the learned Guardian Judge or indeed of the learned Additional District Judge even though the learned Guardian Judge had dismissed respondent No.1's petition for custody of the minor and had only allowed him visitation rights. It is petitioner No.1 who was dis-satisfied with the decision of the learned Guardian Judge and upon her appeal the visitation rights were modified to her advantage, however, she still remains dis-satisfied. This leads one to the conclusion that there is acrimony between petitioner No.1 and respondent No.1. However, any amount of acrimony between ex-spouses should not be allowed to stand in the way of the welfare of the minor, as it is settled law that in guardianship matters welfare of the minor is of paramount consideration.

13. Moreover, I have examined the schedule of visitation as determined by respondent No.2 and find that it is based upon proper appreciation of facts brought on the record. The learned counsel for the petitioners has been unable to point out that the impugned judgment has been passed by exercise of excess of jurisdiction or that it is perverse. The learned counsel has similarly been unable to point out any illegality or material irregularity having been committed by respondent No.2 in passing the impugned judgment.

14. Before parting with this judgment I would like to point out that respondent No.1 has admittedly not been able to meet or visit the minor due to suspension of the impugned judgment through order dated 11-12-2012 passed in C.M. No.1 of 2012. In view thereof, whilst dismissing the petition for the foregoing reasons, I deem it appropriate to direct that the schedule of visitation as determined by respondent No.2 to the extent of the visitation rights of respondent No.1 during the summer/winter vacation of the minor shall become effective from the forthcoming winter vacation of the minor. Respondent No.1 shall, however, be entitled to visit the minor on a monthly basis as per the terms of the impugned visitation schedule.

15. This petition is accordingly dismissed with the above observations.

The parties are left to bear their own costs.

SAK/A-90/L Petition dismissed.

2013 M L D 1640

[Lahore]

Before Mamoon Rashid Sheikh, J

Mst. ZARMEEN---Petitioner

Versus

Dr. OMER MOHAYUDDIN SHEIKH and others---Respondents

Criminal Miscellaneous No.253-H of 2013, decided on 8th March, 2013.

(a) Guardians and Wards Act (VII of 1890)---

----S.12---Criminal Procedure Code (V of 1898), S.491---Interim custody of minor---Jurisdiction of Guardian Judge for custody of minor and that of High Court under S.491, Cr.P.C. for recovery of minor---Scope---Both such jurisdictions for being entirely different would not destroy/exclude the other---High Court as an interim measure in the interest and welfare of minor, while pending its final decision by Guardian Judge, could entrust custody of minor to a person holding lawfully his/her custody before its deprivation of the same.

Muhammad Javed Umrao v. Miss Uzma Vahid 1988 SCMR 1891; Ahmed Sami and 2 others v. Saadia Ahmed and another 1996 SCMR 268 and Abdul Rehman Khakwani and another v. Abdul Majid Khakwani and 2 others 1997 SCMR 1480 rel.

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

----Ss.491 & 561-A---Petition for recovery of custody of two minors aged two years and five years---Second petition before High Court after dismissal of first petition by District Judge---Interim Custody, grant of---Scope---Plea of wife (petitioner) was that husband (respondent) had turned her out from his abode and kept custody of minors forcibly, whereas plea of respondent was that she had voluntarily abandoned minors---Such disputed facts could not be decided without evidence, which High Court would not record in exercise of jurisdiction under S.491, Cr.P.C. for being summary procedure---High Court in exercise of inherent jurisdiction could pass an appropriate order while keeping in view welfare of minors of such tender age and attending circumstances---High Court accepted petition and directed husband to hand over interim custody of minors to wife while directing Guardian Judge to decide case expeditiously while restrained parties to remove minors from jurisdiction of Guardian Judge without his express order and allowed husband to visit minors at specified time.

Zubaida Shahzadi v. Muhammad Aslam and another 2007 MLD 512; Nitasha Rashid v. Rashid Zar and 4 others PLD 2010 Kar. 119; Mst. Khalida Parveen v. Muhammad Sultan Mahmood and another PLD 2004 SC 1; Mst. Azra Bhatti v. S.H.O., Police Station Hydri and 3 others PLD 2009 Kar. 325; Mst. Haleema Bibi v. Bashir Ahmad and 2 others 2000 PCr.LJ 1685 and Mst. Farzana v. Syed Muhammad Afzal and another 1991 PCr.LJ 758 ref.

Ms. Asma Jahangir and Mst. Alia Malik for Petitioner.

Suqrat Basit for Respondents Nos. 1 to 3.

ORDER

MIAN CASE

C.M. No.516-M of 2013

MAMOON RASHID SHEIKH, J.---This order is in continuation of the orders dated 22-2-2013, 25-2-2013, 4-3-2013 and 7-3-2013.

2. The brief facts as given in petition are to the effect that the Nikah ceremony of the petitioner and respondent No.1 was performed on 7-4-2007 and Rukhsati took place on 24-11-2007. The petitioner and respondent No.1 have two children; a girl named Erina Omer aged around 5-years and a boy named Shahvez Omer aged around two years (hereinafter referred to as "the minors"). The relationship between the parties was not a happy one ultimately resulting in respondent No.1 driving the petitioner and the minors out of the marital home on 18-1-2013. Efforts were made for reconciliation with the result that the petitioner and the minors returned to the marital home, however, on 1-2-2013 respondent No.1 with the aid of respondents Nos.2 and 3 who happen to be the parents-in-law of the petitioner again turned the petitioner out of the marital home and at the same time refused to hand over the custody of the minors to the petitioner. Feeling aggrieved the petitioner filed a petition under section 491 of the Cr.P.C. for recovery/ production of the minors before the learned District and Sessions Judge, Lahore, which petition was dismissed by the learned Addl. Sessions Judge, Lahore on 8-2-2013, inter alia, for the reasons that the minors have been taken to Karachi, therefore, they have been removed from the jurisdiction of the Court, moreover, the matter is sub-judice before the learned Guardian Judge, Lahore, before whom a petition under section 25 of the Guardian and Wards Act, 1890, has been filed by respondent No.1. Hence the instant petition.

3. At the outset Dr. Abdul Basit, Advocate, the learned counsel for respondents Nos.1 to 3 raised preliminary objections regarding the maintainability of the petition by, inter alia, submitting that the petition is not maintainable as the order dated 8-2-2013 passed by the learned Addl. Sessions Judge, Lahore, exists whereby the petitioner's earlier petition under section 491 of the Cr.P.C. was dismissed. The matter is sub-judice before the Court of the learned Guardian Judge, Lahore, who is the best judge to determine the welfare of the minors. Any order, therefore, passed by this Court would cut through the Guardian Court's order thus prejudicing the case of respondents Nos.1 to 3. Even otherwise in presence of a guardianship petition a habeas corpus petition is not competent. If at all the petitioner has any remedy it lies in the petitioner filing a petition under Article 199, of the Constitution of the Islamic Republic of Pakistan, 1973. A second petition under section 491 of the Cr.P.C. before this Court does not lie.

4. On merits the learned counsel submitted that the petitioner by her conduct has given up her right to the custody of the minors inasmuch as the petitioner abandoned the minors. The petitioner is more interested in her social life than the welfare of the minors, therefore, the petitioner cannot be given the custody of the minors. Further submitted that the petitioner preferred to attend a New Year party rather than look after the minors. Similarly, she went on a world tour by leaving the minors behind. Contended that there is no element of illegality of respondent No.1 's custody of the minors as respondent No.1 is the father and natural guardian of the minors. Respondent No.1, therefore, has a prior right to the custody of the minors. In any event as the matter is sub-judice before the learned Guardian Judge, Lahore, this Court should refrain from passing any orders regarding the custody of the minors.

5. Ms. Asma Jahangir, Advocate, the learned counsel for the petitioner submitted that the allegations in respect of the character of the petitioner are baseless and false. The petitioner went on the world tour along with respondent No.1. The petitioner never abandoned the minors. The petitioner in fact was thrown out of the marital home by respondent No.1 time and again but the petitioner with a view to salvaging her marriage for the sake of the minors always made efforts to reconcile with respondent No.1. But her efforts have been in vain. Relies on the judgments reported as Muhammad Javed Umrao v. Miss Uzma Vahid (1988 SCMR 1891), Ahmed Sami and 2 others v. Saadia Ahmed and another (1996 SCMR 268), Abdul Rehman Khakwani and another v. Abdul Majid Khakwani and 2 others (1997 SCMR 1480), Zubaida Shahzadi v. Muhammad Aslam and another (2007 MLD 512), Nitasha Rashid v. Rashid Zar and 4 others (PLD 2010 Karachi 119), Mst. Khalida Parveen v. Muhammad Sultan Mahmood and another (PLD 2004 SC 1), Mst. Azra Bhatti v. S.H.O.,

Police Station Hydri and 3 others (PLD 2009 Karachi 325), Mst. Haleema Bibi v. Bashir Ahmad and 2 others (2000 PCr.LJ 1685) and Mst. Farzana v. Syed Muhammad Afzal and another (1991 PCr.LJ 758) to contend that a second petition under section 491 of the Cr.P.C. is competent before this Court, therefore, there was no need for the petitioner to file a petition under Article 199, of the Constitution. Further submitted that this Court is vested with parental jurisdiction that can and should be exercised for the welfare of the minors. Further contended that the filing of a guardianship petition does not debar the petitioner from approaching this Court under section 491 of the Cr.P.C.

6. The learned counsel for the petitioner further contended that the petitioner being the mother of the minors has a preferential right to their custody as the minors are of tender age. The custody of the minors with respondent No.1 is illegal. Assuming without conceding that respondent No.1's custody of the minors is not illegal even then in any event respondent No.1's custody of the minors can at best be termed as irregular.

7. During the course of arguments the learned counsel for respondents Nos.1 to 3 referred to Criminal Miscellaneous No.516-M of 2013 to contend that respondent No.1 is willing to allow the petitioner to live with the minors in respondent No.1's house without any let or hindrance or interference by respondents Nos.1 to 3. The petitioner would be free to come and go and to reside with the minors. Respondent No.1 does not want the minors to be deprived of their mother's company.

8. The learned counsel for the petitioner filed a reply to Criminal Miscellaneous No.516-M of 2013 and submitted, under instructions, that the petitioner is not willing to take up the offer of respondent No.1 and would like that the petition be decided on merits.

9. In view of the above Criminal Miscellaneous No.516-M of 2013 has become infructuous and is disposed of accordingly.

10. Before proceeding in the matter the parties were given an opportunity to explore the possibility of an out of Court settlement, however, no amicable settlement could be arrived at.

11. I have considered the arguments of the learned counsel for the parties and have also gone through the record.

12. The preponderance of the judgments quoted at the bar by the learned counsel for the petitioner are to effect that the jurisdiction of Courts under the Guardians and Wards Act, 1890, in respect of the custody of minors and for recovery/production of minors under section 491 of the Cr.P.C. are entirely different. There is no question of one excluding the other, overlapping the other or destroying the other and there is no repugnancy between the said two provisions, moreover, this Court as an interim measure pending final decision by the Guardian Court can pass an appropriate order where it finds that the interest and welfare of the minor demands that he/she be committed immediately to the custody of the person who was lawfully holding his/her custody before being deprived of the same. Reference is made to the judgments of the Hon'ble Supreme Court reported as Muhammad Javed Umrao v. Miss Uzma Vahid (1988 SCMR 1891), Ahmed Sami and 2 others v. Saadia Ahmed and another (1996 SCMR 268) and Abdul Rehman Khakwani and another v. Abdul Majid Khakwani and 2 others (1997 SCMR 1480).

13. In view of the above stated position of the law I hold the petition to be maintainable. The preliminary objections raised by the learned counsel for respondents Nos.1 to 3 are, therefore, repelled.

14. It is an admitted position that the younger of the two minors is aged around two years and the elder minor is aged 5-years. The convergence of views between the parties unfortunately ends there. There is an allegation on the part of the petitioner that she was thrown out of the marital home and at that time respondents Nos.1 to 3 forcibly retained the custody of the minors, whereas on the other hand it is contended by respondents Nos.1 to 3 that the petitioner had abandoned the minors. It, therefore, cannot be established without recording of evidence as to when and under what circumstances the minors were snatched from the petitioner, indeed, if at all. This Court, however, in the exercise of its jurisdiction under section 491 of the Cr.P.C. does not normally record evidence to determine disputed questions of fact as the procedure adopted in such like cases is summary in nature. In such like circumstances, however, this Court whilst keeping the welfare of the child as also the attending circumstances in mind is empowered to pass appropriate orders to ensure that the rights conferred upon the child are fully protected in a suitable manner in the exercise of its inherent jurisdiction. This is especially so where the minors are of tender age as in the instant case. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court cited by the learned counsel for the petitioner and reported as Mst. Khalida Parveen v. Muhammad Sultan Mahmood and another (PLD 2004 Supreme Court 1) wherein it has been, inter alia, held that even in cases where it is found that the petition under section 491, Cr.P.C. is not competent as there is no element of illegal custody by the

father of his own child, but in the welfare of the child as well as to ensure that the rights conferred upon the child are fully protected in a suitable manner, this Court can pass appropriate orders in exercise of its inherent jurisdiction.

15. Under the circumstances, this petition is accepted and it is directed that by way of an interim measure the custody of the minors be handed over by respondents Nos.1 to 3 to the petitioner forthwith with a further direction to the learned Guardian Judge, Lahore, to decide the matter pending before him expeditiously, purely on merits without being influenced by any observation having been made in this order.

16. This order shall inure till the learned Guardian Judge, Lahore, passes an order regarding the interim custody of the minors. Till such time respondent No. 1 shall have the right to visit the minors and to this end, in view of the fact that the elder minor is a school going child, it is ordered that respondent No. 1 shall collect the minors from the petitioner's residence at 10-00 a.m. on every Sunday and return the minors to the petitioner's custody at 6-00 p.m. on the same day.

17. It is further directed that the minors shall not be removed from the jurisdiction of the learned Guardian Judge, Lahore, by either party without an express order of the learned Guardian Judge, Lahore, granting permission in this behalf.

18. The order whereby it was directed that the names of the minors be placed on the Exit Control List is hereby recalled.

SAK/Z-17/L Petition accepted.

2013 P L C (C.S.) 1183

[Lahore]

Before Mamoon Rashid Sheikh, J

USMAN TARIQ

Versus

PUNJAB PUBLIC SERVICE COMMISSION and others

Writ Petition No.85 of 2013, heard on 15th January, 2013.

Punjab Public Service Commission Regulations, 2000---

----Constitution of Pakistan, Art.199---Constitutional petition---Combined Competitive Examination---Petitioner having failed in paper of English Composition was held by Commission not to be eligible to appear in interview---Re-checking of answer paper at petitioner's request, but no error in its counting and marking was found by Commission---Refusal of Commission to re-evaluate marks of petitioner's , answer to one question in such paper carrying 30 marks---Validity---Petitioner had failed to point out against Examiner or Chairman of Commission any criminality, fraud or abuse of Regulations in marking such paper---Marking of answer papers being a technical job could best be undertaken by experts and not by High Court in exercise of constitutional jurisdiction---Constitutional jurisdiction meant primarily for correcting jurisdictional errors in impugned orders of Tribunals or executive authorities could not be invoked for giving decisions on merits, which the functionary concerned only was entitled to make under relevant law---High Court could not conduct inquiry or record evidence to determine such disputed facts---Re-evaluation of paper, if directed by High Court, would result in an un-ending chain of litigation bringing whole system of examination of Commission at stake---High Court dismissed constitutional petition in circumstances.

Board of Intermediate and Secondary Education, Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others PLD 1992 SC 263; The Chief Settlement Commissioner Lahore v. Raja Muhammad Fazil Khan and others PLD 1975 SC 331; Ms. Shakeela v. University of Peshawar through Vice-Chancellor and another PLD 2003 Pesh. 69; Rabial Riaz v. Board of Intermediate and others 2011 YLR 1656; Muhammad Usman Qayyum v. University of Engineering and Technology, Lahore and 5 others 2004 SCMR 606; Farmanullah Khan v. Controller of Examination, Karachi University 2010 MLD 85; Khurshid Ahmad v. Bahauddin Zakariya University, Multan and 3 others 1999 CLC 694

and Miss Avdhani Meena Ramchandra and others v. Maharashtra State Board of Secondary and Higher Secondary Education, Pune and others AIR 1981 Bombay 126 ref.

Board of Intermediate and Secondary Education, Lahore v. Saima Azad 1996 SCMR 676 rel.

Khawaja Haris Ahmad and Adnan Tariq for Petitioner.

Muhammad Azeem Malik, Addl. A.-G, Punjab and Khawaja Salman Mahmood, Asstt. A.-G., Punjab.

Muhammad Farooq Raja, Deputy Director (Legal) and Muhammad Hanif, Deputy Director (Secretary), Punjab Public Service Commission, Lahore.

Dates of hearing: 9th, 11th and 15th January, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- The brief facts giving rise to this petition are to the effect that the petitioner applied for and competed in the Combined Competitive Examination-2011 of the Punjab Government for recruitment to the posts of Provincial Management Service etc., 2011, conducted by the Punjab Public Service Commission (respondent No.1). The petitioner was declared eligible to compete in the written examination. The petitioner, therefore, sat for the written examination held in 2012 under Roll No.24206. The result of the written examination was announced on 14-12-2012. The petitioner was, however, declared to have failed in the paper of English Composition (Paper-II), therefore, the petitioner was not held to be eligible to appear for the interview component of the examination. The petitioner applied for re-checking of Paper-II and was informed by respondent No.1 through letter No. PPSC-DA-II-PMS-2011/07-SSA, dated 3-1-2013, that his answer sheet of Paper-II has been re-checked thoroughly and no error in counting and marking has been found. Feeling aggrieved the petitioner has filed the instant petition.

2. The learned counsel for the petitioner submitted that the petitioner is a lawyer by profession and has a bright academic record to his credit. The petitioner has attended reputable institutions wherein the standard of instruction has been English. The petitioner won a Gold Medal which was awarded by his law college in recognition of his outstanding performance in the LL.B. examination. In the examination in question the petitioner was awarded 27 out of 100 marks in Paper-II whereas in the paper of English Essay Writing (Paper-I) the petitioner obtained 50 out of 100 marks which marks are amongst the highest

obtained by candidates in Paper-I. This goes to show that the petitioner is well conversant with the English language and has a high caliber of understanding thereof. In the circumstances where the petitioner had passed Paper-I with high marks it is not understandable as to how the petitioner failed in Paper-II. Paper-I involves essay writing whereas Paper-II involves paragraph writing, précis writing, explaining idiomatic phrases (all similar to essay writing) which a person who had scored high marks in an essay -based paper could have easily attempted and obtained high marks. The marks obtained by the petitioner in Paper-II are not commensurate with the high marks obtained by the petitioner in the other papers. The marking of Paper-II has been done in a perverse manner and by abuse of authority. The questions of Paper-II are subjective in nature, therefore, a candidate attempting the same should be given some marks whereas the petitioner has reason to believe that his answers to two questions have not been checked by the examiner. Respondent No.1 has taken the stand that the Punjab Public Service Commission Regulations, 2000 (the Regulations) only allow for re-checking of papers if there is any error in counting or marking. The Regulations do not allow for re-evaluation. This stance of respondent No.1 is against the law laid down by the Hon'ble Supreme Court of Pakistan in the judgment reported as Board of Intermediate and Secondary Education, Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others (PLD 1992 SC 263) wherein it has been, inter alia, held that where fraud is alleged a case of further inquiry in terms of the judgment reported as The Chief Settlement Commissioner Lahore v. Raja Muhammad Fazil Khan and others (PLD 1975 SC 331) is made out. Pleaded that the answer script of the petitioner may be summoned so that it can be demonstrated that there is perversity and abuse of authority in the matter by the examiner of Paper-II. Further relied on the judgments reported as Ms. Shakeela v. University of Peshawar through Vice-Chancellor and another (PLD 2003 Peshawar 69), Rabial Riaz v. Board of Intermediate and others (2011 YLR 1656), Muhammad Usman Qayyum v. University of Engineering and Technology, Lahore and 5 others (2004 SCMR 606), Farmanullah Khan v. Controller of Examination, Karachi University (2010 MLD 85), Khurshid Ahmad v. Bahauddin Zakariya University, Multan and 3 others (1999 CLC 694) and Miss Avdhani Meena Ramchandra and others v. Maharashtra State Board of Secondary and Higher Secondary Education, Pune and and others (AIR 1981 Bombay 126).

3. The departmental representative controverted the stance of the learned counsel for the petitioner and submitted that the Combined Competitive Examination is held by respondent No.1 on a regular basis. Thousands of candidates apply each year and only around a couple of hundred are selected after a detailed process which entails initially vetting of forms, written examination and interviews of those candidates who pass the

written examination. This shows that the examinations are held by respondent No.1 in a fair and impartial manner. Further submitted that the examinations are conducted through eminent and qualified examiners who do not harbour any ill-will, hostility or animosity against the candidates.

4. Mr. Muhammad Azeem Malik, the learned Additional Advocate-General, Punjab, submitted that the mere fact that the petitioner had scored highly in the other papers does not necessarily mean that he should have also passed Paper-II with high marks. Candidates can and do fail in one paper whereas they have obtained very high marks in the other papers. Further submits that this Court in the exercise of its constitutional jurisdiction normally does not interfere in such like matters as institutions as well as candidates are bound by the rules/regulations which have the force of law. The judgments cited at the bar by the learned counsel for the petitioner are not attracted to the case as no case of criminality, irresponsibility or fraud and abuse of Regulations has been made out. Even otherwise the petitioner had no vested right to have his paper re-evaluated.

5. After hearing the contentions of the learned counsel for the petitioner, the departmental representative and the learned Additional Advocate-General and also on the strength of the judgments cited at the bar by the learned counsel for the petitioner it was directed that the petitioner's answer script of Paper-II be produced. In compliance thereof the answer script was produced on 9-1-2013. It was identified by the petitioner as well as his learned counsel as to be that of the petitioner. After going through the answer script it was observed that the last question which the petitioner had attempted was question No.1 of the paper which carried 30 marks. The examiner had graded the petitioner on the basis of the rough draft of the reply, however, the formal answer had not been graded and had been classified as an over attempt. Moreover, the marks awarded for the answer to question No.1 had been reduced from 11 to 6. The matter was, therefore, referred to the Chairman of respondent No.1 for further consideration and the petition was adjourned for 11-1-2013.

6. On 11-1-2013 the departmental representative appeared and submitted that the Chairman has declined to intervene in the matter as the Regulations do not allow for re-evaluation.

7. As the learned principal counsel for the petitioner was not available that day the petition was adjourned to 15-1-2013.

8. On the adjourned date the learned counsel for the petitioner submitted that a clear-cut case of perversity has been made out. There are glaring mistakes in the evaluation of the paper. The rough draft had been checked and graded whereas the formal answer had neither been checked nor graded at all, hence, leading to the conclusion that one answer of the petitioner had not been graded at all. This is a fit case for re-evaluation to be done by an eminently qualified independent examiner. The question of an over attempt by the petitioner does not arise. Moreover, the petitioner was initially awarded 11 marks which were reduced to 6. The learned counsel further contended that this shows bias, perversity and abuse of authority in checking the petitioner's Paper-II by the examiner and further consideration of the matter by the Chairman. Further submits, under instructions, that he would be satisfied if only the formal answer to question No.1 is directed to be re-evaluated by an eminent independent examiner. The learned counsel concluded by reiterating his reliance on the judgments referred to above.

9. The departmental representative submitted that the Regulations do not allow for re-evaluation of any paper. If the contention of the learned counsel for the petitioner is accepted then it will open floodgates and there would be no end to the number of candidates seeking re-evaluation of their papers, thus, leading to hardship for respondent No.1 with the result that candidates would keep on demanding that their papers be re-evaluated again and again. Further submits that the Chairman is competent under the Regulations to ensure that there is no irregularity in the examination process. Contends that 5701 candidates took the written examination out of which 527 qualified. No other candidate has complained except the petitioner. All questions have been marked and graded and the marks obtained by the petitioner have been properly tabulated. On Court's query admits that albeit the Rules do not allow for re-evaluation yet there is no express prohibition against re-evaluation either. He, however, submits that since the Regulations do not allow for re-evaluation, therefore, no re-evaluation is allowed.

10. Khawaja Salman Mahmood, the learned Assistant Advocate-General submitted that the Regulations do not allow for re-evaluation of papers, therefore, the petitioner has no vested right to have his papers re-evaluated. Further submitted that Courts normally do not intervene in such like matters primarily for the reason that if Courts start intervening in such like matters it will open the door for every unsuccessful candidate to challenge the result of his examination in Court, thus, spiraling examining authorities and/or educational institutions into un-ending litigation. In brief invoked the floodgates argument.

11. Heard. Record perused.

12. The learned counsel for the petitioner has tried to make out a case of perversity and abuse of authority by the respondents in evaluating Paper-II of the petitioner. It has been contended that all the questions answered by the petitioner have not been checked and/or the marks of the petitioner's answer to question No.1 had been reduced from 11 to 6 which was not warranted in the circumstances of the case. The main plank of the arguments of the learned counsel for the petitioner has been based on Mst. Salma Afroze's case (supra) wherein it has been, inter alia, held that:

"He had similarly made disclosure about the calculated perverse marking of other papers as well. Such detail was altogether lacking in the cases of the respondents before us. There was no ex facie disclosure of criminality, irresponsibility or fraud and abuse of regulations in marking the papers. The stages in which such a controversy has to be examined are that first the identity of the script or answer-book is to be established by visual inspection of it by the candidate. He must own it. It must be his. Next the perversity, the abuse, the criminality in evaluating it should be particularized by complete disclosure before the Chairman as well as before the Court. The person/examiner accused of having indulged should be impleaded as a party in Court and allowed to meet the allegations. If the Court finds ex facie that there is good ground made out for further inquiry in terms of Muhammad Fazil Khan's case PLD 1975 SC 331, it should itself examine and in the next stage get the answer-books examined after annulling the award of marks on grounds fully established."

13. The question of re-evaluation of examination papers also came up for consideration before the Hon'ble Supreme Court in the case of Board of Intermediate and Secondary Education, Lahore v. Saima Azad (1996 SCMR 676) and the Hon'ble Supreme Court laid down the criteria in such like cases, inter alia, to the following effect:

"We have heard the learned counsel for the parties and are of the view that the High Court while exercising jurisdiction under Article 199 of the Constitution was not justified in summoning the answer books of whole lot of the examinees in order to evaluate and find out whether, the examiner had carried out the marking of numbers in the case of respondent/examinee correctly or not? The marking of numbers on answer book is a technical job performed by experts which the High Court is not expected to undertake in exercise of its power of judicial review under Article 199 of the Constitution. The jurisdiction of High Court under Article 199 of the Constitution is principally meant for correcting the jurisdictional error in the order and proceedings of tribunals and executive authorities. This jurisdiction cannot be invoked for obtaining decisions on merits which the

functionaries alone are entitled to take under the law. Similarly, the plea of discrimination raised by the respondent in her petition before the High Court has to be decided by the Court on the basis of admitted and proved facts brought before it without entering into the process of roving enquiry into disputed facts by the Court.

We are, therefore, of the view that the learned Judge in Chambers, before passing the impugned order should have first examined the scope of proceedings before him and consider the provisions of relevant statute under which relief could be granted to the respondent.

The learned counsel for the respondent while supporting the order of High Court vehemently contended that as the career of respondent is at stake and no remedy is available to her under the relevant statute, the High Court in order to do complete justice can call for answer book of the respondent and others in order to compare whether the marking was carried on correctly in the case of respondent.

We are unable to accept the above contention. The contention of the learned counsel for the respondent if accepted will lead to dangerous consequences, as it will open the door for every unsuccessful candidate to challenge the result of his examination in Court thus involving the educational institutions into unending and unethical litigation and bringing the whole system of examination in vogue, at stake. The solemnity of educational institutions and process of examination cannot be sacrified on the altar of expediency. As earlier stated by us, the jurisdiction of the High Court under Article 199 of the Constitution is meant for correcting the errors of jurisdictional nature. Therefore, in order to succeed, the respondent must first satisfy that the issue brought by her before the Court is justiciable under Article 199 of the Constitution. The learned Judge in Chambers, therefore, could not pass the impugned order without first determining these basic questions regarding jurisdiction of Court in the matter. We, accordingly, accept this appeal, set aside the impugned order and direct that the writ petition filed by the respondent will be disposed of by the learned Judge in Chambers without asking for production of the whole lot of answer books examined by the examiners who examined the answer book of respondent. There will be no order as to costs in the circumstances of the case."

14. In the instant case firstly no ex facie disclosure of criminality or fraud and indeed abuse of Regulations in marking of Paper-II has been pointed out by the petitioner. The learned counsel for the petitioner has, however, contended that a case of perversity and abuse of authority is made out firstly by the examiner in neglecting to check and grade the

formal answer given by the petitioner to question No.1 of Paper-II and secondly by the Chairman in refusing to have Paper-II re-evaluated. A question has also been raised regarding the reduction of the petitioner's marks from 11 to 6 in the petitioner's answer to question No.1. The learned counsel for the petitioner, however, stopped short of alleging criminality or fraud against the examiner or the Chairman. Indeed, the petition is also silent on this score.

15. On examining the facts and circumstances of the case on the touchstone of Mst. Salma Afroze's case (supra) and Saima Azad's case (supra) one comes to the conclusion that even if an ex facie case of criminality or fraud had been made out, which is not so in the instant case, this Court would still be first required to determine its jurisdiction in the matter as on the basis of the ratio of Saima Azad's case (supra) marking of answer papers is a technical job best left to experts and this exercise cannot be expected to be undertaken by this Court in the exercise of its power of judicial review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The said jurisdiction is primarily meant for correcting jurisdictional errors in the impugned orders/proceedings of Tribunals or Executive Authorities. Moreover, this Court cannot invoke its jurisdiction by giving decisions on merits which the functionaries alone are entitled to make under the law.

16. In the instant case firstly as said above no ex facie case of criminality or fraud has been made out and secondly no jurisdictional error has been pointed out. Moreover, the facts brought before this Court are disputed and this Court cannot enter into the exercise of determination thereof by conducting an inquiry or indeed recording evidence. It would, therefore, seem that this Court would be unable to exercise its power of judicial review under Article 199 of the Constitution in favour of the petitioner. The contention of the learned counsel for the petitioner that this Court should direct the respondents to have the answer sheet of Paper-II re-evaluated is, therefore, repelled.

17. Turning to the question of reduction of the petitioner's marks in the answer to question No.1 of the paper from 11 to 6, even if it were to be accepted that the marks were wrongly reduced the petitioner would still not be successful as with the addition of the 5 deducted marks the total marks obtained by the petitioner would come to 32 which figure falls shy of the pass marks of 33 by 1 mark and there is no provision in the Regulations for award of grace marks.

18. I also find force in the argument of the learned Additional Advocate-General that if this Court were to intervene and direct re-evaluation of the paper this would result in an

un-ending chain of litigation bringing the whole system of examinations of respondent No.1 at stake. I am fortified in my view on the basis of Saima Azad's case (supra).

19. Under the circumstances, I am not persuaded to intervene in the matter with the result that this petition fails and is dismissed with no order as to costs.

SAK/U-6/L Petition dismissed.

P L D 2013 Lahore 95

Before Mamoon Rashid Sheikh, J

ALTAF HUSSAIN---Appellant

Versus

ARIFA FAROOQI and 7 others---Respondents

F.A.O. No.27 of 2012, decided on 15th October, 2012.

(a) Cantonments Rent Restriction Act (XI of 1963)---

----S. 17---Qanun-e-Shahadat (10 of 1984), Arts. 75 & 76---Constitution of Pakistan, Art.10A---Ejectment of tenant---Reconstruction of premises, plea of---Proof---Photocopies of documents, reliance on---Effect---Rent Controller relying on photocopies of documents, allowed ejectment applications filed by landlords on the plea of reconstruction---Validity---Rent Controller noted that since extract of revenue record and sanctioned building plan etc. where photocopies, therefore, such documents would be marked as Exhibits---Landlords having brought photocopies of sanctioning letter and sanctioned building plan on record did not prove them in accordance with law---Rent Controller on the basis of same proceeded to decide issue relating to approval of building plan and reconstruction of demised premises against tenants---Rent Controller, therefore, erroneously arrived at the decision in respect of such issue--- Rent Controller had denied opportunity of fair trial and due process to tenants--- Entitlement to fair trial and due process, after insertion of Art.10-A in the Constitution, was a fundamental right--- High Court in exercise of appellate jurisdiction, set aside ejectment orders passed by Rent Controller and remanded the matter to him for decision afresh after affording opportunity of leading additional evidence to parties--- Petition was allowed accordingly.

Fida Muhammad v. Pir Muhammad Khan (deceased) through Legal Hiers and others PLD 1985 SC 341; Syed Nizam Ali and 2 others v. Ghulam Shah through Legal Heirs and another PLD 2000 Lah. 168; Mst. Nazira Begum v. Mir Hussain Khan and others PLD 1984 (AJ&K) 1; Malik Riaz Ahmad and others v. Mian Inayat Ullah and others 1992 SCMR 1488; Ilyas Akhtar and 2 others v. Khan Zaman and another 2001 MLD 1617; Kifayatullah Bangash v. Umar Gul 2000 SCMR 1080 and Manzoor Elahi v. Mst. Surraya Jabin PLD 2004 Pesh. 62 ref.

(b) Power of attorney---

----Acting as attorney/agent---Principle---No person can act for and on behalf of another person unless specifically or impliedly authorized to do so.

Syed Hamid Ali Bokhari for Appellant.

Khawaja Shahid Rasool Siddiqui for Respondents.

ORDER

MAMOON RASHID SHEIKH, J.---Through this single order F.A.O. No.27 of 2012 and F.A.Os No.13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35 and 36 of 2012 shall be decided, as common questions of law and facts arise therein.

2. The appeals have been directed against the orders dated 13-12-2011 passed by the learned Additional Rent Controller, Rawalpindi Cantt., whereby the appellants in all the appeals, who are tenants in the various shops, in the multi-storey building commonly known as Bashir Plaza situated at 64-Adamjee Road, Rawalpindi Cantt. (hereinafter referred to as "the demised premises") have been ordered to be evicted from the demised premises.

3. The brief facts giving rise to the appeals are to the effect that the respondents, who are common in each appeal (hereinafter referred to as "the respondents"), brought 24 (twenty-four) separate ejectment petitions under section 17 of the Cantonments Rent Restriction Act, 1963, against the different appellants in each appeal (hereinafter collectively referred to as "the appellants") on the sole ground of reconstruction of the demised premises. The appellants resisted the ejectment petitions and on the basis of the divergent pleadings of the parties the learned Additional Rent Controller framed the following common Issues in each ejectment petition:--

(1) Whether building plan of the suit property has been approved and petitioners want to construct the suit property? OPP

(2) Whether the ejectment petition is not maintainable in view of preliminary objections raised by the respondent? OPR

(3) Relief.

On the basis of the evidence led by the parties the learned Additional Rent Controller decided Issues Nos.1 and 2 in favour of the respondents. As a consequence, the respondents' ejectment petitions were accepted and through the impugned order dated 13-12-2011 the appellants were directed to vacate the demised premises and to hand over the possession thereof to the respondents within two months of passing of the impugned ejectment orders.

4. The learned counsel for the appellants submits that the impugned orders have been passed by the learned Additional Rent Controller by mis-appreciation of facts and misapplication of law.

5. Contends that the ejectment petitions were filed through one T. Z. Farooqi who claims to be the general attorney of the respondents (hereinafter referred to as "the attorney"). The copies of the various general powers of attorney brought on the record by the respondents do not confer any such power to the attorney. Moreover, the demised premises are admittedly a joint property. They attorney has not been conferred any power by the respondents to apply for and obtain a sanctioned site plan for the purposes of reconstruction of the demised premises nor any power has been conferred upon him to demolish the demised premises. As these powers have not been conferred the ejectment petitions brought by the attorney on behalf of the respondents were not competent. In cases of personal need or default one owner can file an ejectment petition for and on behalf of all the owners but in the case of reconstruction individual authorization was required which has not been obtained by the attorney. Even otherwise, the powers of attorney executed in favour of the attorney do not mention the demised premises. It is settled law that powers of attorney are to be strictly construed. The ejectment petitions were, therefore, not competently filed nor any evidence led on behalf of the other respondents by the attorney can be read in support of the ejectment petitions.

6. Further contends that the learned Additional Rent Controller failed to appreciate that the ejectment petitions were mala fide and had been brought merely with a view to demanding an exorbitant rate of rent from the appellants.

7. Also contends that the norms of natural justice have not been followed by the learned Additional Rent Controller whilst passing the impugned orders. The appellants were not provided with an opportunity to lead their evidence. In fact all the ejectment petitions were decided in a mechanical manner and except for variation in the parties names the impugned ejectment orders in each ejectment petition are exactly the same.

8. Submits that F.A.O. No.27 of 2012 arises out of the ejectment order passed in Ejectment Petition No.1 of 2010 entitled "Arifa Farooqi and 7 others v. Altaf Hussain". In the said ejectment petition the appellant/respondent in his reply had raised a number of preliminary objections. The learned Additional Rent Controller, however, upon holding that the respondents have been able to establish that they intend to reconstruct the demised premises and had also obtained the necessary sanctioned plan from the Cantonment Board, Rawalpindi, further held that since the case of the respondents is established vis-a-vis the ground of reconstruction, as such, there is no requirement for giving a finding on Issue No.2. The said issue was required to be decided for the reason that it was based on a number of preliminary objections having been raised by the appellant/respondent. The same position obtains in the other appeals and their respective ejectment petitions. Indeed, the finding of the learned Additional Rent Controller on Issue No.2 in all the ejectment petitions is a non-speaking order and has been passed in violation of the provisions of Section 24-A of the General Clauses Act, 1897. The appeals are liable to be accepted on this ground alone.

9. Further submits that even otherwise the finding of the learned Additional Rent Controller on Issue No.1 is erroneous and is a result of misreading and non-reading of evidence. Reiterates the arguments in respect of the respondents attorney being not empowered to apply for and obtain the sanctioned building plan and to reconstruct the demised premises. Further submits that the finding of the learned Additional Rent Controller on Issue No.1 in all ejectment petitions/appeals including F.A.O. No.27 of 2012 is liable to be set aside on this ground alone. In the case of the other appeals submits that there is an additional ground available as during the course of hearing of the ejectment petitions on 5-10-2011 the learned counsel for the respondents made a statement in the absence of the appellants to the effect that the evidence of the appellant/respondent in Ejectment Petition No.1 of 2010 has been recorded, the cross-examination on the said appellant/respondent may be treated as the cross-examination of the appellants/respondents in the other ejectment

petitions. The learned Additional Rent Controller on the basis of the statement of the learned counsel for the respondents proceeded to do so and made verbatim copies of the cross-examination of the appellant/respondent in Ejectment Petition No.1 of 2010 in all the other ejectment petitions with the minor variation that the name of each respective appellant/respondent was inserted therein. As a consequence, the appellants were denied the opportunity of leading evidence.

10. Prays for setting aside of the impugned orders and remand of the cases for recordal of evidence afresh and separate decision on the basis thereof on each Issue. Relies on the judgments reported as Fida Muhammad v. Pir Muhammad Khan (deceased) through Legal Hiers and others (PLD 1985 SC 341), Syed Nizam Ali and 2 others v. Ghulam Shah through Legal Heirs and another (PLD 2000 Lahore 168), Mst. Nazira Begum v. Mir Hussain Khan and others (PLD 1984 AJ&K 1), Malik Riaz Ahmad and others v. Mian Inayat Ullah and others 1992 SCMR 1488 and Ilyas Akhtar and 2 others v. Khan Zaman and another (2001 MLD 1617).

11. The learned counsel for the respondents controverts the stance of the learned counsel for the appellants. Maintains that the order dated 5-10-2011 whereby the cross-examination of the appellant/ respondent in Ejectment Petition No.1 of 2010 was directed to be written and read as the cross-examination of the other appellants in their respective ejectment petitions was passed with the consent of the parties concerned. Further submits that the respondents were able to establish their case on the issue of reconstruction of the demised premises. The respondents have obtained a sanctioned building plan which was brought on the record, hence, the respondents' case stood established, therefore, there was no need for leading any further evidence. No finding was, therefore, required on Issue No.2.

12. As to the contention of the learned counsel for the appellants that the ejectment petitions were filed unauthorizedly by the attorney of the respondents, submits that admittedly the very same attorney let out the demised premises to the appellants and they have been paying rent to the said attorney who in effect is the landlord of the appellants. Relies on the definition of the term landlord as defined in section 2(g) of the Act, ibid. Further submits that the attorney of the respondents was duly authorized through the powers of attorney executed in his favour. The powers of attorney have been brought on the record and authorize the attorney to reconstruct the demised premises and to obtain the requisite authorizations including but no limited to obtaining a sanctioned building plan. The attorney of the respondents performed all these functions as the attorney of the respondents and the landlord of the appellants. The appellants, therefore, cannot challenge the authority of the respondents' attorney at this stage.

13. The learned counsel further submits that the findings of the learned Additional Rent Controller are in accordance with the law on the subject and are unexceptionable. Prays for dismissal of the appeals. Relies on the judgments reported as Kifayatullah Bangash v. Umar Gul (2000 SCMR 1080) and Manzoor Elahi v. Mst. Surraya Jabin (PLD 2004 Peshawar 62).

14. Heard. Record perused.

15. The relationship of landlord and tenant is admitted by the appellants. The sole ground on which the ejectment petitions were brought against the appellants is the reconstruction of the building forming the demised premises. The respondents through their attorney who has been contended by the learned counsel for the respondents to be the landlord of the appellants purportedly applied for the necessary permissions/sanctions for reconstruction of the demised premises. This included applying for and obtaining a sanctioned building plan. The respondents led their evidence through their attorney who mainly reiterated the grounds of the ejectment petitions in his statements. He, however, did not adduce in evidence any of the documents relied upon by the respondents. The respondents in fact brought on record their documentary evidence through the statements of their learned counsel. The documents so brought on the record including an extract from the GLR in respect of the demised premises, the various powers of attorney executed in favour of the attorney of the respondents and copies of the sanctioning/covering letter and the sanctioned building plan. The learned Additional Rent Controller noted that since the extract of the GLR and the sanctioned building plan etc. were photocopies, therefore, these documents would be marked as Mark-A, B & C respectively. The respondents, as said above, albeit having brought photocopies of the sanctioning letter and the sanctioned building plan on the record did not prove them in accordance with the law. The learned Additional Rent Controller, however, on the basis of the same proceeded to decide Issue No.1, which pertains to reconstruction of the demised premises, against the appellant. The learned Additional Rent Controller has, therefore, erroneously arrived at the decision in respect to Issue No.1 in all ejectment petitions.

16. In addition to the above the learned Additional Rent Controller having found Issue No.1 against the appellants has decided Issue No.2 in a perfunctory manner without adverting to any of the preliminary objections having been raised by the appellants. I find force in the contention of the learned counsel for the appellants that the decision of the learned Additional Rent Controller on Issue No.2 has been passed in violation of the provisions of section 24-A of the General Clauses Act, 1897. The learned Additional Rent Controller has, therefore, further erred in law in deciding Issue No.2 in the manner he has.

17. Moreover, after having recorded the evidence of the appellant/respondent in Ejection Petition No. 1 of 2010 the learned Additional Rent Controller through order dated 5-10-2011 passed in the other ejectment petitions; on the basis of the statement of the learned counsel for the respondents which was to the effect that the cross-examination of the appellant/respondent in Ejectment Petition No.1 of 2010 may be copied down in the remaining ejectment petitions and may be read as the cross-examination of the appellants/respondents therein; proceeded to copy down the cross-examination of the appellant/ respondent in Ejectment Petition No.1 of 2010 in the remaining ejectment petitions with the variation that the name of the appellant/respondent in each ejectment petition was inserted therein. The learned Additional Rent Controller then proceeded to base its decision on the said copied cross-examination. There is nothing on the record to show that order dated 5-10-2011 was a consent order. Indeed, the order dated 5-10-2011 appears to have been passed behind the back of the remaining appellants. There is also nothing on the record to show that the appellant/respondent in Ejectment Petition No.1 of 2010 had been authorized by the other appellants to make a statement on their behalf nor has he been appointed as their attorney. It is settled law that a person cannot act for and behalf of another person unless specifically or impliedly authorized to do so. These appellants have, therefore, been denied the opportunity of leading their evidence, which is against the norms of natural justice.

18. In proceeding in the above regrettable manner the learned Additional Rent Controller has denied an opportunity of a fair trial and due process to the appellants. The entitlement to a fair trial and due process is now a fundamental right after insertion of Article 10-A in the Constitution of the Islamic Republic of Pakistan, 1973, through the 18th Amendment. Courts are, therefore, required under the Constitution to ensure that parties receive a fair trial and due process is adhered to.

19. Now adverting to the objection of the learned counsel for the appellants regarding the authorization of the attorney of the respondents vis-à-vis filing of the ejectment petitions and leading evidence on behalf of the respondents and/or applying for obtaining the requisite authorization for reconstructing the demised premises. This objection has not been raised by the appellants in their defence filed against the ejectment petitions. The appellants, therefore, cannot raise this issue at this stage. However, having gone through the powers of the attorney in question I find that they confer wide ranging powers on the respondents' attorney which include resort to the Courts of law adducing evidence both oral as well as documentary and managing and looking after the property of the respondents. Moreover, I find force in the contention of the learned counsel for the respondents that the respondents' attorney has been accepted as the landlord by the appellants, therefore, it does

not lie in their mouth to question his authority to file the ejectment petitions. The contention of the learned counsel for the appellants is, therefore, repelled.

20. Under the circumstances I accept these appeals, set aside the impugned ejectment orders dated 13-12-2011 passed by the learned Additional Rent Controller, Rawalpindi Cantt., and remand the matter to the learned Additional Rent Controller for decision afresh in each ejectment petition after affording an opportunity of leading additional evidence to the parties. The learned Additional Rent Controller is further directed to give a reasoned finding on each Issue on the basis of the evidence led by the parties.

21. The parties are directed to appear before the learned Additional Rent Controller, Rawalpindi Cantt., on 5-11-2012 without further notice.

22. It is further directed that the learned Additional Rent Controller shall endeavour to decide the ejectment petitions expeditiously but no later than 31-1-2013.

23. There is no order as to costs.

24. The record be remitted forthwith.

MH/A-161/L Case remanded.

P L D 2013 Lahore 119

Before Mamoon Rashid Sheikh, J

Mst. RUKHSANA BHATTI---Appellant

Versus

K & N'S FOODS (PVT) LTD. and others---Respondents

F.A.O. No.99 of 2011, decided on 27th September, 2012.

Cantonments Rent Restriction Act (XI of 1963)---

----S. 17---Transfer of Property Act (IV of 1882), S. 107---Registration Act (XVI of 1908), Ss.17(d) & 49---Ejectment of tenant---Bona fide personal need of landlord---Un-registered lease agreement---Ejectment application filed by landlord on the plea of bona fide personal need was dismissed by Rent Controller on the ground that it was premature as lease agreement between the parties subsisted---Validity---Unregistered lease agreement for the purpose of tenure would only be binding up to initial period of 11 months, whereafter

relationship between parties was regulated by terms of Cantonments Rent Restriction Act, 1963---Tenant was a statutory tenant and tenancy was to continue on month to month basis---As specified period in lease agreement did not extend beyond initial eleven months, there was no impediment in the way of landlord from seeking eviction of tenant on the basis of bona fide personal need---High Court repelled contention of tenant that there was valid and binding agreement between parties, which was to inure till 31-5-2016---High Court set aside order passed by Rent Controller and remanded the matter for decision afresh on issue pertaining to personal bona fide need of landlord vis-à-vis demised premises---Appeal was allowed accordingly.

Habib Bank Limited v. Dr. Munawar Ali Siddiqui 1991 SCMR 1185; M.K. Muhammad and another v. Muhammad Abu Bakar 1993 SCMR 200; Hassan Khan v. Mrs. Munawar Begum PLD 1976 Kar. 832; M/s Eveready Pictures Ltd. v. Chaman Begum PLD 1982 Kar. 770; Mumtaz Begum v. Muhammad Yousaf (deceased) represented by Mst. Nasim Begum and 6 others 1982 CLC 1735; Muhammad Zaman v. Mehboob Ellahi PLD 1981 Lah. 609 and M/s Syed Brothers v. M/s Film Exhibitors Ltd. and 10 others 1984 CLC 3434 ref.

M/s. Shama Soap factory, Faisalabad v. Commissioner of Income Tax, Zone, Faisalabad 2006 PTD 178 rel.

Muhammad Atif Farzouq Raja for Appellant.

Muhammad Akbar Butt for Respondents.

ORDER

MAMOON RASHID SHEIKH, J.---The brief facts giving rise to this appeal under section 24 of the Cantonments Rent Restriction Act, 1963, are to the effect that the appellant is the owner and landlady of Shops Nos.59-A and 59-B along with basement constructed on plot No.15, Murree Road/Bank Road, Rawalpindi (here-in-after referred to as "the demised premises"). The appellant let out the demised premises to the respondent through an unregistered tenancy agreement dated 31-5-2004. At the same time the parties entered into an agreement for providing maintenance services in respect of the demised premises. On 7-10-2010, the appellant filed an ejectment petition before the Controller of Rents, Rawalpindi Cantonment, under Section 17 of the Act, ibid, for eviction of the respondent from the demised premises, inter alia, on the grounds of bona fide personal need and default. The respondent resisted the petition. On the divergent pleadings of the parties the following issues were framed by the learned Additional Rent Controller:

(1) Whether the petitioner in good faith requires the suit premises for her own personal bona fide use and occupation? OPP

(2) Whether the respondent is a wilful rent defaulter since June, 2010? OPP

(3) Whether the ejectment petition is not maintainable in view of the preliminary objections? OPR

(4) Relief.

On the basis of the evidence led by the parties Issues Nos. 1 to 3 were decided against the petitioner. Consequently, the appellant's ejectment petition was dismissed by the learned Additional Rent Controller, Rawalpindi Cantt., through order dated 4-11-2011. The learned Additional Rent Controller found that as per the lease agreement between the parties the tenancy of the demised premises was for a period of six years renewable for another term at the option of the respondent which option the respondent had exercised. The learned Additional Rent Controller, therefore, held that the petition was premature as the tenure of the lease agreement between the parties still subsisted. The question of personal need was, therefore, not gone into by the learned Additional Rent Controller. It was also held that the appellant has been unable to establish default on the part of the respondent.

2. The learned counsel for the appellant contends that the learned Additional Rent Controller has erred in holding that since the period of tenancy is to continue till 31-5-2016, therefore, the petition is premature. Admittedly the lease agreement is an unregistered document. It is settled law that a lease agreement between a landlord and tenant for a period exceeding one year requires registration. In case a lease agreement is for a period exceeding 11 months and is not registered it is bad in law. The lease agreement in question was executed on 31-5-2004 and as it was unregistered it expired on 30-4-2005, whereafter the relationship between the parties was to be regulated by the provisions of the Act, ibid. The learned Additional Rent Controller has fallen into error in holding that the lease agreement continues and consequently the ejectment petition is premature. Relies on the judgments reported as Habib Bank Limited v. Dr. Munawar Ali Siddiqui (1991 SCMR 1185) and M.K. Muhammad and another v. Muhammad Abu Bakar (1993 SCMR 200). Further contends that on the basis of the evidence brought on the record the appellant was able to establish her bona fide personal need. Relies on the judgments reported as Hassan Khan v. Mrs. Munawar Begum (PLD 1976 Karachi 832), M/s Eveready Pictures Ltd. v. Chaman Begum (PLD 1982 Karachi 770), Mumtaz Begum v. Muhammad Yousaf (deceased) represented by Mst. Nasim Begum and 6 others (1982 CLC 1735), Muhammad Zaman v. Mehboob Ellahi (PLD 1981 Lahore 609) and M/s Syed Brothers v. M/s Film Exhibitors Ltd. and 10 others (1984 CLC 3434).

On the question of default readily admits that the appellant was unable to establish the same.

Prays for acceptance of the appeal.

3. The learned counsel for the respondent, has controverted the stance of the learned counsel for the appellant. He submits that the lease agreement in question is a valid and binding instrument between the parties and upon expiry of the initial period of 6 years was extendable at the option of the respondent for another term of 6 years. The respondents exercised that option at the relevant time, therefore, the lease agreement is to inure till 31-5-2016. The petition brought by the appellant was premature and has been so held by the learned Additional Rent Controller. Further submits that even otherwise the appellant failed to establish her personal bona fide need qua the demised premises, therefore, the appeal is liable to be dismissed.

4. Heard. Record perused.

5. The basic question which requires determination in the appeal is as to whether an unregistered lease agreement beyond a period of one year confers any rights on a tenant or the tenant is to be classified as a holding over tenant and the relationship between the landlord and tenant is to be regulated by the provisions of the Act, ibid. It has been consistently held by the Hon'ble Supreme Court that a lease agreement which is beyond a period of one year requires registration by virtue of the provisions of section 107 of the Transfer of Property Act, 1882, read with sections 17(d) and 49 of the Registration Act, 1908. In case a lease agreement is for a term exceeding one year or reserves a yearly rent and is not registered then it is bad in law. In such a case the relationship between the landlord and tenant is to be regulated by the provisions of the Statute in question which in the instant case is the Act, ibid. It has been further held that even though the lease agreement would be bad in law yet it can be acted upon for other collateral terms and conditions between the parties. Reliance in this respect is placed on the judgments cited at the bar by the learned counsel for the appellant and on the judgment reported as M/s Shama Soap Factory, Faisalabad v. Commissioner of Income Tax, Zone, Faisalabad (2006 PTD 178).

6. On the basis of the above position of the law it would, therefore, follow that as in the instant case the lease agreement is admittedly unregistered, the lease agreement for the purposes of tenure would only be binding up to the initial period of 11 months whereafter the relationship between the parties would be regulated by the terms of the Act, ibid. The respondent is, therefore, a statutory tenant and the tenancy is to continue on a month to month basis. As the specified period in the lease agreement does not extend beyond the initial 11 months there is no impediment in the way of the appellant from seeking the eviction of the respondent on the basis of bona fide personal need. The contention of the learned counsel for the respondent that there is a valid and binding agreement between the parties which is to inure till 31-5-2016 is, therefore, repelled.

7. The learned Additional Rent Controller, has, therefore, erred in holding that the lease agreement between the parties is to continue till 31-5-2016 and as a consequence the ejectment petition filed against the respondent is premature.

8. As mentioned above, the learned Additional Rent Controller, upon coming to the conclusion that the appellant's ejectment petition is premature further held that the appellant does not require the demised premises for her own personal bona fide occupation. In having done so the learned Additional Rent Controller did not in effect evaluate the evidence brought on the record by the parties on the issue of personal bona fide need of the appellant. Issue No.1 therefore for all intents and purposes remained undecided. The learned Additional Rent Controller has further erred in law in not deciding Issue No.1.

9. As held above, the tenure of the lease agreement between the parties has expired. The respondent is, therefore, a holding over tenant and the tenancy in question is continuing on a month to month basis. The question, therefore, of personal bona fide need of the appellant requires to be determined.

10. The impugned order dated 4-11-20111 passed by the learned Additional Rent Controller, Rawalpindi Cantt. is, therefore, set aside and the matter is remanded to the learned Additional Rent Controller for decision afresh on issue No.1 i.e. the question of personal bona fide need of the appellant vis-à-vis the demised premises. The parties would be at liberty to lead additional evidence in support of their respective contentions, if so advised.

11. The learned Additional Rent Controller is further directed to endeavour to expeditiously decide the appellant's ejectment petition but no later than 31-12-2012.

12. The appeal is accordingly disposed of in the above terms with no order as to costs.

13. The record of the case be remitted forthwith.

MH/R-47/L Case remanded.

P L D 2013 Lahore 210

Before Sh. Najam ul Hasan and Mamoon Rashid Sheikh, JJ

GHAZI KHAN and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeal No.700 of 2006, Criminal Revision No.480 and Murder Reference No.328 of 2006, decided on 4th September, 2012.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Conversion of death sentence into imprisonment for life---Injuries received by accused suppressed by complainant side---Weapon and crime empties not sent to Forensic Laboratory---Effect---Accused allegedly murdered his brother/deceased due to litigation between them---Trial Court convicted accused under S.302(b), P.P.C and sentenced him to death with a direction to pay Rs.100,000 as compensation to legal heirs of deceased---Validity---F.I.R. was lodged about 3 hours after the occurrence at a police station which was 30 kilometers from the place of occurrence, therefore, it would seem that F.I.R. was not lodged with undue delay---After his arrest accused led to the recovery of crime weapon used by him during the occurrence---Five crime empties were also recovered from the place of occurrence---Medical evidence and post mortem report of deceased also supported the prosecution version---One of the prosecution witnesses was real brother of accused and deceased, therefore, the fact that he deposed against the accused lent credence to the prosecution case---Trial Court had rightly convicted the accused under S.302(b), P.P.C, however accused was also admittedly injured during the occurrence and it was not explained as to how he received the injuries---Accused was examined by a doctor three hours after the occurrence and was found to have received two firearm injuries---Said doctor appeared as a witness and attested to the fact of accused having received firearm injuries---Complainant suppressed evidence of doctor who had examined the accused---Circumstances showed that there was an exchange of fire between the parties during the course of which deceased received fatal firearm injuries---Dead body of deceased was recovered from a part of land which belonged to the accused, and such fact was admitted by the complainant in his cross-examination---Weapon recovered from accused and crime empties recovered from place of occurrence were not sent to Forensic Science Laboratory---Conviction recorded by Trial Court was maintained in circumstances, however death sentence awarded to accused was converted into imprisonment for life---Accused was directed to pay compensation to legal heirs of deceased as ordered by Trial Court---Appeal was dismissed accordingly.

Haji Inayat Ali v. Shahzada and others 2008 SCMR 1565; Muhammad Akram v. The State 2012 SCMR 440; Mushtaq Hussain and another v. The State 2011 SCMR 45 and Umar Hayat v. the State 2007 SCMR 1296 ref.

(b) Criminal trial---

----Sentence---Benefit of doubt---Scope---Whilst convicting and sentencing an accused the court had to consider the prevailing circumstances and if there was any doubt the benefit thereof had to be given to the accused.

Israr Ali v. The State 2007 SCMR 525 and Rasheed alias Sheeda v. The State 2011 PCr.LJ 129 rel.

Azam Nazeer Tarar for Appellant.

Syed Zahid Hussian Bokhari for the Complainant.

Shahid Bashir Chaudhry, Deputy Prosecutor-General for the State.

Date of hearing: 4th September, 2012.

JUDGMENT

MAMOON RASHID SHEIKH, J. - The appellant, Ghazi Khan son of Alam Sher along with his son Javed Iqbal, involved in case bearing F.I.R. No.416/2004, dated 29-10-2004, registered at Police Station Jauharabad, District Khushab, for offence under section 302/34, P.P.C., was tried by the learned Additional Sessions Judge, Khushab, in a private complaint entitled "Mansoor Haider v. Ghazi Khan and another". The learned Additional Sessions Judge through his judgment dated 27-4-2006 while acquitting the co- accused Javed Iqbal convicted the appellant under section 302(b), P.P.C. and sentenced him to death for committing qatl-e-amd of Shadi Khan, deceased, with a direction to pay a sum of Rs.100,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased and in default to undergo simple imprisonment for six months. The State has filed Murder Reference No.328 of 2006 seeking confirmation of the death sentence awarded to the appellant/convict and the appellant has filed the instant appeal (Criminal Appeal No.700 of 2006) against his conviction and sentence, whereas the complainant has filed Criminal Revision No.480 of 2006 for enhancement of amount of compensation. All these interconnected matters are being disposed of through this single judgment.

2. Briefly, the facts of the prosecution case are that on 29-10-2004, at about 8-00 a.m., Mansoor Haider, complainant, along with Muhammad Sadiq (P.W.10) and Muhammad Feroze (given up P.W.) was present at his Dera when his father Shadi Khan went to the North-East side of the fields to answer the call of nature. Upon his return as Shadi Khan was approaching the Dera, Ghazi Khan (appellant) and Javed Iqbal (acquitted co-accused) armed with .12 bore guns appeared at the spot. Ghazi Khan and Javed Iqbal raised lalkara that they would teach him a lesson for getting a stay order against them. Ghazi Khan fired a shot at Shadi Khan who received it on the right side of his forehead. Javed Iqbal fired a shot which landed on the left side of the forehead of Shadi Khan, Javed Iqbal again fired a shot which landed on the left part of the chest of Shadi Khan. Another shot fired by Javed Iqbal hit the outer side of right thigh of Shadi Khan as a result Shadi Khan fell to the ground. Thereafter, Ghazi Khan fired another shot which hit Shadi Khan on the back. Javed Iqbal also fired another shot which hit Shadi Khan on the back of his right thigh. Ghazi Khan again fired a shot which hit the left buttock of Shadi Khan. The complainant, Muhammad Sadiq and Muhammad Feroze, the witnesses of the occurrence, rushed towards the scene. Shadi Khan, however, died at the spot while the accused fled away.

3. The motive for the occurrence is stated to be that the deceased and the appellant were real brothers. The deceased and the appellant along with one Saeed Akhtar Wattoo obtained some agricultural land. A dispute arose in respect of the share of the appellant and the deceased in the land. The deceased instituted/filed a suit against the appellant and his co-accused through the complainant in the Civil Courts at Khushab for perpetual injunction and obtained a temporary injunction. The appellant and his co-accused were infuriated upon issuance of the temporary injunction against them, therefore, they are said to have murdered the deceased.

4. The complainant after leaving Muhammad Khan and Alam Sher to guard the dead body went to Police Station Jauhar Abad where on his statement F.I.R. No.416/2004 was registered.

5. After registration of the F.I.R. Qazi Asif Mahmood, Medical Officer, DHQ Hospital, Khushab (P W-11)conducted autopsy on the dead body of Shadi Khan and observed the following injuries:

(1) Wound of entrance 1 1/2 x 1 1/2 cm on the right side of forehead oval shaped.

(2) Wound of entrance 1 1/2 x 1 1/2 cm on the left side of forehead oval shaped.

(3) Wound of entrance 1/2 x 1/2 cm on left side of chest just below the clavicle (left).

(4) There were 4 wounds of entrance on lateral side of right thigh measuring 1/2 x 1/2 cm each in grouping.

(5) There were 4 wounds of exit on back of right thigh each measuring 1 x 1 cm.

(6) Wound of entrance 1/2 cm x 1/2 cm on back of left buttocks.

(7) Wound of exit on lateral side of left thigh 1 x 1 cm.

(8) There were 2 wounds of entrance on back of right thigh 1/2 x 1/2 cm.

(9) There were 2 wounds of exit 1 x 1 cm on lateral aspect of right thigh.

(10) There were 2 wounds of entrance 1/2 x 1/2 cm on lateral aspect of right thigh.

(11) There were 2 wounds of exit 4 x 4 cm on back of right knee.

(12) There were 9 wounds of entrance on lower back (lumbosacral region) each measuring 1/2 x 1/2 cm in grouping.

In the opinion of the doctor, all the injuries caused profuse bleeding and hypovolamic shock. All injuries were ante mortem, caused by firearm weapon and were sufficient to cause death in the ordinary course of nature individually as well as collectively. According to the doctor, the probable time which elapsed between the injuries and death was sudden whereas between death and post-mortem it was seven hours.

6. The investigation of the case ensued, the complainant was, however, dissatisfied with the conduct of the investigation by Abdul Rehman Inspector/Investigating Officer. As a consequence, the complainant also filed a private complaint titled "Mansoor Haider v. Ghazi Khan and another" in respect of the occurrence. The trial of the accused commenced on the basis of the complaint filed by the complainant. The charge was framed against the accused (including the appellant) to which they pleaded not guilty and claimed trial.

7. The prosecution in order to prove its case produced 12 witnesses. Muhammad Sarwar, Constable (P.W.1) took the dead body to the mortuary for post-mortem examination. Muhammad Khan (P.W.2) identified the dead body at the time of post-mortem examination before the Medical Officer. Muhammad ljaz, Constable (P.W.3) was the witness of recovery of gun P-3. Azhar Hussain, Constable (P.W.4) took sealed parcels containing blood stained earth and pellets etc. on 4-11-2004 and delivered the same in the office of the Chemical Examiner and the Forensic Science Laboratory, Lahore. Nisar Muhammad, Patwari Halqa Cheena, District Khushab (P.W.5) visited the place of occurrence on 2-11-2004. He took rough notes of the spot on the direction of the police and on pointation of the P.Ws. and prepared a scaled site plan Exh.PC and Exh.PC/1. Muhammad Khalil, Constable (P.W.6) was a formal witness. Said Rasool, Constable (P.W.7) was the witness of the recovery of the 7 mm rifle P-4 from the co-accused. Muhammad Riaz, A.S.I. (P.W.8) kept the sealed parcels for their safe custody in Malkhana till 4-11-2004. Mansoor Haider (P.W.9) and Muhammad Sadiq (P.W.10) furnished the ocular account of the occurrence. Qazi Asif Mehmood, Medical Officer (P.W.11) conducted the post-mortem examination on the dead body of Shadi Khan, deceased. Muhammad Afzal, Sub-Inspector (P.W.12) recorded the F.I.R. (Exh.PG) on 29-10-2004 (on the statement of Mansoor Haider, complainant) and thereafter proceeded to the place of occurrence, examined the dead body, prepared the inquest report (Exh.PN) and dispatched the dead body for post-mortem examination to the Civil Hospital, Jauharabad. He recorded the statements of Muhammad Sadiq and Muhammad Feroze, P.Ws. He secured the bloodstained earth, made it into a sealed parcel and took the same into possession vide memo Exh.PD. He collected five crime empties P-1/1-5 from the spot and took them into possession through recovery memo Exh.PE. He prepared the rough site plan of the place of occurrence Exh.PC. He arrested the appellant on 8-11-2004 and obtained his physical remand. During interrogation the appellant led to ,the recovery_of gun P-3 double barrel which was taken into possession through recovery memo Exh.PB. Muhammad Afzal, S.I., prepared a rough site plan of the place of recovery Ex.PE/1 and recorded the statement of the recovery witnesses. Thereafter he was transferred to Police Station Katha Saghral. Dr. Rao Gulzar Yousaf, Medical Officer, DHQ Hospital, Jauharabad appeared as C.W.1. Abdul Rehman, Inspector, Police Lines, Jauharabad appeared as C.W.2 who, on 1-12-2004, took over the investigation of the case, arrested Javed Iqbal, co-accused and during the course of investigation recovered the 7 mm rifle P-4 on the pointation of the co-accused through recovery memo Exh.PF. And after completing the formalities C.W.2 filed the report under section 173 of the Cr.P.C. in respect of both accused. Mansoor Haider, complainant, after tendering the report of the Chemical Examiner, Exh.PP and that of the Serologist, Exh.PQ closed the prosecution evidence.

8. At the end of the prosecution evidence, the appellant was examined under section 342, Cr.P.C. He denied and dismissed each piece of prosecution evidence. In reply to the question, "Why this case against you and why the P.Ws. deposed against you?" he said:

> "Due to enmity while the P.Ws. are also closely related to the complainant. In fact, Shadi Khan deceased wanted to grab our land. I was present on my land when Shadi Khan deceased duly armed with firearm reached there and fired at me. Owing to firearm injuries sustained by me at the hands of Shadi Khan deceased I remained admitted in the hospital. When Shadi Khan happened to die, false story of my aggression was cooked up and I was falsely challaned in this case."

9. The appellant did not opt to record his statement under section 340(2) of the Cr.P.C. He also did not produce evidence in his defence. At the conclusion of the trial, the appellant was convicted and sentenced as noted above. The co-accused of the appellant namely Javed Iqbal was acquitted of the charge by the learned trial court. The complainant filed an appeal against the acquittal of the co-accused. The said appeal was, however, dismissed.

10. The learned counsel for the appellant contends that the F.I.R. has been lodged falsely against the appellant. The main motive, if any, would have been against the complainant who was the plaintiff of the suit filed against the appellant in respect of the land in dispute which became the matter in issue and as a result of which the occurrence took place. The complainant, however, did not receive any injuries whereas the deceased father of the complainant statedly received many firearm injuries. It is contended that no reasons for convicting the main accused were brought on the record. The learned counsel further contends that during investigation it had been clearly brought on record that the dead body of the deceased was found lying in the land of the appellant and similarly five crime empties of .12 bore gun were recovered from the land of the appellant. It is clear that the appellant did not cross the boundary of his land. The learned counsel has mainly emphasized on the point that Javed Iqbal, the co-accused of the appellant, was assigned possession of a similar .12 bore gun and assigned different injuries with that gun on the deceased. But during investigation he was found to be innocent and the Investigating Officer came to the conclusion that at the relevant time he was not present at the place of occurrence, therefore, his name was placed in Column No.2. On 26-2-2005 that is to say almost four months after the occurrence the complainant narrated the same story which was brought on record and then after trial Javed Iqbal, co-accused, was acquitted by the learned trial Court. The appeal filed against the acquittal of Javed Iqbal, co-accused, was dismissed. It is further contended that one thing is clear that four witnesses had not come to the Court with clean hands as they assigned the

same role to the appellant, as was assigned by them to his acquitted co-accused, for conviction of the appellant for a crime entailing capital punishment.

11. The learned counsel for the appellant further contends that the appellant was also found to be injured immediately after the occurrence. The appellant appeared before the doctor and was medically examined within three hours of the occurrence. The appellant was found to have received two firearm injuries, one on the scapula region and the other on the buttocks. It is contended that thereafter the appellant remained in the hospital for treatment and the factum of the appellant having received injuries was suppressed by the prosecution even though the name of the doctor who examined the appellant was duly mentioned in the calendar of witnesses. It is further contended that in these circumstances and keeping in view the fact that the dead body was found lying in the land of the appellant it appears that the other side was the aggressor. Five crime empties were recovered from the place of occurrence and later a .12 bore gun was recovered but there is no reasonable cause or evidence to indicate that the gun and the crime empties were sent to the Forensic Science Laboratory. It is contended that the report was intentionally concealed to suppress the original facts that the deceased was aggressor in the occurrence and he fired at the appellant in the first instance. Lastly contends that no specific fatal injury has been described by the doctor and keeping in view that certain specific injuries were assigned to the acquitted co-accused, therefore, it cannot be established with certainty that who is responsible for killing the deceased. The learned counsel relies on the judgment reported as Haji Inayat Ali v. Shahzada and others (2008 SCMR 1565).

12. The learned counsel further relies on the judgments reported as Muhammad Akram v. The State (2012 SCMR 440) wherein it has been held that while disbelieving the witnesses certain accused are acquitted then the same set of witnesses cannot be relied upon for the conviction of the appellant.

13. The learned counsel further submits that during cross-examination the appellant had brought on record his plea but that has not specifically been taken in his statement under section 342 of the Cr.P.C. and in such circumstances the Court can make an inference in favour of the appellant. Relies on the judgment reported as Mushtaq Hussain and another v. The State (2011 SCMR 45).

14. The learned counsel for the complainant controverts the stance of the learned counsel for the appellant. The learned counsel submits that the occurrence took place in broad day light in the month of October. Both parties are closely related. The deceased was the

brother of the appellant and the complainant is the son of the deceased. The identity of the accused was not a matter in issue. The motive is admitted by both sides. The time of occurrence, the place of occurrence and the weapon used are admitted by both sides. Further submits that the Investigating Agency did not cooperate with the complainant as a result mala fide the name of Javed Iqbal, co-accused, was placed in Column No.2. Feeling dis-satisfied with the investigation the complainant filed a private complaint. The same version which was mentioned in the F.I.R. was narrated in the complaint. It is contended that in these circumstances the F.I.R. gains importance as it was recorded just after three hours of the occurrence at Police Station Jauharabad which is about 30 k.m. away from the place of occurrence.

15. Further submits that the police did not cooperate with the complainant and it was for the same reason the empties and the gun were not sent to the Forensic Science Laboratory with a view to damaging the case of the prosecution.

16. The co-accused was given the benefit of doubt and he was found innocent but the present appellant is not entitled to any such exception especially when his case is distinguishable from his co- accused, firstly on the ground that the appellant was found injured inasmuch as he had received two firearm injuries. Even according to the appellant's own version the site plan indicates the place from where the co-accused fired from a distance of 175 ft. and no crime empty was recovered from that place. The doctor observed that the deceased received all injuries from shots which were fired from same distance. The prosecution proved its case beyond any reasonable doubt.

17. The learned counsel for the complainant further submits that the dispute was mainly between two elders i.e. the deceased and the appellant, as such, they were involved in the matter. The learned counsel further submits that even according to the defence the appellant only received two pellets injuries but the injuries on the person of the deceased were much more in number and it cannot be said that the same were the result of a single fire. Further contends that such a difference in the number of injuries leads to the inference as to who was the aggressor.

18. The learned counsel relies on the judgment reported as Umar Hayat v. The State (2007 SCMR 1296) wherein the principle of falsus in uno falsus in omnibus was rejected and rather principle of sifting of grain from chaff was adopted.

19. Further contends that the appellant has not taken any specific stance so he is not entitled to any exception. It is the duty of the accused to prove the case if he wants to bring the same under exception which is lacking in this case. Prays for dismissal of the appeal.

20. Heard. Record perused.

21. The deceased and the appellant were related to each other in that they were real brothers. The acquitted co-accused is the son of the appellant. The complainant is the son of the deceased that is to say the nephew of the appellant. Meaning to say thereby that the parties are closely related to each other. The place of occurrence is the adjoining pieces of land independently owned by the parties. The complainant, the deceased and some of the P.Ws. were stated to be present at the complainant's Dera at the time of the occurrence and the deceased is stated to have gone to the North-East side of the fields to answer the call of nature. Upon his return, however, the appellant and the co-accused appeared at the spot and whilst raising lalkara that they would teach the deceased a lesson for obtaining a stay order against them both accused are stated to have fired at the deceased with .12 bore guns which the accused were said to be in possession of. The deceased received multiple injuries out of which some were attributed to the appellant. In the opinion of the doctor who conducted the post-mortem examination all injuries to the deceased caused profuse bleeding and hypovolamic shock. All injuries were stated to be ante mortem caused by firearm weapon and were sufficient to cause death in the ordinary course of nature individually as well as collectively.

22. The occurrence is stated to have taken place at around 8-00 a.m. The F.I.R. was lodged at 11-15 a.m. that is to say around three hours from the time of occurrence at Police Station Jauharabad which is stated to be 30 k.m. from the place of occurrence. It would, therefore, seem that the F.I.R. was not lodged with undue delay.

23. The investigation in the case ensued and the accused were arrested. The appellant was arrested on 8-11-2004, whereafter he led to the recovery of the gun which is stated to have been used by him in the occurrence. Five crime empties were recovered from the spot.

24. In so far as the motive is concerned, it has been contended by the prosecution that the deceased and the appellant being real brothers purchased a piece of land along with one Saeed Akhtar Wattoo. A dispute, however, arose between them vis-à-vis their respective shares in the land so purchased. The deceased was, therefore, constrained to file a civil suit on behalf of the complainant (who was a minor at the relevant time) against the appellant

and his co-accused in the Civil Courts at Khushab for perpetual injunction and was able to obtain a temporary injunction. The appellant and his co-accused are stated to have been infuriated upon issuance of the temporary injunction against them, therefore, they attacked the deceased and murdered him.

25. The learned counsel for the complainant concedes the above position and contends that the factum of the deceased having filed the suit and obtaining the temporary injunction had infuriated the appellant to such an extent that he murdered the deceased.

26. As said above, the medical evidence supports the version of the prosecution. It may be further noted that during the course of investigation of the case the complainant lost faith in the investigation due to the fact that the co-accused was declared to be innocent and his name was placed in column 2 of the challan. As a consequence, the complainant filed a private complaint and the trial of the case was conducted as a complaint case wherein the complainant narrated the same story as given in the F.I.R. The result was the conviction and sentencing to death of the appellant and acquittal of the co-accused.

27. P.W.10 is the brother of the deceased and the appellant. He has deposed against the appellant, therefore, lending credence to the prosecution case.

28. Under the circumstances, we are not persuaded by the arguments of the learned counsel for the appellant that the appellant is not guilty of the offence he has been convicted of. We, therefore, do not differ with the finding of the learned trial court vis-à-vis the conviction of the appellant under section 302(b) of the P.P.C. However, there are certain aspects of the case which have remained unexplained. Admittedly the appellant was also injured during the course of the occurrence. It has not been explained as to how the appellant received the injuries. It has, however, been brought on the record that soon after the occurrence the appellant was seen by a doctor and was medically examined within three hours of the occurrence. The appellant was found to have received two firearm injuries, one on the scapula region 6 cm below the left shoulder joint and the other on the left hip joint. The appellant remained hospitalized for receiving treatment, however, the complainant suppressed the evidence of the doctor who had examined the appellant. The said doctor appeared as CW-1 and attested to the fact of the appellant having received firearm injuries on the day of the occurrence. It, therefore, appears that there was an exchange of fire between the parties during the course of which the deceased received fatal injuries and died. The learned counsel for the complainant has been unable to explain the cause of injuries received by the appellant.

29. Another factor which is worth noting is that the dead body of the deceased was recovered from that part of the land which belonged to the appellant. This fact has been admitted by the complainant in his cross-examination. It is further worth noting that even though five crime empties were recovered from the place of occurrence and a .12 bore gun was also recovered from the appellant but these items were not sent to the Forensic Science Laboratory for reasons best known to the prosecution.

30. It is a settled principle of law that whilst convicting and sentencing an accused the Court has to consider the prevailing circumstances and if there is any doubt the benefit thereof has to be given to the accused. The Hon'ble Supreme Court of Pakistan in the judgment reported as Israr Ali v. The State (2007 SCMR 525) has held that "accused persons are entitled to extenuating benefit of doubt on the question of sentence". This judgment has been followed in the judgment reported as Rasheed alias Sheeda v. The State (2011 PCr.LJ 129).

31. In view thereof the award of death sentence to the appellant under section 302(b) of the P.P.C. would appear to be excessive. We, therefore, whilst maintaining the conviction of the appellant under section 302(b) of the P.P.C. convert his death sentence into that of imprisonment for life. The appellant shall, however, be liable to pay compensation as ordered by the learned trial court.

32. With the above modification in the impugned judgment the appeal filed by the appellant (Criminal Appeal No.700 of 2006) stands dismissed.

33. As a consequence, Criminal Revision No.480 of 2006 also stands dismissed.

34. Resultantly, the death sentence awarded to the appellant is NOT CONFIRMED and the murder reference i.e. Murder Reference No.328 of 2006 is answered in the NEGATIVE.

MWA/G-4/L Order accordingly.

2013 Y L R 2226

[Lahore]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

KARAM ELLAHI BANDIAL---Appellant

Versus

RETURNING OFFICER PP-40, KHUSHAB-II and others---Respondents

Election Appeals Nos.25 and 51 of 2013, decided on 12th April, 2013.

Constitution of Pakistan---

----Arts. 63(1)(n) & 62---Representation of the People Act (LXXXV of 1976) 14 & 12--Disqualifications for membership of Majlis-e-Shoora (Parliament)----Appellant impugned the acceptance of the Nomination Papers of the respondent on the ground that the respondent was a deserter from the Pakistan Air Force and his educational degrees were not genuine, therefore, he was disqualified under Art.63 of the Constitution---Validity----Respondent showed documentary proof that he was retired from the service of Pakistan Air Force, therefore the contention of the appellant was repelled---Appellant had also failed to bring on record any decision of a court of law on the educational degrees of the respondent, and in absence of the same, the educational degrees of the respondent could not be declared to be non-genuine---Appeal was dismissed.

Malik Saleh Muhammad Gunjial v. Kamran Elahi Bandial and others 2008 SCMR 1 ref.

Shah Khawar for Appellant.

Tanvir Iqbal for Respondent No.2.

Date of hearing: 12th April, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--Through this single order we intend to decide E.A. No.25 of 2013 and Election Appeal No.51 of 2013 as common questions of law and facts arise therein.

2. The brief facts giving rise to these appeals are to the effect that the appellants in both appeals have been declared as validly nominated candidates to contest the forthcoming elections to the Constituency PP-40, Khushab-II. Both appellants are aggrieved of the orders of the learned Returning Officer PP-40 whereby the nomination papers of the both

appellants have been accepted. For the sake of convenience the appellant in Election Appeal No.25 of 2013 shall be referred to as "the appellant" hereinafter and the appellant in Election Appeal No.51 of 2013 shall be referred to as "respondent No.2".

3. The learned counsel for the appellant submits that respondent No.2 is disqualified to be elected or chosen as a member of the Provincial Assembly as firstly he is deserter from the Pakistan Air Force and has been so adjudged through the judgment of the Hon'ble Supreme Court reported as "Malik Saleh Muhammad Gunjial v. Kamran Elahi Bandial and others" (2008 SCMR 1). The appellant is, therefore, permanently disqualified from contesting elections on the national and provincial level. Further submits that in his nomination paper respondent No.2 had mentioned that he has the Shahadat-ul-Alamia degree but he did not append a copy thereof to the nomination paper. Respondent No.2 did not append any copies of his other educational qualifications as he was required under the law to do. Further submits that the authenticity of the degrees of respondent No.2 is, therefore, doubtful. This factum was brought to the notice of the learned Returning Officer but he declined to hold any inquiry in this matter. No proof of authenticity of the degrees in question was produced by respondent No.2 before the learned Returning Officer. In view thereof as the authenticity of the educational qualifications of respondent No.2 was not established it would tantamount to respondent No.2 providing misleading and false information along with his nomination paper. Respondent No.2 by the said acts of omission and commission does not fall within the definition of sagacious, righteous, honest and ameen as envisaged by Article 62(1)(f) read with Article 113 of the Constitution of the Islamic Republic of Pakistan, 1973.

4. Insofar as the objections raised by respondent No.2 to the candidature of the appellant submits that there are no discrepancies in the nomination paper filed by the appellant. The appellant has made full disclosure. If there are any discrepancies then they are of a clerical nature and have occurred due to inadvertence and are curable.

5. In reply the learned counsel for respondent No.2 insofar as the allegation of respondent No.2 having deserted and / or absconded from the Pakistan Air Force submits that respondent No.2 has since been retired from the Pakistan Air Force and has shown us documents to this effect. As to his educational qualifications submits that respondent No.2 holds both the B.A. degree and Shahadat-ul-Alamia degree. This fact is mentioned in the nomination paper. Respondent No.2 passed his B.A. degree from the University of Balochistan. Both degrees are authenticated. In the absence of any finding of any Court of law to the contrary the authenticity of the degrees cannot be challenged, therefore, respondent No.2 cannot be said to have provided misleading information along with his

nomination paper. Further submits that there is no requirement under the law to provide certificates of the other qualifica-tions along with the nomination paper.

6. In respect of the candidature of the appellant the learned counsel for respondent No.2 submits that the appellant is guilty of concealment of facts. The appellant has concealed his true income and value of assets. The appellant has not paid his agriculture income tax and has also concealed his income from Olympia Chemicals Ltd.

7. We have considered the arguments of the learned counsel for the parties and have also gone through the record with their able assistance. We propose to go through the objections raised by the parties against each other one by one:

(i) The objection regarding the desertion of respondent No.2 from the Pakistan Air Force and the consequential lifetime disqualifica-tion of respondent No.2 from contesting elections of Provincial or National Assemblies does not hold force simply for the reason that as per the documents shown to us by respondent No.2 he has since been retired from the service of Pakistan Air Force. This contention of the learned counsel for the appellant is, therefore, repelled.

(ii) Insofar as the authenticity of the degrees of B.A. and Shahadat-ul-Alamia of respondent No.2 is concerned suffice it to say that the appellant has failed to bring on record any decision of a Court of law to the contrary. In absence, therefore, of any decision from a Court of law the degrees of respondent No.2 cannot be declared to be non-genuine.

(iii) As to the objections of respondent No.2 regarding the nomination paper of the appellant to the effect that he has not made full disclosure therein or has deliberately withheld information or that he has not paid income tax or agriculture income tax suffice it to say that the learned counsel for respondent No.2 has been unable to substantiate any of the allegations made in this respect.

8. Under the circumstances both appeals fail and are dismissed accordingly.

9. Copies of the order be sent to the learned District Returning Officer and Returning Officer concerned for information and necessary action.

KMZ/K-20/L Appeals dismissed.

2013 Y L R 2397

[Lahore]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

Raja PERVEZ ASHRAF---Appellant

Versus

RETURNING OFFICER, NA-51 and another---Respondents

Election Appeal No.76 of 2013, heard on 15th April, 2013.

(a) Representation of the People Act (LXXXV of 1976)---

----S.99---Constitution of Pakistan, Arts.62 & 63---Notice issued to contesting candidate by Supreme Court for initiating contempt of court proceedings against him---Effect---Such candidate would not stand disqualified on account of mere pendency of such proceedings, wherein neither a charge was framed nor was he convicted.

(b) Representative of the People Act (LXXXV of 1976)---

----S.14(5)---Constitution of Pakistan, Arts. 62(1)(f) & 63(1)(h)---Appeal before Election Tribunal---Returning Officer found appellant not sagacious, righteous, upright, trustworthy, honest and Ameen on basis of judgments of Supreme Court and High Court and secret letter written by appellant to influence the Supreme Court---Validity---Election Tribunal in appeal could not sit over such judgments---Appellant was not qualified to contest election in view of declarations and of directions given against him in such judgments---Appeal was dismissed, in circumstances.

Alleged Corruption in Rental Power Plants etc. Human Rights Cases Nos. 7734-G/2009, 1003-G/2010 and 56712 of 2010 and Messrs M.N. Construction Company v. Federation of Pakistan and others Writ Petition No.3387 of 2012 rel.

Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others PLD 2009 SC 644; Raja Muhammad Afzal v. Ch. Muhammad Altaf Hussain and others 1986 SCMR 1736; Illahi Bux Soomro v. Aijaz Hussain Jakhrani and 7 others 2004 CLC 1060; Pir Allay Immrawn and another v. Mian Muhammad Nawaz Sharif and another 1991 CLC 1; Munir Ahmad and another v. District Returning Officer/Appellate Authority Sargodha and others 2004 SCMR 1456; Sheikh Arsalan Hafeez v. Election Tribunal District Rawalpindi, at Attock and 5 others PLD 2003 SC 355; Rana Aftab Ahmad Khan v. Muhammad Ajmal

and another PLD 2010 SC 1066 and Ch. Nisar Ali Khan v. Ghulam Sarwar Khan and 3 others 2003 CLC 442 ref.

Farooq H. Naek and Syed Qalb-i-Hassan for Appellant.

Sh. Zameer Hussain and Raja Irfan Aziz for Respondent No.2.

Date of hearing: 15th April, 2013.

JUDGMENT

JUSTICE MAMOON RASHID SHEIKH (MEMBER).---This appeal under section 14(5) of the Representation of the People Act, 1976, assails the order dated 7-4-2013 passed by the learned Returning Officer NA-51, Gujar Khan, Rawalpindi, whereby the nomination paper of the appellant to contest the election of the said constituency has been rejected. The learned Returning Officer in view of the decision of the Hon'ble Supreme Court of Pakistan in the judgment reported as Alleged Corruption in Rental Power Plants etc, (in the matter of Human Rights Cases Nos.7734-G of 2009, 1003-G/2010 and 56712 of 2010, decided on 13-3-2012) (2012 SCMR 773) (hereinafter referred to as the RPP's case), the judgment dated 28-3-2013 of the learned Islamabad High Court in Writ Petition No.3387 of 2012 entitled "Messrs M. N. Constructions Company v. Federation of Pakistan and others; and the writing of a secret letter by the appellant to influence the Hon'ble Supreme Court of Pakistan has held that the appellant is not qualified to be chosen or elected as a member of Majlis-e-Shoora (Parliament) by virtue of the provisions of Article 62(1)(f) of the Constitution of the Islamic Republic of Pakistan, 1973, as he is not sagacious, righteous, up right, trustworthy, honest and Ameen.

2. Mr. Farooq H. Naek, Advocate, the learned counsel for the appellant submits that the impugned order is neither sustainable nor tenable in the eye of the law. The judgment of the Hon'ble Supreme Court in the RPP's case only directed that the persons involved are to be dealt with under the civil laws as also under the provisions of the National Accountability Bureau (NAB) Ordinance, 1999. There is no declaration against the appellant as has been erroneously held by the learned Returning Officer. Till date no action has been taken in accordance with the law by the NAB against the appellant what to talk of his conviction. Indeed, no final report has been prepared by the NAB in the RPP's case nor any interim or final challan has been submitted. Under the provisions of Article 62(1)(f) of the Constitution a person is presumed to be sagacious, righteous, up-right, trustworthy, honest and Ameen unless there is a declaration of a Court of law to the contrary. Article

63(1)(h) envisages that unless a period of five (5) years have elapsed since his release, a person convicted and sentenced for a term not less than two (2) years for any offence involving moral turpitude, shall be disqualified from contesting the election to the Parliament. In the appellant's case no such declaration or conviction is in the field against the appellant.

3. Insofar as the judgment of the learned Single Judge is Chambers of the learned Islamabad High Court in Writ Petition No.3387 of 2012 is concerned submits that the learned High Court has only given a direction to the NAB Authorities. This direction cannot be taken to be a declaration by a Court of law in terms of Article 62(1)(f) of the Constitution. The appellant was not a party in Writ Petition No.3387 of 2012. The appellant has not been given an opportunity of defending himself. He has been condemned unheard and his fundamental right as envisaged by Article 10-A of the Constitution has been infringed. There is no conviction against the appellant. In fact the appellant had only assigned the work. There is no allegation of corruption. Relies on the judgment of the Hon'ble Supreme Court of Pakistan reported as "Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others" (PLD 2009 SC 644) to contend that the right to contest elections is a fundamental right of the appellant. The learned Returning Officer failed to appreciate this aspect of the case and also the law as laid down in Mian Nawaz Sharif's case (Supra) whereby it has been held that High Courts in their exercise of writ jurisdiction cannot give a declaration in respect of Articles 62(1)(f) and Article 63(1)(h) of the Constitution. The principle of due process requires that findings adversely affecting the dignity, liberty, reputation and political rights of a candidate be not given ex parte and that too in the constitutional jurisdiction. The learned Returning Officer did not take into consideration the said principle whilst relying on the judgment of the learned Islamabad High Court.

4. As to the question of initiation of contempt of Court proceedings submits that only a notice has been issued to the appellant, neither a charge has been framed nor has the appellant been convicted. In such circumstances, the appellant cannot be said to be disqualified on the ground that he has committed contempt of Court.

5. Syed Qalb-i-Hassan, Advocate, the learned co-counsel for the appellant whilst adopting the arguments of Mr. Farooq H. Naek, Advocate, has further contended on behalf of the appellant that the learned Returning Officer in disqualifying the appellant has erred in law. The learned Returning Officer has failed to appreciate that in the absence of a conviction the appellant should not have been disqualified as his fundamental right to contest the

election has been denied. If the matter comes to trial and the appellant is acquitted then the appellant would have lost a valuable right. The learned Returning Officer did not take into consideration the irreparable loss which would occur to the appellant. Places reliance on the judgments reported as "Raja Muhammad Afzal v. Ch. Muhammad Altaf Hussain and others" 1986 SCMR 1736 "Illahi Bux Soomro v. Aijaz Hussain Jakhrani and 7 others" (2004 CLC 1060), "Pir Allay Immrawn and another v. Mian Muhammad Nawaz Sharif and another" (1991 CLC 1), "Munir Ahmad and another v. District Returning Officer/Appellate Authority Sargodha and others" (2004 SCMR 1456), "Sheikh Arsalan Hafeez v. Election Tribunal District Rawalpindi, at Attock and 5 others" (PLD 2003 SC 355), "Rana Aftab Ahmad Khan v. Muhammad Ajmal and another" (PLD 2010 SC 1066) and "Ch. Nisar Ali Khan v. Ghulam Sarwar Khan and 3 others" (2003 CLC 442).

6. Sheikh Zameer Hussain, Advocate, the learned counsel for respondent No.2, controverts the stance of the learned counsel for the appellant. He submits that conviction of a person is not a sine qua non for the person to be disqualified by virtue of the provisions of Articles 62 and 63 of the Constitution. Article 62 enumerates the qualifications subject to the restrictions mentioned therein and Article 63 speaks of the disqualifications. These are not the only provisions whereby a person/candidate can be disqualified from contesting elections. Sections 93 and 99 of the Act, ibid, also apply. Referring to the judgment of the Islamabad High Court submits that what further declaration is required from a Court of law. The learned Single Judge in Chambers has unequivocally given a declaration that the appellant is involved in corrupt practices and is not "Ameen". No formal trial is required. The learned Returning Officer was bound to follow the judgment of the Hon'ble Supreme Court in the RPP's case as also the judgment of the learned Islamabad High Court.

7. We have considered the arguments addressed at the bar and have also gone through the record with the able assistance of the learned counsel for the parties.

8. We shall first of all consider the disqualification of the appellant by the learned Returning Officer on grounds of initiation of contempt of Court proceedings against him by the Hon'ble Supreme Court of Pakistan. We are in agreement with the learned counsel for the appellant that since the proceedings are at the initial stage and neither a charge has been framed nor any conviction has taken place, therefore, mere pendency of contempt of Court proceedings cannot be an impediment to the appellant's candidature.

9. As to the other grounds, upon our query the learned counsel for the appellant have submitted that the appellant had challenged the judgment of the learned Single Judge in

Chambers of the learned Islamabad High Court by way of I.C.A. No.616 of 2013, however, the said ICA was dismissed in limine through order dated 8-4-2013. The appellant has now filed C.P.L.A. No.450 of 2013 before the Hon'ble Supreme Court of Pakistan. C.P.L.A. No.450 of 2013 is, however, yet to come up for hearing.

10. The findings of the Hon'ble Supreme Court in the RPP's case are too well known to be reproduced in extenso, however, for the sake of reference a few excerpts are being reproduced hereunder:-

"84. Thus, in the light of the above facts and circumstances, we hold as under:--

(i) _____

(ii) _____

(iii) The contracts of all the RPPS - solicited and unsolicited, signed off or operational, right from BHIKKI & SHARAQPUR upto PIRANGHAIB, NAUDERO-I & NAUDERO-II were entered into in contravention of law/PPRA Rules, which, besides suffering from other irregularities, violated the principle of transparency and fair and open competition, therefore, the same are declared to be non-transparent, illegal and void ab initio. Consequently, the contracts of RPPS are ordered to be rescinded forthwith and all the persons responsible for the same are liable to be dealt with for civil and criminal action in accordance with law;

(iv) _____

(v) _____

(vi) _____

(vii) _____

(viii) _____

(ix) All the government functionaries, including the Ministers for Water and Power holding charge in 2006 and onward and from 2008 to onward, during whose tenure the RPPS were approved/set up and Minister as well as Secretary Finance holding the charge

when the down payment was increased from 7% to 14%, prima facie, violated the principle of transparency under Articles 9 and 24 of the Constitution and section 7 of the Act, 1997, therefore, their involvement in getting financial benefits out of the same by indulging in corruption and corrupt practices cannot be overruled in view of the discussion made hereinabove. Consequently, they are liable to be dealt with under the National Accountability Ordinance, 1999 by the NAB;

(x) All the functionaries of PEPCO, GENCOs, PPIB and NEPRA along with sponsors (Successful bidders) who had derived financial benefits from the RPPs contracts are prima facie, involved in corruption and corrupt practices, therefore, they are also liable both for the civil and criminal action; and

(xi) The Chairman NAB is directed to proceed against all the persons referred to in subparagraphs (iii), (ix) and (x) above forthwith in accordance with law and submit fortnightly progress report to Registrar for our perusal in Chambers."

11. The findings of the learned Single Judge in Chambers of the learned Islamabad High Court passed in Writ Petition No.3387 of 2012 are as under:--

"In view of the above discussion, Writ Petition Nos.3387, 3724 of 2012 and 582 of 2013 are allowed. I declare that assigning of work to respondent No.5 i.e. NLC is illegal, unconstitutional, besides the PPRA Ordinance, 2002 and PPRA Rules 2004, dictums laid down by the august Supreme Court, offensive to the universally accepted principle of fairness, honesty, transparency, openness and is result of colourable exercise of authority, irrelevant considerations, a naked corruption, polluted mannerism, offensive to public exchequer and an infringement to constitutionally guaranteed fundamental rights. It is also declared that assigning of work to NLC is glaring example of discrimination, favouritism, nepotism, ulterior motives and stinking approach to advance personal agenda.

The Directive No.4218/M/PSPM/ 2012 dated 2-10-2012 issued by the Principal Secretary to the Prime Minister, Memorandum of Understanding between Secretary, Ministry of Housing and Works and NLC and all subsequent orders passed are hereby set aside, declared void, unprecedented, sham, rarity, based on cheating, deception, fraud and nullity in the eyes of law, therefore, same are set aside.

The assigning of work to NLC is declared to be cancelled with the direction that NLC shall return all amount received vide Cheques Nos.B836966, B850167 and B853844 for execution of the projects within one week of the receipt of the order.

The procuring agency i.e. Pak PWD may initiate the procedure afresh strictly in accordance with the PPRA Ordinance, 2002 and PPRA Rules, 2004 and by following the dictums laid down on the point of Public Procurement by the Hon'ble Supreme Court of Pakistan and may complete its process within one month.

It is further directed that copies of this judgment be sent to Chairman NAB for initiating proceedings against all those persons involved in big scam, including the then Prime Minister, his Principal Secretary, Secretary Ministry of Housing & Works and all the official of Pak PWD who abetted, aided and executed the illegal orders issued on behalf of the then Prime Minister and officials of NLC, who remained involved in obtaining assigning of work of development projects.

Similarly copy of this judgment may also be sent to the Chief Election Commissioner, District Returning Officer of constituency NA-51, Gujar Khan to appreciate as to whether in the light of the observations made in the judgment, Raja Pervaiz Ashraf can be believed as sagacious, righteous, honest, upright, trustworthy and Ameen."

12. The main thrust of the arguments of the learned counsel for the appellant have been to the effect that since the High Courts in the exercise of their jurisdiction under Article 199 of the Constitution cannot give a declaration against a person in respect of Articles 62(1) (f) and 63(1)(h) of the Constitution, therefore, the judgment of the learned Islamabad High Court against the appellant is not sustainable in the eye of the law. The contentions of the learned counsel for the appellant do not come to their aid as the judgment of the learned Single Judge in Chambers has been upheld by a learned Division Bench of the Islamabad High Court. The learned Returning Officer as also this Tribunal under the law cannot sit in appeal against the declaration and directions given by the learned Islamabad High Court. We, therefore, find force in the arguments of the learned counsel for respondent No.2 that in view of the declaration given by the Hon'ble Supreme Court in the RPP's case as also by the learned Islamabad High Court the appellant is disqualified to contest the election in question by virtue of the provisions of Articles 62 (1)(f) and 63(1)(h) of the Constitution. We, therefore, find no infirmity, illegality or irregularity in the impugned order except for the disqualifi-cation of the appellant on the ground of pendency of contempt of Court

proceedings against him before the Hon'ble Supreme Court. This finding is accordingly set aside.

13. Under the circumstances, this appeal fails and is dismissed accordingly.

14. Copies of this order be sent to the learned District Returning Officer and the Returning Officer concerned for information and necessary action.

SAK/P-13/L Appeal dismissed.

2013 Y L R 2422

[Lahore]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

Syed PERVEZ MUSHARRAF---Appellant

Versus

RETURNING OFFICER NA-48, ISLAMABAD and others---Respondents

Election Appeal No.73 of 2013, decided on 16th April, 2013.

Representation of the People Act (LXXXV of 1976)---

----Ss.14 & 99(1-A)(g)---Constitution of Pakistan, Arts. 62 & 63---Nomination papers, rejection of---Returning Officer on basis of findings contained in judgment of Supreme Court declared appellant to be disqualified to contest election---Appellant's plea was that there was no mandatory direction or declaration in said judgment regarding his disqualification to contest election---Validity---Supreme Court in the judgment had declared appellant's act of imposing emergency including other acts done subsequent thereto as illegal, void ab initio and unconstitutional---Appeal was dismissed, in circumstances.

Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others PLD 2012 SC 1089 ref.

Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others PLD 2009 SC 879 rel.

Malik Qamar Afzal for Appellant.

Muhammad Shafqat Chaudhry for Respondent No.6 with Respondent No.6 in person.

Respondent No.10 in person.

Date of hearing: 16th April, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--This appeal assails the order dated 7-4-2013 passed by the learned Returning Officer NA-48, Islamabad, whereby the nomination paper of the appellant has been rejected in the following terms:--

"According to section 99(1A)(g) of the Representation of the People Act, 1976 "a person shall be disqualified from being elected if he is acting in any manner against the integrity or independence of the Judiciary of Pakistan or which defames or brings into ridicule the Judiciary" clearly disqualify a candidate who has committed such act and in addition to this the decision of Full Bench of the Hon'ble Supreme Court of Pakistan in PLD 2009 SC 879 it was held at Page-1033 as under:-

"It is hereby firmly laid down that the holding in abeyance of the Constitution or any other act having the effect of discontinuing the operation and the enforceability of the Constitution for a single moment in a manner not authorized under the Constitution is nothing but an overthrowing of the Constitution, so to say, the subversion of the Constitution and thus constitutes the offence of high treason."

Hence, keeping reliance on the observations made in the judgment of the Hon'ble Supreme Court of Pakistan, it is very much clear that Mr. Pervez Musharaf Ex-President has violated his oath as President and Chief of Army Staff by abrogating the Constitution acting mala fide, preferring his personal interest on the National interest, ridicule the Judiciary and acted against the independence of the Judiciary by deposing so many Judges of Hon'ble High Courts as well as Judges of Hon'ble Supreme Court of Pakistan and even Chief Justice of Pakistan and furthermore as per the report of FBR Mr.Pervez Musharaf has not paid any income tax despite the fact that he is having a huge amount in his bank accounts and immovable property in his name, is not qualified to contest the election of the Parlia-ment for N.A. 48, Islamabad-I. With the result that while accepting all the objection petitions his nomination papers are rejected."

2. The learned counsel for the appellant contends that whilst passing the impugned order the learned Returning Officer has misconstrued and mis-appreciated the observations of the Hon'ble Supreme Court of Pakistan in the judgment reported as Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879), (hereinafter referred to as "the Judgment"). For a person to be declared as disqualified under the provisions of Articles 62 and 63 of the Constitution of the Islamic Republic of Pakistan, 1973, read with section 99(1A)(g) of the Representation of the People Act, 1976, to be chosen or elected as a member of the Majlis-e-Shoora (Parliament) there has to be a declaration in unequivocal terms from a Court of law against the person. The Judgment is only declaratory without any attribution of a personal act of the appellant. Indeed, it was only an official act of the appellant which has been declared as void ab initio. The appellant has not been personally held responsible.

3. The learned counsel for the appellant has taken us through Pages 987, 914, 952, 1057, 1070, 1107, 1198, 1200, 1202, 1203, 1204, 1205 and 1206 of the Judgment in support of his contentions. Further submits that para-200 on page 1214 of the Judgment only disposes of the case, hence there is no mandatory direction or declaration as to the appellant's disqualification.

4. As to the finding of the learned Returning Officer about non-filing of the Income Tax Returns by the appellant the learned counsel for the appellant submits that the finding is not sustainable as there was no requirement under the law for the appellant filing Income Tax Returns as he was not residing in Pakistan since having resigned from the office of the President of Pakistan. He further submits that whatever income the appellant earned in the said period was by way of compensation for lectures delivered abroad at various forums for which the appellant was paid in foreign currency. The appellant under the law is not required to file Income Tax Returns in respect of his foreign earnings, especially the ones in foreign exchange.

5. The learned counsel for the respondents controverts the stance of the learned counsel for the appellant and submits that the Judgment is a monumental Judgment and is exhaustive. It was passed in the context of the events obtaining in the country at the relevant time. All the factors were weighed and the actions of the appellant were also taken into consideration. The contention of the learned counsel for the appellant that the actions declared illegal and void ab initio in the Judgment were those of the Government of Pakistan and not of the appellant in his individual capacity is misconceived and erroneous inasmuch as the appellant took action against the superior Judiciary of the country as a whole and the Hon'ble Chief Justice of Pakistan in particular for the appellant's own personal gain as is exemplified by para-80 of the Judgment wherein it is, inter alia, held that

the actions of the appellant of 3rd November, 2007 were the result of his apprehensions regarding the impending disqualification of the appellant to contest the election of President as a result of the decision of Wajihuddin Ahmed's case. It was, therefore, held that it could not be said that the actions taken by the appellant were for welfare of the people rather they were taken by him in his own interest and for illegal and unlawful personal gain of maneouvring another term of office of President. The appellant's actions were, therefore, held to be mala fide.

6. Further submits that the appellant is guilty of firstly violating his oath as an Army Officer to protect the Constitution; secondly his promise to the Nation to shed his uniform and thirdly for taking illegal and mala fide actions against the superior Judiciary to perpetuate his rule. The appellant, therefore, cannot be termed as "ameen". Refers to para-16 page-987; para-179 page-1200 and pages-1032, 1037, 1038 & 1039 of the Judgment in support of his contentions. Also relies on the judgment reported as Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1089).

7. We have considered the arguments of the learned counsel for the parties and have gone through the impugned order and the Judgment and finding that through the Judgment the Hon'ble Supreme Court has, inter alia, held against the appellant as under:

"80. Seen in the above perspective, the actions of General Pervez Musharaf dated 3rd November, 2007 were the result of his apprehensions regarding the decision of Wajihuddin Ahmed's case and his resultant disqualification to contest the election of President. Therefore, it could not be said that the said actions were taken for the welfare of the people. Clearly, the same were taken by him in his own interest and for illegal and unlawful personal gain of maneouvring another term in office of President, therefore, the same were mala fide as well. The statement made in Proclamation of Emergency that the situation had been reviewed in meetings with the Prime Minister, Governors of all the four Provinces, and with Chairman, Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice Chief of Army Staff and Corps Commanders of the Pakistan Army, and emergency was proclaimed in pursuance of the deliberations and decisions of the said meetings, was incorrect. The Proclamations of Emergency emanated from his person, which was apparent from the words "I, General Pervez Musharraf...." Used in it."

"81. There is force in the submission of the learned counsel for the petitioners that the continuation in power of General Pervez Musharraf was all along the result of maneouvring. The holding of Referendum 2002 and the amendments made in the Constitution by means of the LFO, 2002 were hotly contested at the floors of the Houses of

Parliament, but the amendments so made in the Constitution were ultimately accepted and the Seventeenth Amendment to the Constitution was passed on 31st December, 2003 under the umbrella of an accord between the PML (Q) and the MMA, thus paving the way for General Pervez Musharaf to be the President of Pakistan for the next five years, i.e. up to 15th November, 2007 while continuing to be the Chief of Army Staff at the same time in terms of the aforesaid Seventeenth Amendment. He promised to relinquish the office of Chief of Army Staff on or before 31st December, 2004, but later in deviation of his promise, he got enacted the President to Hold Another Office, Act, 2004. That is why his candidature for the election of President was challenged before the Supreme Court, first by the major political parties of the country in Jamat-e-Islami's case and later by the two rival candidates of the election of President in Wajihuddin Ahmed's case. The majority decision in Jamat-e-Islami's case was rendered in favour of General Pervez Musharraf only on a legal ground, namely, the petitions were not maintainable as it did not involve enforcement of any of the Fundamental Rights of the petitioners. However, four out of nine Judges gave decision on merits and held him disqualified to contest the election of President."

"82. As to the constitutionality and the legality of the acts/actions of 3rd November, 2007, General Pervez Musharraf himself in an interview to a foreign TV news channel (BBC) admitted that he had taken unconstitutional steps. Relevant portion from his interview, as reported in the Daily DAWN of 18th November, 2007 is reproduced below:---

The daily DAWN, Islamabad, 18th November, 2007 NO ILLEGAL STEP TAKEN BEFORE NOV. PRESIDENT;

"Before March, I was very good. Suddenly did I go mad after March or suddenly my personality changed, am I Doctor Jekyll and Mister Hyde or what is it?" He said.

"Am I such a person?

"Please go into the details, the causes. What I am doing? Have I done anything unconstitutional, yes, I did it on Nov. 3. "Did I do it before? Not once."

"102. In the light of the above discussion, it is held and declared that the amendments purportedly made by General Pervez Musharraf from 3rd November, 2007 up till 15th December, 2007 (both days inclusive) were neither made by an authority mentioned in the Constitution nor the same were made following the procedure prescribed in the Constitution and were, therefore, unconstitutional, illegal and void ab initio……"

"174. As seen above, the whole grievance was nurtured against the Judges of the Supreme Court who were hearing the disqualification case of General Pervez Musharraf but in issuing the unconstitutional and illegal Proclamation of Emergency, PCO No.1 of 2007 and Oath Order, 2007 all Judges of the Supreme Court, Federal Shariat Court and High Courts were declared to have ceased to hold office and only such Judges were allowed to occupy the seats of Judges who made oath in violation of the order dated 3rd November, 2007 passed by a seven---member Bench of this Court in Wajihuddin Ahmed's case."

"179. All the acts/actions done or taken by General Pervez Musharraf from 3rd November, 2007 to 15th December, 2007 (both days inclusive), that is to say, Proclamation of Emergency and the subsequent acts/actions done or taken in pursuance thereof having been held and declared to be unconstitutional, illegal ultra, vires and void ab initio are not capable of being condoned. These include Proclamation of Emergency and the PCO No.1 of 2007 issued by him as Chief of Army Staff and Oath Order, 2007 issued by him as President of Pakistan in pursuance of the aforesaid two instruments, all dated 3rd November, 2007; Provisional Constitution (Amendment) Order, 2007 dated 15th November, 2007; Constitution (Amendment) Order, 2007 (President's Order No.5 of 2007 dated 20th November, 2007); Constitution (Second Amendment) Order, 2007 (President's Order No.6 of 2007 dated 14th December, 2007); Islamabad High Court (Establishment) Order 2007(President's Order No.7 of 2007 dated 14th December 2007); High Court Judges (Pensionary Benefits) Order, 2007 (President's Order No.8 of 2007 dated 14th December, 2007) and Supreme Court Judges (Pensionary Benefits) Order, 2007 (President's Order No.9 of 2007 dated 14th December, 2007). The aforesaid actions of General Pervez Musharraf are also shorn of the validity purportedly conferred upon them by the decisions in Tikka Iqbal Muhammad Khan's case. The said decisions have themselves been held and declared to be coram non judice and nullity in the eye of law. The amendments purportedly made in the Constitution in pursuance of PCO No.1 of 2007 themselves having been declared to be unconstitutional and void ab initio, all the actions of General Pervez Musharraf taken on and from 3rd November, 2007 till 15th December, 2007 (both days inclusive) are also shorn of the validity purportedly conferred upon them by means of Article 270AAA."

8. In view of the foregoing we find that the contentions of the learned counsel for the appellant are not only misconceived but are also fallacious and are, therefore, repelled.

9. We find no illegality, infirmity or irregularity in the order of the learned Returning Officer. As a consequence, this appeal fails and is dismissed accordingly.

SAK/P-12/L Appeal dismissed.

2014 C L C 65

[Lahore]

Before Mamoon Rashid Sheikh, J

Mst. SAEEDA----Petitioner

Versus

PROVINCE OF PUNJAB and others----Respondents

Civil Revision No.813 of 2011, decided on 11th April, 2012.

(a) Civil Procedure Code (V of 1908)---

----O. XXXIX, Rr. 1 & 2---Temporary injunction, grant or refusal of---Essential factors requiring considerations by Courts stated.

An injunction is not to be granted only on the basis that a prima facie case exists in favour of the plaintiff. The courts are required to take into consideration whether the question of balance of convenience or irreparable loss to the party seeking such relief co-exists or not.

Besides the above factors, the courts in the facts and circumstance of a case have to take into consideration certain other factors such as whether the plaintiff has approached the court with clean hands or not; whether the court has been approached promptly or not; whether the grant of an injunction will be against public interest/policy; whether grant of an injunction to a party will result into an undue advantage being given to him which would perpetuate injustice, and whether a party approaching the court for interim relief has concealed material facts and/or acted in a mala fide manner. In case the answer of any of the questions is in the affirmative, then the relief of an injunction being discretionary in nature can be granted.

One who seeks discretionary relief is required to approach the court with clean hands or in other words one who seeks equity must do equity.

Marghub Siddiqi v. Hamid Ahmad Khan and 2 others 1974 SCMR 519; ATCO Lab. (Pvt.) Limited v. PFIZER Limited and others 2002 CLD 120; Syed Kamal Shah v. Government of N.-W.F.P. 2010 SCMR 1377 and Mst. Sharifan Bibi and others v. Muhammad Abid Rasheed 2011 YLR 2396 rel.

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

----S. 42---Civil Procedure Code (V of 1908), O.XXXIX, Rr.1 & 2---Subsequent suit for declaration---Non-disclosure of filing of earlier suit regarding same subject matter in subsequent suit---Application for grant of temporary injunction to protect plaintiff's possession over suit land---Validity---Land possessed by plaintiff was beyond his share/entitlement therein---Plaintiff by concealing factum of filing of earlier suit had acted in a mala fide manner, thus, he had not approached court with clean hands---Plaintiff by his such conduct had become disentitled to grant of such discretionary relief as person seeking equity would have to do equity---Such application was dismissed in circumstances.

Syed Kamal Shah v. Government of N.-W.F.P. 2010 SCMR 1377 and Mst. Sharifan Bibi and others v. Muhammad Abid Rasheed 2011 YLR 2396 rel.

Muhammad Younas Sheikh for Petitioners.

Zafarullah Khan Khakwani, Asstt. A.-G. Punjab.

Ch. Saghir Ahmad for Respondents Nos.7 to 11.

ORDER

MAMOON RASHID SHEIKH, J.--- This petition calls into question the order dated 12-1-2011 passed by the learned Civil Judge, Khanewal and the order dated 24-5-2011 passed by the learned Addl. District Judge, Khanewal, whereby the petitioner has been unsuccessful in obtaining a temporary injunction in her suit for declaration, etc, in respect of the property in dispute.

2. The brief facts giving rise to the petition are to the effect that the petitioner and respondents Nos.5-A to 34 are stated to be co-sharers in the land in dispute bearing Khewat No.30 measuring 165 kanals and 3 marlas and Khewat No.189 measuring 1046 kanals and 8 marlas (total 1211 kanals and 11 marlas), situated in Chak No.125/15-L Tehsil Mianchannu, District Khanewal. An application for partition of the land in dispute was made before the Tehsildar/Assistant Collector Grade-I, Mianchannu on 13-7-1993. During pendency of the proceedings a compromise was effected between the parties whereby land measuring 99 kanals and 14 marlas of the petitioner and one of the co-sharers was separated and the rest of the holding of the other co-sharers was kept intact. A deed of compromise in this respect was presented before the Tehsildar/AC-I, Mianchannu on 8-3-1994 and an order dated 9-3-1994 was passed thereon. As a consequence, Mutations

Nos.1648 and 3082 were sanctioned on 29-3-1994. Feeling aggrieved some of the co-sharers preferred an appeal, inter alia, on the grounds that they had not entered into any compromise with the petitioner, the whole exercise had been carried out by playing a fraud. The Assistant Commissioner/Collector, Mianchannu, however, dismissed the appeal on 26-1-1997 on merits as well as being barred by time. The said co-sharers filed revision petitions before the Addl. Commissioner (Consolidation), Multan Division who through order dated 25-7-1998 dismissed the revision petitions. In the meantime some of the other co-sharers also filed a review petition seeking review of the order dated 9-3-1994. This review petition was dismissed by the Deputy Commissioner/District Collector on 7-7-1994. The revision petition against the order dated 7-7-1994 was dismissed by the Additional Commissioner (Consolidation) on 25-7-1998. The matter ultimately came up before the learned Member Board of Revenue in RORs No.1356, 1583, 1494 and 1495 of 1998. These RORs were allowed and the Senior Member Board of Revenue through order dated 2-8-1999 set aside the order dated 9-3-1994 and cancelled the consequential mutations. The matter was remanded to the Tehsildar/ Assistant Collector Grade-I, Mianchannu, for decision afresh in accordance with the law. Feeling aggrieved the present petitioner filed W.Ps. Nos.11422 and 11531 to 11533 of 1999 which were dismissed by a learned Single Judge of this Court through judgment dated 9-12-2003. The petitioner filed CPs. No.385 to 388 of 2004 against the said judgment before the Hon'ble Supreme Court of Pakistan. The leave to appeal was, however, not granted to the petitioner and the CPs. were dismissed through judgment dated 17-1-2005. Upon remand the Tehsildar/AC-I, Mianchannu after summoning the parties and inspecting the site issued partition order dated 30-6-2005. The petitioner challenged the order before the Revenue Authorities and ultimately through order dated 1-2-2010 the petitioner's and one Asim Hassan's ROR Nos.1615/2009 and 2049/2007 were dismissed by the learned Member (Judicial-II), Board of Revenue, Punjab. The petitioner thereafter filed a civil suit challenging the various orders of the Revenue Authorities as also the order dated 1-2-2010. In the suit the petitioner, as said above, was unsuccessful in obtaining a temporary injunction, hence this petition.

3. At the outset the learned counsel for respondents Nos.7 to 11 has raised preliminary objections regarding the maintainability of the petition and also the suit of the petitioner by, inter alia, submitting that the order dated 30-6-2005 impugned in the suit was an order passed in post remand proceedings in compliance with the judgment of the Hon'ble Supreme Court dated 17-1-2005 passed in C.Ps. Nos.385 to 388 of 2004. The filing of the suit by the petitioner amounts to contempt of Court. The petitioner's suit is not maintainable. As a consequence, no prima facie case is made out. Hence, the question of grant of a temporary injunction in the petitioner's favour does not arise. Further submits

that the petitioner has filed the suit by concealment of material facts inasmuch as prior to filing of the present suit the petitioner had filed a civil suit against the present respondents. Through the said suit the petitioner had, inter alia, sought the declaration that the compromise effected between the parties on 6-3-1994 is effective and binding on the parties. The suit was resisted by the respondents and the plaint was rejected by the learned Civil Judge, Khanewal through order dated 2-7-1995, inter alia, on the grounds that the compromise deed dated 6-3-1994 had been set aside by the Hon'ble Supreme Court, therefore, a fresh suit on the basis of the compromise deed does not lie. The petitioner's appeal was dismissed by the learned Additional District Judge, Khanewal, through judgment dated 14-3-2009. As the petitioner has failed to mention these facts in her present suit as also the instant petition she is not entitled to any discretionary relief.

4. The learned counsel for respondents Nos.7 to 11 has submitted certified copies of the abovementioned judgments/orders in support of his contentions. The said copies are made a part of the record.

5. The learned counsel further contends that the learned Courts below noted these factors whilst dismissing the petitioner's application for grant of a temporary injunction and the appeal arising therefrom. Indeed, the petitioner was unsuccessful before the learned Courts below for non-disclosure of material facts.

6. The learned Assistant Advocate-General whilst adopting the arguments of the learned counsel for respondents Nos.7 to 11 submits that this is the third round of litigation to which the petitioner has resorted to in respect of the land in dispute. In the first round the Hon'ble Supreme Court set aside the compromise deed dated 6-3-1994 and the subsequent order dated 9-3-1994. In the second round the petitioner filed a suit for declaration on the basis of the compromise deed. The petitioner's plaint was rejected and her appeal was dismissed. Both the learned Courts held that the matter had been finally decided by the Hon'ble Supreme Court, hence, the suit was barred under the law, therefore, the plaint was liable to be rejected. Now without disclosing the factum of filing of the earlier suit the petitioner has challenged the post remand proceedings before the Revenue Authorities. The suit of the petitioner is not maintainable. No prima facie case has been made out, hence, the question of balance of convenience and irreparable loss does not arise. Even otherwise, as held by the learned Member Board of Revenue the petitioner is in occupation of land in excess of her share, therefore, she is merely trying to prolong the litigation to perpetuate her illegal occupation. Prays for dismissal of the petition.

7. When confronted with the contentions of the learned counsel for respondents Nos.7 to 11 and the learned Assistant Advocate-General vis-a-vis the non-disclosure of the filing of the earlier suit, the learned counsel for the petitioner has tried to maintain that the non-disclosure of the filing of the earlier suit is not fatal to the petitioner's case. Contends that the earlier suit was not dismissed on merits. In fact only the plaint was rejected. As a consequence there is no res judicata. Even otherwise the said suit did not challenge the order dated 1-2-2010 passed in ROR No.1619 of 2009 by the learned Member Board of Revenue but in effect sought a declaration vis-a-vis the compromise dated 6-3-1994 arrived at between the parties. Further contends that the petitioner has been able to make out a prima facie case and has also been able to establish that the balance of convenience lies in her favour and if the temporary injunction is not issued irreparable loss shall be caused to her. The learned Courts below failed to appreciate this aspect of the case.

8. I have considered the arguments of the learned counsel for the parties and I have also gone through the record.

9. It is well-settled law that an injunction is not to be granted only on the basis that a prima facie case exists in favour of the plaintiff. The Courts are required to take into consideration whether the question of balance of convenience or irreparable loss to the party seeking such relief co-exists or not. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court reported as Marghub Siddiqi v. Hamid Ahmad Khan and 2 others (1974 SCMR 519).

10. It is also a settled principle of law that besides the above factors the Courts in the facts and circumstances of a case have to take into consideration certain other factors such as whether the plaintiff has approached the Court with clean hands or not; whether the Court has been approached promptly or not; whether the grant of an injunction will be against public interest/policy; whether grant of an injunction to a party shall result into an undue advantage being given to him which would perpetuate injustice and whether a party approaching the Court for interim relief has concealed material facts and/or acted in a mala fide manner. In case the answer of any of the questions is in the affirmative then the relief of an injunction being discretionary in nature can be declined. Reliance in this regard is placed on a judgment reported as ATCO Lab. (Pvt.) Limited v. PFIZER Limited and others (2002 CLD 120).

11. In the instant case admittedly the petitioner is in possession of land beyond her entitlement/share. She has remained unsuccessful in the earlier rounds of litigation even up

to the level of the Hon'ble Supreme Court. Moreover, after the Hon'ble Supreme Court had in effect declared that the compromise dated 6-3-1994 did not exist between the parties, the petitioner through her earlier suit unsuccessfully tried to seek a declaration to the effect that the compromise existed and the land in dispute be partitioned accordingly. These factors as also the fact that the filing of the earlier suit has been concealed by the petitioner not only in the plaint of the present suit but also in the instant petition goes to establish that the conduct of the petitioner is not above board and she has approached the Court with unclean hands. On the touchstone of the judgments referred to above and the judgments reported as Syed Kamal Shah v. Government of N.-W.F.P. (2010 SCMR 1377) and Mst. Sharifan Bibi and others v. Muhammad Abid Rasheed (2011 YLR 2396), it can safely be said that one who seeks discretionary relief is, therefore, required to approach the Court with clean hands or in other words one who seeks equity must do equity. The petitioner is not only guilty of concealment of material facts but has also acted in a mala fide manner, therefore, on this ground alone I decline to interfere in the orders of the learned Courts below. Indeed, the learned appellate Court below has in part dismissed the petitioner's appeal for non-disclosure of material facts.

12. Even otherwise, the learned counsel for the petitioner has been unable to show the co-existence of a prima facie case, balance of convenience and irreparable loss in the instant case. The petitioner as noted by the learned Member Board of Revenue is in possession of land in excess of her share. Her ROR No.1619 of 2009 before the learned Member, Board of Revenue was time-barred. During the post remand proceedings before the Revenue Authorities the petitioner was given repeated opportunities to present her case but she failed to do so, consequently her defence was struck off. All these factors go to show that the petitioner does not have a prima facie case in her favour nor does the balance of convenience tilt in her favour, similarly the factor of irreparable loss is also missing. Relying, therefore, on Marghub Siddiqi's case supra I find that the petition also fails on merits.

13. Dismissed accordingly.

SAK/S-69/L Petition dismissed.

2014 C L C 94

[Election Appellate Tribunal Punjab]

Before Justice Rauf Ahmad Sheikh and Justice Mamoon Rashid Sheikh, Members

TARIQ MEHMOOD MURTAZA----Appellant

Versus

RETURING OFFICER PP-2, RAWALPINDI and another----Respondents

Election Appeal No.5 of 2013, heard on 13th April, 2013.

Representation of the People Act (LXXXV of 1976)---

----Ss. 12 & 14---Constitution of Pakistan, Arts.63 & 62---Rejection of nomination papers---Concealment of assets---Appellant impugned order of Returning Officer whereby his nomination papers were rejected on the ground that appellant concealed his assets on his nomination papers and was therefore disqualified from being elected as a Member of the Provincial Assembly under Arts.63 & 62 of the Constitution---Validity---Factum of ownership of a private limited company and land had not been satisfactorily explained by the appellant, and the said private limited company still existed on the register of the SECP and was yet to be dissolved---Appellant was therefore required under law to disclose that he owned the said company even if it was not conducting any business---Land in question was transferred to the appellant on 19-8-2006, while the appellant's father died in the year 2006, therefore, the contention that the land had been bought by the appellant's father in the appellant's name could not be accepted---Appellant had therefore, not only misdeclared but had also concealed his assets and had thus made a false statement/declaration on oath and was as a result disqualified from being chosen or elected a Member of the Provincial Assembly---Appeal was dismissed, in circumstances.

Ali Raza for Appellant.

Ch. Taufeeque Asif and Ms. Ambreen Nawaz Chaudhry for Respondent No.2.

Date of hearing: 13th April, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- This appeal calls into question the order dated 5-4-2013 passed by the learned Returning Officer PP-2, Rawalpindi, whereby the nomination papers of the appellant to contest the elections of the said constituency have been rejected.

2. The learned counsel for the appellant submits that the impugned order has been passed by the learned Returning Officer by misreading the record and misapplication of the law. The appellant had made full disclosure in his nomination paper and had not made any concealment of his assets. At the time of his death the appellant's father owned a Toyota Prado (Land Cruiser) bearing Registration No.BB-7296 (Sindh). The said Prado is very old and upon the demise of the appellant's father it devolved upon his legal heirs. By way of family settlement the Prado came under the ownership and use of the appellant's mother and upon her demise by way of another family settlement the Prado became the property of the appellant's sister, a divorcee. The appellant at no point in time owned the Prado, therefore, the question of the Prado being in the name of the appellant does not arise. As to the Toyota Corolla, Model 2012 car owned by the appellant submits that it is upto the appellant to assess its value. The said car is an accidented car and, therefore, does not admit of fetching the prevalent market value of an unaccidented car. Contends that no concealment had been made in this respect. Insofar as the appellant having concealed the existence of his Bank Account No.01-2454793-01 with Standard Chartered Bank is concerned, submits that as at the cut-off date i.e. 30-6-2012 the account did not exist. The account in question was opened in January, 2013 as a consequence of Citibank closing its consumer operations in Pakistan. The appellant was, therefore, constrained to open a new account in Standard Chartered Bank but at a date much later than the cut-off date, therefore, the non-mentioning of the same in the nomination paper. The appellant had, however, mentioned his Citibank account in the nomination paper. As to the credit card and the amount outstanding against it is concerned, the learned counsel for the appellant submits that there is no column in the nomination paper requiring detail of the credit card. Even otherwise there is no outstanding balance in this respect hence non mentioning of the same. Insofar as the appellant having shares in the company known as Mehr Paper and Board (Pvt.) Ltd. and non-disclosure of this fact is concerned, submits that the said company is no longer carrying on business and has seized to have any operations. A notice to this effect has been given by the SECP to the shareholders. And the company shall be struck off from the register of the SECP and dissolved in due course of time. The appellant has informed the SECP that the company has no assets or liabilities, therefore, non-disclosure is not attracted in respect of this company.

3. The learned counsel for respondent No.2 controvert the stance of the learned counsel for the appellant and submit that the appellant is guilty of concealment of his assets. They refer to the statement of assets and liabilities given by the appellant in his nomination form and contend that in the detail of immovable properties given by the appellant at Sr. No.4 i.e. immovable properties held in Pakistan the appellant had mentioned 10 kanals of land in

Khajot, Tehsil Murree, District Rawalpindi. The said land is stated to be inherited whereas the appellant purchased the same on 19-8-2006 through Mutation No.417. The learned counsel have submitted a copy of the mutation in support of their contentions. Further submit that the appellant is the owner of Mehr Paper and Board (Pvt.) Ltd. but has not disclosed the same in his nomination paper. Further contend that in not having made full disclosure the appellant cannot be considered to be honest and Ameen and is, therefore, disqualified from running or being chosen as a member of the Provincial Assembly in terms of Articles 62, 63 and 119 of the Constitution of the Islamic Republic of Pakistan, 1973.

4. The learned counsel for the appellant submits that all the immovable property mentioned by the appellant in his nomination paper is inherited property. The land in Khajot was in fact bought by the appellant's father in the appellant's name. As to Mehr Paper and Board (Pvt.) Ltd. reiterates his previous submissions.

5. We have considered the arguments of the learned counsel for the parties and have also gone through the record with their assistance.

6. We find that the impugned order has disqualified the appellant for the reasons mentioned in the submissions of the learned counsel for the appellant. The appellant has, however, been able to explain that the Prado was never in his use or name, therefore, we find that the finding of the learned Returning Officer in respect of concealment of the same is erroneous. Similarly is the position regarding the appellant's account in the Standard Chartered Bank. Insofar as the valuation of the Toyota Corolla Car or of the gold jewellary is concerned, non-disclosure of its value or incorrect valuation thereof is a matter of fact which cannot be resolved in these proceedings as they are summary in nature. Even otherwise, disclosure of ownership of these assets has been made. Similarly the learned counsel for the appellant has satisfactorily explained that there is no outstanding against the appellant insofar as the credit card is concerned. However, the factum of ownership of Mehr Paper and Board (Pvt.) Ltd. and the ownership of the land in Khajot are questions which have not been satisfactorily explained by the learned counsel for the appellant. The company as pointed out by Miss Ambreen Nawaz Chaudhry, Advocate, co-counsel for respondent No.2, is still borne on the register of the SECP and is yet to be dissolved. The appellant was, therefore, required under the law to disclose that he owns the company even though if it was not conducting any business. As regards the land in Khajot we find that the same was transferred in the name of the appellant through Mutation No.417 dated 19-8-2006. From a perusal of the documents appended by the appellant with the appeal especially the affidavits of the appellant and his sister in respect of the ownership of the Prado it appears that the appellant's father died in or around the year 2005. The mutation in

question is dated 19-8-2006. The contention of the learned counsel for the appellant that the land had been bought by the appellant's father in the appellant's name, therefore, it is inherited land, does not come to the aid of the appellant.

7. The appellant has, therefore, not only misdeclared but has also concealed his assets. He has thus made a false statement/declaration on oath and is consequently disqualified from being chosen or elected as a member of the Provincial Assembly.

8. Under the circumstances, this appeal fails and is dismissed accordingly.

KMZ/T-13/L Appeal dismissed.

2014 C L C 308

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD HAYAT----Petitioner

Versus

ZAFAR IQBAL and others----Respondents

Civil Revision No.547 of 2004, decided on 2nd October, 2012.

Punjab Pre-emption Act (IX of 1991)---

----Ss. 13 & 19---Pre-emption right---Scope---Talb-e-Ishhad, performance of---Contention of plaintiff was that notice of Talb-e-Ishhad was served upon two minor vendees (defendants) through their father and suit should have been decreed to the extent of minor defendants whereas defendants contended that only one notice of Talb-e-Ishhad was sent in the name of all the vendees---Suit was dismissed concurrently---Validity---Service of notice of Talb-e-Ishhad upon the defendants including minor vendee was disputed---Plaintiff was bound to produce postman to prove service of said notice and without his production same could not be said to have been proved---Right of pre-emption was neither transferable nor divisible and claim for pre-emption had to be made on the whole pre-emptible property---Revision was dismissed in circumstances.

Muhammad Askari v. Rahmatullah and others AIR 1927 All. 548 distinguished.

Bashir Ahmed v. Ghulam Rasool 2011 SCMR 762 rel.

Mujeeb-ur-Rehman Kiani for Petitioner.

Malik Lal Khan for Respondents.

ORDER

MAMOON RASHID SHEIKH, J.--- The plaintiff/petitioner has been unsuccessful, at the trial as well as the appellate level to have his suit for possession through pre-emption, in respect of the property in dispute, decreed in his favour. Hence the filing of the instant petition challenging the impugned judgment and decree dated 25-3-2003 passed by the learned Civil Judge 1st Class, Tala Gang District Chakwal and the impugned judgment and decree dated 19-6-2004 passed by the learned Additional District Judge, Tala Gang District Chakwal.

2. The learned counsel for the petitioner submits that the petitioner was non-suited by the learned Courts below inter alia on the grounds that the petitioner has not been able to prove the Talb-e-Muwathibat and Talb-e-Ishhad, even though, the petitioner's suit had been held to be within time by the learned appellate Court despite the objection by the respondents that the petitioner's suit was barred by time. Further submits that the petitioner brought on record evidence to show that the Talb-e-Muwathibat had been performed in accordance with the law. Similarly, the notice (Exh.P.E.) of the Talb-e-Ishhad was sent to the respondents who happen to be real brothers through registered post A.D. The notice was received by their real father, therefore, their service was complete. The learned Courts below have erred in holding that the service of notice on the respondents through their father was not proper service. Further submits that similarly the findings of the learned Courts below that separate notices should have been issued to each respondent is contrary to the principles of "Mahomedan Law". In this respect relies on the judgment reported as "Muhammad Askari v. Rahmatullah and others" (AIR 1927 Allahabad 548). Further contends that assuming without conceding that individual notices were required to be sent to the respondents even then the notice issued in the names of the minor respondents Nos.3 and 4 was validly served as it was received by their father, consequently, they were served in accordance with the law i.e. through their father and natural guardian. The petitioner's suit should, therefore, have been decreed at least against the said minor respondents Nos.3 and 4. Further contends that the impugned judgments and decrees suffer from misreading and non-reading of evidence. The minor variations in the statements of the petitioner and his witnesses should not detract from the fact that the Talb-e-Muwathibat had been performed in accordance with the law. The learned Courts below have erred in holding otherwise.

3. The learned counsel for the respondents submits that it is a case of concurrent findings of fact. The petitioner failed to prove Talb-e-Muwathibat as also Talb-i-Ishhad. Under the law separate notices of Talb-e-Ishhad should have been issued to all the respondents. The petitioner only sent one notice in the names of all the respondents. The said notice too was not served. Even if, it were to be assumed that the minor respondents Nos.3 and 4 were served through their father and natural guardian then the service of the notice would not be deemed to be in accordance with the law as the respondents' father is neither a party to the proceedings nor was he at any time appointed as the minor respondents Nos.3 and 4's guardian ad litem. Moreover, the notice was not addressed to respondents Nos.3 and 4 through their father. Further contends that where the service of notice is disputed then it is mandatory for the plaintiff to adduce the evidence of the postman concerned in order to establish service of notice. In the instant case, admittedly, the evidence of the postman concerned was not produced. Relies on the judgment reported as "Bashir Ahmed v. Ghulam Rasool" (2011 SCMR 762). Also contends that the sale took place in the year 1997 and the petitioner waited till the year 1999 for filing the suit. The suit was, therefore, barred by time. The findings of the learned appellate Court below on the question of limitation is against the facts and the law.

4. Arguments heard. Record perused.

5. Admittedly, this is a case of concurrent findings of fact. The learned counsel for the petitioner has tried to make out a case for decreeing of the petitioner's suit by maintaining that the petitioner was able to prove Talb-e-Muwathibat as well as Talb-e-Ishhad. It has been further maintained on the basis of the principles of "Mahomaden Law" that even if it is accepted that respondents Nos.1 and 2 have not been served in accordance with the law the fact still remains that the minor respondents Nos.3 and 4 have been served through their father and natural guardian, therefore, a decree for possession through pre-emption ought to have been passed in favour of the petitioner to the extent of the minor respondents Nos.3 and 4's share in the property in dispute. In this respect the learned counsel has relied on Muhammad Askari's case (supra). I am afraid this contention of the learned counsel for the petitioner does not come to his aid. The service of the notice of Talb-e-Ishhad on the respondents including the minor respondents Nos.3 and 4 is disputed, therefore, in view of the law as laid down by the Hon'ble Supreme Court in Bashir Ahmed's case (supra) (cited at the bar by the learned counsel for the respondents) it was incumbent upon the petitioner to have produced the postman concerned. In absence of the evidence of the postman concerned service of notice of Talb-e-Ishhad cannot be said to have been proved. Moreover, the right

of pre-emption under the provisions of Section 19 of the Punjab Pre-emption Act, 1991, is neither transferable nor divisible and the claim for pre-emption has to be made on the whole property pre-emptible. In view thereof, the reliance placed by the learned counsel for the petitioner on Muhammad Askari's case (supra) is misconceived.

6. Under the circumstances, the petition fails and is dismissed accordingly with no order as to costs.

AG/M-3/L Revision dismissed.

2014 C L C 445

[Lahore]

Before Syed Mansoor Ali Shah and Mamoon Rashid Sheikh, JJ

Ch. MUHAMMAD SALEEM----Appellant

Versus

DIRECTOR-GENERAL ENVIRONMENTAL PROTECTION AGENCY----Respondent

Environmental Appeal No.892 of 2010, heard on 4th March, 2013.

(a) Pakistan Environmental Protection Act (XXXIV of 1997)---

----Ss. 22 & 23---Appeal---Limitation---Appeal has to be preferred before Tribunal or High Court within thirty days of communication of order.

(b) Pakistan Environmental Protection Act (XXXIV of 1997)---

----Ss. 22 & 23---General Clauses Act (X of 1897), S.9---Limitation Act (X of 1908), S.12---Appeal---Limitation---Computation---Period spent in getting certified copy---Appellant preferred appeal before Environmental Tribunal, which was dismissed being barred by limitation---Plea raised by appellant was that no order was communicated to the appellant and appeal was filed after getting certified copy of the order---Validity---Nothing was placed on record to show as to when order of Environmental Tribunal was communicated to the appellant, if at all---Benefit of time spent by appellant in obtaining certified copy of the order, therefore, accrued to him, by virtue of provisions of S.12 of Limitation Act, 1908-

--Appeal filed by appellant was well within time and order passed by Tribunal was set aside and matter was remanded for decision afresh---Appeal was allowed accordingly.

Messrs Tribal Friends Co. v. Province of Balochistan 2002 SCMR 1903; Sher Muhammad and 6 others v. Gul Fraz 1989 CLC 1344; Messrs Malik Muhammad Nawaz, Haji Aziz Ahmad Commission Agents, Chakwal v. Syed Mehmood Hussain 1997 SCMR 264 and Muhammad Amin v. Muhammad Latif PLD 1996 Lah. 321 ref.

Imran Ahmad Bhatti for Appellant.

Sharjeel Haider, Assistant Director (Legal), Environment Protection Agency, Punjab for Respondent.

Date of hearing: 4th March, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- The limited question of law involved in the instant appeal which requires determination is that whether the appeal filed by the appellant under section 22 of the Pakistan Environmental Protection Act, 1997 (the Act), before the learned Environmental Tribunal, Punjab (the Tribunal), against the Environmental Protection Order (the EPO) dated 31-5-2010 passed under section 16 of the Act, by the Director-General, Environmental Protection Agency, Government of the Punjab (the respondent) was within time or not.

2. The learned counsel for the appellant submits that section 22 of the Act envisages that any aggrieved person can file an appeal before the Tribunal within thirty (30) days of the communication of the impugned order or direction. The impugned order was passed by the respondent on 31-5-2010 and admittedly the order was communicated to the appellant on 6-7-2010 so the period of thirty days for filing of the appeal was due to expire on 5-8-2010. The learned Tribunal, however, took the view that the requisite period of thirty (30) days expired on 4-8-2010, therefore, the appellant's appeal was held to be time barred by one day. It was further held that since the Act is a special law, therefore, by virtue of section 29 of the Limitation Act, 1908, the provisions of section 5 of the Limitation Act, 1908, do not apply. Hence, the appellant could not claim condonation of delay.

3. The learned counsel for the appellant contends that the view taken by the learned Tribunal is erroneous as the matter in issue was whether the appeal was filed within thirty (30) days of the communication of the impugned order to the appellant or not. The question

of applicability of section 5 of the Limitation Act to the instant case does not arise. Further submits that under section 9 of the General Clauses Act, 1897, as also the provisions of section 12 of the Limitation Act, the day the order is communicated to a party is to be excluded for the purposes of calculation of the period of limitation. In the instant case the order was admittedly communicated to the appellant on 6-7-2010, therefore, the period of thirty (30) days of limitation would start from 7-7-2010 and not from 6-7-2010 as held by the learned Tribunal. The thirty (30) days, therefore, expired on 5-8-2010 i.e. the date on which the appeal was filed by the appellant before the learned Tribunal. The appellant's appeal was, therefore, within time. He submitted that this aspect of the case has been totally ignored by the learned Tribunal whilst passing the impugned order dated 23-8-2010 and places reliance on the judgments reported as Messrs Tribal Friends Co. v. Province of Balochistan (2002 SCMR 1903), Sher Muhammad and 6 others v. Gul Fraz (1989 CLC 1344), Messrs Malik Muhammad Nawaz, Haji Aziz Ahmad Commission Agents, Chakwal v. Syed Mehmood Hussain (1997 SCMR 264) and Muhammad Amin v. Muhammad Latif (PLD 1996 Lahore 321).

4. The Assistant Director (Legal), Environmental Protection Agency, Punjab, controverts the stance of the learned counsel for the appellant. Contends that not only the appeal of the appellant before the learned Tribunal was barred by time but also the instant appeal is barred by time. Further contends that the date on which the impugned order of the respondent was communicated to the appellant (i.e. 6-7-2010) is to be counted for the purposes of calculating the period of limitation for filing of the appeal before the learned Tribunal. On such calculation thirty (30) days of limitation expired on 4-8-2010 and not on 5-8-2010 as contended by the learned counsel for the appellant. As to the instant appeal submits that the appeal was filed beyond the requisite period of thirty (30) days.

5. In reply to the objection of the learned Assistant Director the learned counsel for the appellant submits that the impugned order was not communicated to the appellant, therefore, the appellant was constrained to obtain a certified copy of the impugned order. Under the provisions of section 12 of the Limitation Act, 1908, the time spent by the appellant in obtaining a certified copy of the impugned order is to be excluded from the period of limitation. The instant appeal is, therefore, within time.

6. We have considered the arguments of the learned counsel for the appellant as also of the Assistant Director and find that for the purposes of assessing whether the appeal before the learned Tribunal as also the instant appeal has been filed within time the provisions of

sections 22 and 23 of the Act, need to be gone through. The said provisions are, therefore, being reproduced hereunder for ease of reference:---

"22. Appeal to the Environmental Tribunal.--- (1) Any person aggrieved by any order or direction of the Provincial Agency under any provision of this Act, and rules and regulations may prefer an appeal with the Environmental Tribunal within thirty days of the date of communication of the impugned order or direction to such person.

(2) An appeal to the Environmental Tribunal shall be in such form, contain such particulars and be accompanied by such fees as may be prescribed.

23. Appeals from orders of the Environmental Tribunal.--- (1) Any person aggrieved by any final order or by any sentence of the Environmental Tribunal passed under this Act may, within thirty days of communication of such order or sentence, prefer an appeal to the High Court.

(2) An appeal under subsection (1) shall be heard by a Bench of not less than two Judges."

7. A bare perusal of sections 22 and 23 of the Act shows that the appeals have to be preferred before the Tribunal or this Court within thirty days of the communication of the impugned order.

8. The learned counsel for the appellant has placed reliance on section 9 of the General Clauses Act, 1897, and the provisions of section 12 of the Limitation Act, 1908, to contend that the day the order is communicated to a party has to be excluded from the period of limitation as the said sections envisage that the date of announcement of the order and/or the date the order is communicated to a party is to be excluded. In order to fully appreciate the contention of the learned counsel for the appellant it would be advantageous to reproduce the provisions of the said sections:---

The General Clauses Act, 1897

9. Commencement and termination of time.---(1) In any Central Act or Regulation made after the commencement of this 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."

(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

The Limitation Act, 1908

12. Exclusion of time in legal proceedings.

(1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

(5) For the purposes of subsections (2), (3) and (4), the time requisite for obtaining a copy of the decree, sentence, order, judgment or award shall be deemed to be the time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery."

9. When the above sections are read jointly the contention of the learned counsel for the appellant appears to have force. Section 12(1) of the Limitation Act, 1908, provides that for the purposes of calculating the period of limitation prescribed for filing any suit/appeal/application the day from which such period is to be reckoned shall be excluded. It, therefore, follows that the date on which the order was communicated to the appellant "shall be excluded" for the purposes of calculating the period of limitation for filing the appeal.

10. In the instant case admittedly the order was communicated to the appellant on 6-7-2010. The limitation in the case would, therefore, run from 7-7-2010 and the thirty (30) days period would end on 5-8-2010. The appeal filed by the appellant before the learned Tribunal would, therefore, appear to be within time.

11. On this view of the matter the question of condonation of delay in filing the appeal by invoking the provisions of section 5 of the Limitation Act and/or the applicability thereof by virtue of section 29 of the said Act does not arise.

12. As to the objection of the learned Assistant Director regarding the instant appeal being barred by time we find that as per section 23 of the Act an appeal against any final order or any sentence passed by the Tribunal under the Act is to be filed in this Court within thirty days of communication of such order/sentence. It is the case of the appellant that the order was not communicated to the appellant, therefore, the appellant applied for obtaining a certified copy of the impugned order and under the provisions of section 12 of the Limitation Act the time spent by the appellant in obtaining the certified copy is to be excluded from the period of limitation.

13. We find force in the contention of the learned counsel for the appellant given the fact that nothing has been placed on record to show as to when the order of the learned Tribunal was communicated to the appellant, indeed, if at all. Benefit of the time spent by the appellant in obtaining a certified copy of the impugned order dated 23-8-2010 would, therefore, accrue to the appellant by virtue of the provisions of section 12 of the Limitation Act, 1908. The contention of the learned Assistant Director is, therefore, repelled.

14. It is accordingly held that the instant appeal, as well as, the appeal filed by the appellant before the learned Tribunal are within time. The impugned order dated 23-8-2010 is accordingly set aside. The appellant's appeal would deem to be pending before the learned Tribunal who shall decide the same in accordance with the law after affording an opportunity of hearing to the parties.

MH/M-5/L Case remanded.

2014 C L C 465

[Lahore]

Before Mamoon Rashid Sheikh and Kh. Imtiaz Ahmad, JJ

FAZAL KHALIQ and another----Appellants

Versus

NATIONAL HIGHWAY AUTHORITY and 2 others----Respondents

Regular First Appeal No.177 of 2010, decided on 3rd December, 2013.

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

----S. 18---Reference to Court---Nature of objections---Determination---If any person is not satisfied with award he may file application before Collector to refer the matter to Referee Court for determination of his objection whether it is in respect of measurement of land or amount of compensation payable or the person to whom it is payable or the apportionment of compensation amongst persons interested.

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

----S. 18---Reference to Court---Limitation---Computation---If person making application was present or represented before Collector at the time of making award, then application has to be filed within six weeks from the date of the award---If person making application was neither present nor represented at the time of making of award, then application can be made within six weeks of the receipt of the notice under S.12(2) of Land Acquisition Act, 1894, from Collector or within six months from the date of award whichever period expires first.

(c) Land Acquisition Act (I of 1894)---

----S. 18---Referee Court---Jurisdiction---Referee Court cannot go behind the reference and hold that it was illegally made.

Government of West Pakistan (Now Government of N.-W.F.P.) through Collector, Peshawar v. Arbab Haji Ahmed Ali Jan and others PLD 1981 SC 516 rel.

(d) Land Acquisition Act (I of 1894)---

----Ss. 18 & 54---Reference to Court---Limitation---Determination---Jurisdiction of Court---Reference filed by Collector on the application of landowner was rejected by Court on the

ground that it was barred by time---Validity---Question of limitation could not have been decided by Referee Court while exercising its jurisdiction under S.18 of Land Acquisition Act, 1894---Referee Court could not go behind the reference and reject it being barred by limitation or to hold that reference had been illegally made as application for making reference was beyond time---High Court set aside the order rejecting the reference and remanded the case to Referee Court for decision afresh---Appeal was allowed in circumstances.

Government of N-W.F.P. through District Collector, Abbottabad and 2 others v. Allah Dad and 6 others 1996 SCMR 384; Fazal Karim and 3 others v. Azad Government of the State of Jammu and Kashmir through Chief Secretary, Muzaffarabad and others PLD 1998 SC (AJ&K) 26; Jannat Khan v. Chairman National Highway Authority, Islamabad and 3 others 2013 CLC 1134; Muhammad Yousuf v. Collector Land Acquisition, District Skardu and 6 others 2007 CLC 1288; Government of West Pakistan (Now Government of N.-W.F.P.) through Collector, Peshawar v. Arbab Haji Ahmed Ali Jan and others PLD 1981 SC 516; Government of West Pakistan (now N-W.F.P.) and 2 others v. Mst. Asmatun Nisa and 6 others PLD 1983 SC 109; Muhammad Rafique Khan v. Province of Punjab through Collector Bahawalpur and another 1992 CLC 1775 and Muhammad Sharif and 12 others v. Oil and Gas Development Corporation, Club Road Branch, Karachi through Chairman and 2 others 2001 YLR 618 rel.

Azad Government of the State of Jammu and Kashmir v. Muhammad Shafi PLD 1971 Azad J&K 33 ref.

Muhammad Ilyas Sheikh for Appellants.

Ms. Shahina Akbar for Respondents.

Date of hearing: 3rd December, 2013.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- The instant appeal under section 54 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act"), calls into question the judgment and decree dated 12-6-2010 whereby the appellants' Reference under section 18 of the Act, against the Award dated 28-5-2007 announced by the Land Acquisition Collector, National Highway Authority, Islamabad (respondent No.2), has been rejected by the learned Senior Civil Judge, Rawalpindi (the Referee Court), being barred by time.

2. The facts relevant for the present purposes are to the effect that respondent No.1 acquired the appellants' land measuring 37 kanals, 12 marlas bearing Khasra Nos.1158/816 and 1159/816 situated in village Manga, Tehsil Murree, District Rawalpindi (hereinafter referred to as "the land"), for the purposes of construction of the Islamabad-Muzaffarabad Dual Carriageway Project (hereinafter referred to as "the Project"). The Notification under section 4 of the Act was published in the official Gazette on 19-5-2001 whereas the Notification under section 17(4) was published on 22-8-2005. The appellants appeared before respondent No.2 and submitted their objections. Respondent No.2 announced the Award on 28-5-2007. Feeling aggrieved the appellants on 26-11-2007 moved an application before respondent No.2 under section 18 of the Act for onward transmission of their Reference against the Award dated 28-5-2007 to the learned Referee Court. The Reference was remitted to the learned Referee Court. The respondents entered appearance and resisted the Reference. On the basis of the divergent pleadings of the parties the learned Referee Court framed the following issues:

(1) Whether the reference is barred by the time? OPR

(2) Whether the petitioner had not come to the Court with clean hand? OPR

(3) Whether the petitioners have filed the instant reference with mala fide intention and ulterior motive? OPR

(4) Whether the instant reference is frivolous and fictitious and liable to be dismissed with special costs under section 35, C.P.C.? OPR

(5) Whether the petitioners are entitled to get a decree as prayed for? OPP

The recording of the parties' evidence commenced and whilst the matter was pending for recording of the documentary evidence of the respondents an application under Order VII, Rule 11 of the C.P.C. was moved by the respondents for rejection of the Reference on grounds of limitation. The said application was resisted by the appellants. The learned Referee Court, however, through the impugned judgment and decree dated 12-6-2010 rejected the Reference being barred by time. No other finding on any other Issue was given.

3. The learned counsel for the appellants contends that it is settled law that the jurisdiction to be exercised by a Referee Court under the Act is not an appellate jurisdiction.

The Referee Court whilst exercising its jurisdiction under the Act cannot go behind the Reference made to it and hold that the Reference was violative of law because the application was made beyond the period of limitation or for any other reason. Contends that the question of limitation can only be determined by the Collector (respondent No.2 in the instant case). Further contends that the learned Referee Court has erred in law in rejecting the Reference being barred by time as it was not invested with the jurisdiction to go into the question of limitation. Relies on the judgments reported as Government of N-W.F.P. through District Collector, Abbottabad and 2 others v. Allah Dad and 6 others (1996 SCMR 384), Fazal Karim and 3 others v. Azad Government of the State of Jammu and Kashmir through Chief Secretary, Muzaffarabad and others (PLD 1998 Supreme Court (AJ&K) 26), Jannat Khan v. Chairman National Highway Authority, Islamabad and 3 others (2013 CLC 1134) and Muhammad Yousuf v. Collector Land Acquisition, District Skardu and 6 others (2007 CLC 1288).

4. The learned counsel for the respondents submits that the impugned judgment and decree are unexceptionable. They have been passed in accordance with the law. Submits that the appellants were present in person at the time of making of the Award which is established from the fact that their names are mentioned at Sr. No.9 of the Award. As the appellants were present at the time of making of the Award, therefore, under section 18(2)(a) of the Act the prescribed period of limitation for making the application under section 18 of the Act is six (6) weeks from the making of the Award. In the instant case the Award was made on 28-5-2007 whereas the Reference was moved on 26-11-2007 approximately six months after making of the Award, hence, the Reference was hopelessly time-barred. Contends that it is for the Referee Court to determine if a particular Reference is filed within time or not. The learned Referee Court has, therefore, passed the impugned judgment and decree in accordance with the law. Relies on the judgment reported as Azad Government of the State of Jammu and Kashmir v. Muhammad Shafi (PLD 1971 Azad J&K 33).

5. The learned counsel for the appellants, whilst reiterating his earlier submissions, submits that the appellants were neither present nor represented at the time of making of the Award, therefore, it was mandatory upon respondent No.2 to have given a notice to the appellants under section 12(2) of the Act. No such notice was given to the appellants. The Reference was filed as soon as the appellants became aware of the announcement of the Award and the date of filing of the Reference is within the period of six months as stipulated in section 18(2)(b) of the Act. Further contends, on the basis of the judgments earlier cited by him, that, in any event the question of limitation does not come under the

purview of respondent No.2. The impugned judgment and decree is, therefore, liable to be set aside.

6. Arguments heard and record perused.

7. Both parties have laid great stress on the provisions of section 18 of the Act in support of their contentions. The relevant provisions of section 18 of the Act are, therefore, being reproduced hereunder for ease of reference:

"18. Reference to Court.

(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made:---

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, subsection (2), or within six months from the date of the Collector's award whichever, period shall first expire.

(3) ……."

From a perusal of the above it is evident that the Act through section 18 provides that if any person is not satisfied with the Award he may file an application before the Collector to refer the matter to the Referee Court for determination of the Referee Court his objection whether it is in respect of the measurement of the land or the amount of compensation payable or the person to whom it is payable or the apportionment of the compensation amongst the persons interested. If the person making the application was present or represented before the Collector at the time of making of the Award then the application

has to be filed within six (6) weeks from the date of the Award. However, if the person making the application was neither present nor represented at the time of making of the Award then the application can be made within six (6) weeks of the receipt of the notice from the Collector under section 12(2) of the Act or within six (6) months from the date of the Award whichever period expires first.

8. It is the case of the appellants that the Reference was filed by them under the provisions of section 18(2)(b) of the Act as they were neither present nor represented at the time of making of the Award. Moreover, no notice as envisaged under section 12(2) of the Act was given to the appellants, therefore, the application was filed by the appellants immediately upon coming to know of making of the Award and in any event was filed within six months of the making of the Award as prescribed under section 18(2)(b) of the Act. On the other hand, it is the case of the respondents that since the appellants had been participating in the proceedings before respondent No.2 and were also present at the time of making of the Award, therefore, the period of limitation for making the application is six weeks from the date of making of the Award as stipulated in section 18(2)(a) of the Act. The application of the appellants was, therefore, beyond limitation.

9. We, however, do not propose to go into the above factual controversy as it is settled law that the Referee Court cannot go behind the Reference and hold that it was illegally made for the reason that the Collector had no power to do so as the application for making the Reference was filed beyond the period of limitation. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court of Pakistan reported as Government of West Pakistan (Now Government of N.-W.F.P.) through Collector, Peshawar v. Arbab Haji Ahmed Ali Jan and others (PLD 1981 SC 516) wherein it has been held as under:---

"The question posed for consideration relates to the scope and extent of jurisdiction exercised by the Court mentioned in section 18 of the Land Acquisition Act. Sections 18 and 30 of the Land Acquisition Act authorize the Collector to make references to the Court for the determination of those matters referred to therein. Such matters are enumerated in those sections. For reference sake it will be convenient to reproduce those sections:---

"18.--- (1) Any person interested who has not accepted the award may by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

30. When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same Collector may refer such dispute to the decision of the Court."

This is not all. There are other sections which follow section 18, that is, sections 19, 20 and 21 which determine the scope and extent of jurisdiction exercised by such Court. Section 19 relates to the information to be furnished to the Court which also includes, amongst it the objection of the persons interested. Section 20 regulates the procedure for the determination of the objection and section 21 confines the scopes and inquiry of proceedings only to the consideration of the interest of the persons affected by the objection. Similarly, section 30 restricts the scope of jurisdiction to the determination of the apportionment of the amount of compensation. These sections are a part of a special Act which provides for the acquisition of land for a public purpose and the determination of the compensation payable to the persons affected by such acquisition. Therefore, the extent and scope provided therein must constitute the jurisdiction of the designated Court which hears the reference. Such is the connotation of the word "jurisdiction". As held by this Court in State v. Zia-ur-Rahman (1):---

"It may well be asked at this stage as to what is meant by 'jurisdiction'? How does it differ from 'judicial power'? Apart from setting up the organs the Constitution may well provide for a great many other things, such as the subjects in respect of which that power may be exercised and the manner of the exercise of that power. This it may provide that the Courts set up will exercise revisional or appellate powers or only act as a Court of a cessation or only decide constitutional issues. It may demarcate the territories in which a particular Court shall function and over which its writs shall run. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. These are all matters which are commonly comprised in what is called the jurisdiction of the Court.

It expresses the concept of the particular res or subject-matter over which the judicial power is to be exercised and the manner of its exercise. Jurisdiction is, therefore, a right to adjudicate concerning a particular subject-matter in a given case, as also the authority to exercise in a particular manner the judicial power vested in the Court.

It is, accordingly, in aid of this jurisdiction that the judicial power, which resides in it, is exercisable for resolving the matters in controversy. Clearly, therefore, the extent of this jurisdiction is not the same as one conferred on a Court of general jurisdiction while hearing a suit under section 9, C.P.C. It is only when a reference is made under section 18 that the designated Court is empowered to act and not otherwise; and while exercising its jurisdiction, it cannot go behind the reference and hold that it was illegally made for the reason that the Collector had no power to do so as the application for making the reference was made beyond time. Such exercise of judicial power must be eminent from the jurisdiction otherwise it cannot be exercised."

10. The above precedent has been consistently followed as is evident from the judgments reported as Government of West Pakistan (now N-W.F.P.) and 2 others v. Mst. Asmatun Nisa and 6 others (PLD 1983 SC 109), Muhammad Rafique Khan v. Province of Punjab through Collector Bahawalpur and another (1992 CLC 1775), Muhammad Sharif and 12 others v. Oil and Gas Development Corporation, Club Road Branch, Karachi through Chairman and 2 others (2001 YLR 618); and the judgments cited at the bar by the learned counsel for the appellants viz. Government of N-W.F.P. through District Collector, Abbottabad and 2 others v. Allah Dad and 6 others (1996 SCMR 384), Fazal Karim and 3 others v. Azad Government of the State of Jammu and Kashmir through Chief Secretary, Muzatfarabad and others [PLD 1998 Supreme Court (AJ&K) 26], Jannat Khan v. Chairman National Highway Authority, Islamabad and 3 others (2013 CLC 1134) and Muhammad Yousuf v. Collector Land Acquisition, District Skardu and 6 others (2007 CLC 1288).

11. In view of the above stated position of the law we find that in the facts and circumstances of the case the question of limitation could not have been decided by the learned Referee Court as whilst exercising its jurisdiction under section 18 of the Act it could not have gone behind the Reference and rejected the Reference being barred by limitation or to indeed hold that the Reference had been illegally made as the application for making the Reference was beyond time.

12. Under the circumstances, we accept the appeal, set aside the impugned judgment and decree dated 12-6-2010 and remand the matter to the learned Referee Court for decision in accordance with the law on Issues Nos.2 to 5, quoted in para 2 hereinabove, after affording opportunity to the parties to complete their evidence. The record of the case be remitted forthwith.

There is no order as to costs.

MH/F-1/L Case remanded.

2014 C L C 698

[Lahore]

Before Mamoon Rashid Sheikh, J

TAUSEEF IDREES and another----Petitioners

Versus

HAMAYUN KHALID and others----Respondents

Writ Petition No.1644 of 2012, decided on 18th December, 2013.

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

----S. 5, Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Fresh plea, raising of---Scope---Suit for recovery of maintenance allowance, dowry articles and jewellery---Trial Court decreed suit of wife partially which was maintained by the Appellate Court with certain modifications---Validity---No misreading or non-reading of evidence had been pointed out by the parties---List of dowry articles was not proved as same was tendered into evidence in the statement of counsel and objection to such effect was also raised from the opposite side---Decree to the extent of dowry articles was varied according to the concessional statement of husband---No cogent evidence was produced with regard to snatching of jewellery from the wife---Prayer for recovery of maintenance till the minor was suckling baby had not been made by the wife in her plaint, therefore same could not be considered---Parties were bound by their pleadings and they could not be allowed to lead evidence beyond the same---If any evidence was sought to be led beyond pleadings then same would not be recorded and if same was led then it was not to be considered---Plea with regard to recovery of maintenance till the minor was suckling baby was neither raised at the appellate stage nor same was included in the grounds of present constitutional petition---Party could not be allowed to raise fresh plea in the constitutional petition of which the opposite side had no notice---New plea could not be raised which would require a fresh investigation of facts---Impugned judgment qua recovery of maintenance was maintained---Constitutional petition was partially accepted in circumstances.

Muhammad Iqbal v. Ali Sher 2008 SCMR 1682; Irshad Begum v. Muhammad Rafique PLD 2010 Lah. 649; PAKCOM Limited and others v. Federation of Pakistan and others PLD 2011 SC 44; Mst. Roshan Akhtar v. Muhammad Boota and 4 others 2000 SCMR 1845; Messrs Bakhsh Textile Mills Ltd. v. Pakistan and others 1982 SCMR 497 and Mst. Murad Begum and others v. Muhammad Rafiq and others PLD 1974 S.C. 322 rel.

Muhammad Aslam v. Muhammad Usman and others 2004 CLC 473 distinguished.

Ms. Shahida Tanveer Chaudhry for Petitioner.

Muhammad Arif Malik for Respondent No.1.

ORDER

MAMOON RASHID SHEIKH, J.--- Through this petition the petitioners assail the judgment and decree dated 16-1-2012 of the learned Judge Family Court, Rawalpindi (respondent No.3) and the judgment and decree dated 20-4-2012 passed by the learned Additional District Judge, Rawalpindi (respondent No.2).

2. The brief facts giving rise to this petition are to the effect that petitioner No.1 and respondent No.1 were married to each other on 11-10-2008. They have one son who has been arrayed as petitioner No.2 (the minor).

3. The marital relationship between petitioner No.1 and respondent No.1, however, deteriorated culminating in the break up of their marital tie. Subsequent thereto the petitioners brought a suit against respondent No.1 with the following prayer:---

"In the light of above submissions, it is most respectfully prayed that a decree for recovery of maintenance allowance @ Rs.15000 with 15% annual increase for plaintiff No.2 since birth till majority and Rs.10,000 for plaintiff No.1 from the date of marriage till their existence.

It is further prayed that a decree for recovery of gold ornaments weighing 11 tolas.

It is further prayed that a decree for recovery of dowry articles as per list or alternate price.

It is further prayed that a decree for recovery of delivery expenses amounting to Rs.50,000.

May kindly be decreed in favour of the plaintiff and against the defendant.

Any other relief, which is necessary and proper, may also be granted to the plaintiff, in the interest of justice."

4. The suit was contested by respondent No.1 and on the basis of the divergent pleadings of the parties the following issues were framed:---

"ISSUES.

(1) Whether the plaintiff No.2 is entitled for maintenance allowance at the rate of Rs.15000 per month since his birth? OPP.

(2) Whether the plaintiff No.1 is entitled for the maintenance allowance at the rate of Rs.10000 till the period of IDDAT? OPP.

(3) Whether the plaintiff No.1 is entitled for recovery of gold ornaments weighing 10 tollas or cash price in alternative? OPP.

(4) Whether the plaintiff is entitled for recovery of dowry articles as per list attached with the plaint or Rs.8,45,688 as alternate cash price? OPP.

(5) Whether the plaintiff is entitled for delivery expenses of minor Rs.50,000? OPP.

(6) Whether the plaintiff has no cause of action? OPD.

(7) Whether the plaintiff is estopped by his words and conduct to file the suit? OPD.

(8) Whether the plaintiff No.1 has taken gold ornaments with him when she left the house of the defendant? OPD.

(9) Relief."

5. The parties led their respective evidence for and against the issues, whereafter respondent No.3, through the impugned judgment and decree dated 16-1-2012 held that the minor was entitled for recovery of maintenance at the rate of Rs.3000 per month w.e.f. 28-8-2010 till attaining puberty with annual increment at the rate of 10% per annum. Petitioner No.l's claim for recovery of maintenance allowance was, however, turned down. Her claim for delivery expenses was accepted to the extent of Rs.30,000. Her claim for recovery of dowry/gold jewellery was partially decreed to the extent that she was held entitled to recover the articles of dowry mentioned at serials Nos.1 to 39 of Exh.PC or Rs.150,000 in lieu thereof.

6. Feeling aggrieved the petitioners as well as respondent No.1 filed appeals against the judgment and decree dated 16-1-2012. Both appeals were partially accepted through the impugned consolidated judgment and decrees dated 20-4-2012 by respondent No.2. As a consequence, petitioner No.1 was held entitled to receive maintenance for the period of Iddat at the rate of Rs.3000 per month, however, the valuation of petitioner No.1 's dowry was reduced from Rs.150,000 to Rs.100,000.

7. On the last date of hearing the parties were given time to explore the possibility of an out of Court settlement. Today the learned counsel for the parties submit that no out of Court settlement has been arrived at. The learned counsel for respondent No.1, however, submits, under instructions, that respondent No.1 does not contest the prayer of the minor to the effect that he may be allowed maintenance till he reaches the age of majority. The impugned decrees may, therefore, be varied to the effect that the minor is entitled to receive maintenance at the rate of Rs.3000 per month, w.e.f. 28-8-2010 till he attains the age of majority with 10% annual increment. Further submits that respondent No.1 also does not object if the valuation of the dowry as determined by respondents Nos.2 and 3 may be enhanced from Rs.100,000 to Rs.125,000.

8. The learned counsel for the petitioners submits, under instructions, that petitioners accept respondent No.1's offer vis-a-vis the maintenance of the minor. Petitioner No.1, however, would like to contest the petition on merits in respect of the other grounds raised in the petition.

9. Submits that the amount and the period for which maintenance has been awarded to petitioner No.1 has been erroneously arrived at by respondents Nos.2 and 3. They failed to appreciate that at the time of divorce between the parties petitioner No.1 was pregnant with the minor, therefore, petitioner No.1 should have been allowed maintenance even after Iddat till such time she breastfed the minor. Relies on the judgment reported as "Muhammad Aslam v. Muhammad Usman and others" (2004 CLC 473) to contend that a, "Mother is entitled to maintenance for breastfeeding the suckling baby for two years even after the period of Iddat for breastfeeding the babe of the man who was a man of sufficient means".

10. In respect of the dowry submits that in coming to the conclusion that petitioner No.1 is only entitled to receive Rs.150,000 in lieu of dowry, respondent No.3 erred in calculating the value of the dowry as given in the list of dowry Exh.PC. Contends that respondent No.2 compounded the error by not considering the fact that the list consists of more than one

page and the total value of the dowry given in the list is Rs.324,400 and not Rs.167800 as determined by respondent No.2. The rate of depreciation of the articles of dowry have been wrongly arrived at by both respondents Nos.2 and 3.

11. As to the gold jewellery submits that respondents Nos.2 and 3 failed to appreciate the evidence brought on the record in this respect. Petitioner No.1 is entitled to receive back her jewellery or its value in lieu thereof as at the time of actual payment.

12. The learned counsel for respondent No.1 whilst defending the impugned judgments and decrees to the extent of the claims of petitioner No.1 submits that petitioner No.1 failed to prove her case. The list of dowry (Exh.PC) was not exhibited in accordance with the law. In fact it was tendered into evidence in the statement of the learned counsel for the petitioners, therefore, the list has not been formally proved. Respondent No.1 raised an objection to this effect at the relevant time. Even otherwise, no receipts in respect of the dowry or the gold jewellery have been brought on the record. Further submits that no evidence as to the snatching of the gold jewellery from petitioner No.1 by respondent No.1 was ever brought on the record.

13. So far as the contention of the learned counsel for the petitioners that petitioner No.1 is entitled to receive maintenance at an enhanced rate and beyond the period of Iddat till such time the minor remained a suckling baby is concerned, contends that there is nothing on the record to prove that petitioner No.1 breastfed the minor nor was this point raised earlier by petitioner No.1. In absence of any such assertion or evidence the maintenance cannot be awarded. Moreover, the rate of maintenance for the period of Iddat has been correctly arrived at by respondents Nos.2 and 3.

14. Arguments heard. Record perused.

15. The learned counsel for the petitioners has been unable to establish any misreading or non-reading of the evidence except that respondent No.2 whilst assessing the value of the articles of dowry reduced their value from Rs.150,000 (as determined by respondent No.3) to Rs.100,000 by coming to the conclusion that the depreciation of dowry should be at a higher rate than as calculated by respondent No.3. In this respect the learned counsel for the petitioners has contended that Exh.PC consists of 3 pages whereas respondents Nos.2 and 3 have only taken into account the first page of Exh.PC, therefore, the erroneous valuation of the dowry. I do not find force in the contention of the learned counsel for the petitioners for the reason that although the list of dowry tendered into evidence as Exh.PC

consists of 3 pages, however, page No.2 of the list is endorsed as Exh.P3 but the said endorsement does not bear the signature of respondent No.3. Moreover, as contended by the learned counsel for respondent No.1 the list of dowry was not formally proved in that it was tendered into evidence through the statement of the learned counsel for the petitioners and an objection to this effect was raised by the learned counsel for respondent No.1. In view of the above circumstances no reliance can be placed on the said additional pages. However, the learned counsel for respondent No.1 has made a concessional statement, under instructions, and has offered on respondent No.1's behalf that the valuation of the dowry articles made by respondent No.2 may be increased from Rs.100,000 to Rs.125,000. In the given situation, therefore, I find that the offer is reasonable. The decrees to the extent of dowry are accordingly varied to the effect that petitioner No.1 is entitled to receive back the articles of dowry mentioned in Exh.PC at serials Nos.1 to 39 or Rs.125,000 in lieu thereof.

16. In respect of the contentions of the learned counsel for the petitioners qua the gold jewellery of petitioner No.1 suffice it to say that the learned counsel has been unable to point out any misreading or non-reading of evidence. The learned counsel has similarly been unable to establish from the record any cogent evidence re-snatching of the gold jewellery from petitioner No.1 by respondent No.1. I, therefore, find force in the contention of the learned counsel for respondent No.1 that petitioner No.1 was unable to prove her case vis-a-vis her jewellery.

17. It has been urged by the learned counsel for the petitioner that the quantum as also the period for which maintenance has been awarded to petitioner No.1 is not in accordance with the law in view of the fact that at the time of dissolution of marriage petitioner No.1 was pregnant with the minor, therefore, on the strength of the decision in Muhammad Aslam's case (supra) petitioner No.1 is entitled to receive maintenance till such time she breastfed the minor.

18. A perusal of the record reveals that this plea has been raised by petitioner No.1 for the first time. The plaint filed by the petitioners is silent in this respect. The prayer clause as quoted in Para-3 hereinabove is also silent in this respect. Indeed, the heading of the plaint states that petitioner No.1 is seeking maintenance till her period of Iddat. Similarly no issue was framed on this question as is evident from the issues quoted in Para-4 hereinabove. This question has also not been raised by petitioner No.1 in her grounds of appeal before respondent No.2 nor indeed in the grounds raised in the instant petition.

19. It may, however, be added that the only earlier reference in respect of this plea is contained in the affidavit (Exh.PA) filed by petitioner No.1 as her examination-in-chief. However, the said reference has been made in passing and is in the form of a prayer that petitioner No.1 may be allowed maintenance till such time the minor is a suckling baby but this prayer/assertion as said above, has not been made by petitioner No.1 in the plaint, therefore, it cannot be considered to have been raised as it is settled law that parties are bound by their pleadings and cannot be allowed to lead evidence beyond their pleadings. If any evidence is sought to be led by a party beyond its pleadings then the evidence is either not recorded by the trial Court or if it is so led then it is not to be considered. Reliance in this regard is placed on the judgments reported as "Muhammad Iqbal v. Ali Sher" (2008 SCMR 1682) and "Irshad Begum v. Muhammad Rafique" (PLD 2010 Lahore 649).

20. Even if it were to be considered that this plea was earlier raised by virtue of the assertion/prayer in Exh.PA then it would be deemed to have been abandoned due to the fact that this plea was neither raised at the appellate stage nor indeed in the grounds of the instant petition.

21. In any event this plea requires investigation of facts inasmuch as it has been contended by the learned counsel for the petitioner that respondent No.1 breastfed the minor whereas it is the case of respondent No.1 that petitioner No.1 did not breastfeed the minor. Similarly, there is nothing on the record to show that respondent No.1 had required petitioner No.1 to breastfeed the minor.

22. It is settled law that a party cannot be allowed to raise a new plea of which the opposite side had no notice. Similarly, a party cannot raise a new plea requiring a fresh investigation of facts. Moreover, ordinarily a person whilst invoking the constitutional jurisdiction of this Court cannot be allowed to raise a completely new point for the first time. Reliance in this regard is placed on the judgments reported as "PAKCOM Limited and others v. Federation of Pakistan and others" (PLD 2011 SC 44), "Mst. Roshan Akhtar v. Muhammad Boota and 4 others" (2000 SCMR 1845), "Messrs Bakhsh Textile Mills Ltd. v. Pakistan and others" (1982 SCMR 497) and "Mst. Murad Begum and others v. Muhammad Rafiq and others" (PLD 1974 SC 322).

23. On this view of the matter petitioner No.1, cannot be allowed to raise this plea for the first time before this Court by way of a verbal argument and that too without leave of the Court. The ratio of Muhammad Aslam's case (Supra) cited at the bar by the learned counsel for the petitioner is, therefore, not attracted to the facts and circumstances of the case, I,

therefore, decline to vary the impugned judgments and decrees qua the maintenance awarded to petitioner No.1.

24. Under the circumstances, the instant petition is partially accepted and the impugned decrees dated 16-1-2012 and 20-4-2012 are varied to the following effect:---

(i) The minor (petitioner No.2) shall be entitled to receive Rs.3000 per month as maintenance w.e.f. 28-8-2010 till he attains the age of majority with 10% annual increase.

(ii) Petitioner No.1 is entitled to recover her dowry articles as mentioned at Serial Nos.1 to 39 of Exh.PC or Rs.125,000 in lieu thereof.

There is no order as to costs.

AG/T-1/L Order accordingly.

2014 C L C 895

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD ZAHID----Petitioner

Versus

Mst. GHAZALA MAZHAR and others----Respondents

Writ Petition No.3101 of 2013, decided on 29th January, 2014.

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

----S. 5. Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Recovery of dowry articles---Wife sought recovery of gold ornaments weighing 12 tolas and the same was decreed in her favour---During execution husband intended to pay market value of gold prevalent at the time of filing of suit---Validity---Wife had only prayed for recovery of 12 tolas of gold ornaments and she did not fix price of gold jewellery in alternative---Decree for recovery of 12 tolas gold jewelry was passed by lower Appellate Court in favour of wife---Husband had the option either to hand over 12 tolas of gold jewellery to wife or in case he was not in position to do so, then to compensate wife in terms of money equal to an amount that would enable her to purchase 12 tolas gold from open market---Executing Court

rightly held that wife was entitled to recover present market value of gold jewelry--- Petition was dismissed in circumstances.

Mst. Ayesha Shaheen v. Khalid Mehmood and another 2013 SCMR 1049 rel.

Mst. Mehbooba v. Abdul Jalil 1996 SCMR 1063 distinguished.

Habib Ullah Malik for Petitioner.

ORDER

MAMOON RASHID SHEIKH, J.--- This petition calls into question the judgment dated 18-5-2013 passed by the learned executing Court/Judge Family Court, Rawalpindi (respondent No.4) and the judgment dated 25-11-2013 passed by the learned Additional District Judge, Rawalpindi (respondent No.3).

2. The brief facts giving rise to this petition are to the effect that respondents Nos.1 and 2 filed a suit for recovery of maintenance, dower and dowry, etc. against the petitioner.

3. The petitioner also filed a separate suit for restitution of conjugal rights against respondent No.1. Both suits were consolidated and through the consolidated judgment and decree dated 15-3-2010 the learned Judge Family Court, Rawalpindi, partially decreed respondents Nos.1 and 2's suit to the extent that the minor respondent No.2 was allowed maintenance. Respondent No.1 was awarded the dower and dowry, however, her claim for recovery of 12 tolas gold jewellery was dismissed. The petitioner's suit for restitution of conjugal rights was also dismissed.

4. Feeling aggrieved the petitioner as well as respondents Nos.1 and 2 filed appeals. The learned Additional District Judge, Rawalpindi, through a consolidated judgment and decrees dated 15-7-2010 partially accepted respondents Nos.1 and 2's appeal in that respondent No.1 was held entitled to recover 12 tolas gold jewellery. The remaining portion of the decree was maintained. The petitioner's appeal was dismissed with the result that the dismissal of his suit for restitution of conjugal rights was maintained.

5. Subsequent thereto, the petitioner filed Writ Petition No.4423 of 2010 before this court. The said petition was dismissed on 19-1-2011. The petitioner challenged the order dated 19-1-2011 before the Hon'ble Supreme Court of Pakistan through Civil Petition

No.281 of 2011. The petitioner's Civil Petition was, however, dismissed through the order dated 25-6-2011.

6. In the meantime, respondents Nos.1 and 2 filed an execution petition and during the course thereof the petitioner moved an application for determination of the value of the 12 tolas gold jewellery. The learned executing Court framed an issue on this question which was to the following effect:---

(i) What was the market value of 12 tolas gold ornaments at the time of institution of suit of decree-holder?

7. Feeling aggrieved respondents Nos.1 and 2 filed an appeal which was allowed by the learned Additional District Judge, Rawalpindi, on 7-9-2012. As a consequence, the learned executing Court reframed the issue as to the value of 12 tolas gold jewellery to the following effect:---

"What price of 12 tolas gold ornaments decree holder is entitled to recover from the judgment debtor? OP. Parties."

8. Evidence of the parties was recorded and through the impugned judgment dated 7-5-2013 respondent No.4 held that respondent No.1 is entitled to recover the present market value of the gold jewellery.

9. The petitioner challenged the finding of respondent No.4 through an appeal and respondent No.3 through the impugned judgment dated 25-11-2013 held that on the strength of the judgment of the Hon'ble Supreme Court reported as "Mst. Ayesha Shaheen v. Khalid Mehmood and another (2013 SCMR 1049) respondent No.1 is entitled to recover the present market value of 12 tolas gold jewellery.

10. The learned counsel for the petitioner submits that respondents Nos.3 and 4 have erred in coming to the conclusion that respondent No.1 is entitled to recover from the petitioner the present market value of 12 tolas gold jewellery. During recording of evidence the petitioner brought on record evidence that the market value of one tola gold on 14-11-2007 was Rs.18,200/-. The learned counsel for respondent No.1 taking the said value as the base point put questions to the petitioner, during his cross-examination. Respondent No.1, therefore, impliedly accepted the value of one tola gold as Rs.18,200/-. Further submits that since respondent No.1 had not fixed the value of 12 tolas gold jewellery at the time of

institution of the suit, therefore, by virtue of the judgment of the Hon'ble Supreme Court reported as "Mst. Mehbooba v. Abdul Jalil" (1996 SCMR 1063) the alternative price of the gold jewellery should be either fixed at the time of institution of the suit or at best at the time of passing of the decree. Further submits that the present market value of the gold jewellery cannot be awarded. Contends that "Mst. Ayesha Shaheen's case" (supra) is distinguishable in view of the facts of the case. The learned Courts below have, therefore, erred in directing the petitioner to pay the present market value of 12 tolas gold.

11. Heard, record perused.

12. In order to fully appreciate his contentions the learned counsel for the petitioner was required, during the course of arguments, to furnish a copy of the plaint filed by respondent No.1 in her suit as the said copy has not been appended to the petition. A perusal of the copy of the plaint so furnished reveals that in respect of the gold jewellery in question respondent No.1 had prayed as under:---

"Dower amount Rs.50,000/- in accordance with Annexure A along with jewellery 12 tolas gold ornaments which were snatched by the defendant. Documents and dowry articles as per list or value mentioned in the list attached may kindly be passed in favour of the plaintiff and against the defendant throughout with cost."

13. As will be evident respondent No.1 had only prayed for recovery of, "12 tolas gold ornaments". She had not fixed the price of the gold jewellery in the alternative. A decree for recovery of 12 tolas gold jewelry was passed by the learned appellate Court in favour of respondent No.1. The petitioner, therefore, has the option either to hand over the 12 tolas gold jewelry to respondent No.1 or in case he is not in a position to do so then to compensate respondent No.1 in terms of money equal to an amount that would enable her to purchase 12 tolas gold from the open market. I am fortified in my view on the basis of "Mst. Ayesha Shaheen's case" (supra) wherein whilst distinguishing "Mst. Mehbooba's case" (supra) the Hon'ble Supreme Court has held as under:---

"We heard the learned counsel for the appellant as well as the respondent and have gone through the judgments referred to in the leave granting order. As regards 17 tolas of gold, which were included in the list of dowry articles (Exh.P.5), the appellant had prayed for its recovery or its value, stated to be Rs.380,000/-. The trial Court granted decree for recovery of dowry articles and not its market value in the alternative. The appellant was therefore held entitled to the recovery of 17 tolas of gold. This part of the decree can be

satisfied either upon the handing over by the judgment-debtor/respondent to the appellant gold ornaments weighing 17 tolas and in case he is not in a position to provide the same the appellant can be appropriately and fully compensated in terms of money only if she is paid an amount that would enable her to purchase the same from the open market. She can do that only if she is paid the current market value of gold. Unlike other property, moveable or immovable determination of the market value of the gold does not pose any difficulty as the same is fixed by the gold market on daily basis and is readily exchangeable for cash. The case of Mst. Mehbooba v. Abdul Jalil (ibid) is distinguishable as there the plaintiff wife had not claimed the recovery of gold ornaments or its value but only its value specified in the plaint. In order to highlight the distinction the relief claimed in the suit filed by Mst. Mehbooba is reproduced:---

"... for recovery of Rs.1,62,600, detailed as under:---

(1) .....

(2) Rs.25,000 the value of the golden ornaments exclusively given to her by her husband at the time of her marriage as given in para. 9 of the plaint; and

(3) Rs.87,000 the market value of the golden ornaments belonging to the plaintiff; given to her by her parents mentioned in para. 10 of the plaint."

The Court thus held that the petitioner before it was entitled to the market value of the gold ornaments decreed in her favour in accordance with the price fixed by her as "no decree for delivery of ornaments had been passed." The petitioner was granted a simple money decree. In the present case not only the relief claimed was for the recovery of gold ornaments or in the alternative its market value but the decree so granted was for the recovery of the gold ornaments. The case of Mst. Mehbooba v. Abdul Jalil turned on its own facts and does not in any way lay down a general rule that in all cases where the decree for recovery of gold is granted its value shall be determined at the market price prevailing on the date of grant of decree or filing of the suit. Where decree for delivery of gold or its market value is granted the value shall be determined with reference to the date of payment. As only then the decree can become fully satisfied. Neither the High Court nor the First Appellate Court had focused on the afore-stated distinction. In the case of Mst. Humaira Majeed v. Habib Ahmad cited in the leave granted order the Lahore High Court had also drawn the said distinction and had rightly held that the provisions of Order XX, Rule 10,

C.P.C. will not be applicable strictly to the execution of a decree by the Family Court in view of section 17 of the West Pakistan Family Courts Act, 1964.

(3) In view of the above, we hold that the appellant is entitled to the recovery of 17 tolas of gold ornaments or in the alternative its current market value. Consequently, the appeal is allowed. The impugned judgments of the High Court as well as the First Appellate Court are set aside and that of the Executing Court dated 12-1-2011 is restored."

The reliance placed by the learned counsel for the petitioner on "Mst. Mahbooba's case" (supra) is, therefore, misconceived and is accordingly repelled.

14. Under the circumstances, I do not find any infirmity in the impugned orders. They are unexceptional and do not call for any interference.

15. The instant petition is accordingly dismissed in limine being devoid of force.

MH/M-65/L Petition dismissed.

2014 C L D 1020

[Lahore]

Before Mamoon Rashid Sheikh and Ch. Muhammad Younis, JJ

GHULAM DASTGIR ASIF and another---Appellants

Versus

UNITED BANK LTD. through Manager and 7 others---Respondents

R.F.A. No. 75 of 2006, decided on 9th September, 2013.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 22--- Limitation Act (IX of 1908), Ss. 5 & 12---Appeal---Condonation of delay---Provisions of Limitation Act, 1908---Applicability---Though provisions of S.5 of Limitation Act, 1908, have not been made applicable to proceedings under Financial Institutions (Recovery of Finances) Ordinance, 2001, however, the same has not excluded applicability of S. 12 of Limitation Act, 1908---In absence of such exclusion, provisions of S.12 of

Limitation Act, 1908, are applicable to proceedings under Financial Institutions (Recovery of Finances) Ordinance, 2001.

Chairman District Evacuee Trust Committee, Rawalpindi v. Sharif Ahmad and others PLD 1991 SC 246 rel.

(b) Administration of justice---

----Proceedings, conversion of---Principle---Courts have always liberally allowed conversion of proceedings of one kind into the other---Mis-description in title of proceedings and/or mentioning of a wrong provision of law is not considered fatal to grant of relief if it is otherwise available under the law to an aggrieved party.

Margrete Williams v. Abdul Hamid Mian 1994 SCMR 1555 and Muhammad Sarwar v. The State PLD 1969 SC 278 rel.

(c) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 22---Limitation Act (IX of 1908), Ss.5 & 12---Appeal---Limitation---Time for certified copy, exclusion of---Condonation of delay---Banking Court passed judgment on 21-12-2005 against defendants who applied for certified copies on 22-12-2005, copies were prepared on 1-2-2006 and obtained on 27-4-2006, while appeal was filed on 16-5-2006---Defendants sought condonation of delay on the plea that no date was given by Copying Agency for delivery of copy, therefore, time spent in obtaining copies was to be excluded while calculating period of limitation---Contention of plaintiff bank was that provisions of Limitation Act, 1908, were not applicable to proceedings under Financial Institutions (Recovery of Finances) Ordinance, 2001---Validity---Time requisite for obtaining certified copies of judgment and decree to be appealed against was to be excluded for the purposes of computing period of limitation---Time requisite was deemed to be the time intervening between the day on which application for copy was made and the day actually intimated to defendants for delivery of copy---Copying Agency was to intimate date on which copy would be ready for delivery---Ambiguity existed as to whether any date for delivery of copies was communicated to defendants or not---Stamp of Copying Agency did not reveal as to when application for obtaining certified copies was made or when were the certified copies prepared or what was date of delivery intimated to defendants---Only date which appeared with stamp was 1-2-2006, i.e. purported date of preparation of certified copies---In absence of requisite dates plea raised by defendants was relied upon by High Court---Period spent in obtaining certified copies of judgment was excluded from computing period of limitation in filing of appeal---Application was allowed in circumstances.

Akhtar Kaleem v. Citibank N.A. through Branch Manager 2004 CLD 1361; Mian Muhammad Sabir v. Malik Muhammad Sadiq through Legal Heirs and others PLD 2008 SC 577; M. Asif Ali Khan v. Ghulam Shabbir 2010 YLR 507; Noor Jahan alias Bhoori through L.Rs. v. Mst. Anjum Mughees and 3 others 2009 MLD 645; Messrs Pak Suzuki Motor Col. Ltd. v. Haji Ahmed Shaikh and another 2005 CLC 680 and Haji Umer and 2 others v. Province of Sindh through Secretary, Revenue Department, Karachi and 5 others PLD 2009 Kar. 247 ref.

Islamic Republic of Pakistan through the Secretary Ministry of Defence, Government of Pakistan, Rawalpindi and another v. Amjad Ali Mirza PLD 1977 SC 182 rel.

Sardar Riaz Karim for Appellants.

Muhammad Ishaq Rana for Respondents.

Date of hearing: 24th November, 2011.

JUDGMENT

MAMOON RASHID SHEIKH, J.---Through a short order dated 2-11-2011, for reasons to be recorded later, we had held R.F.A. No.75 of 2006 to be within time.

The following are the reasons for the short order dated 2-11-2011:

1. At the outset the learned counsel for the respondents has raised the objection that the appeal is hopelessly time barred. The impugned judgment and decree was passed on 21-12-2005. The appellants applied for obtaining certified copies thereof on 22-12-2005. The copies were ready to be delivered on 1-2-2006. The appellants, however, took delivery on 27-4-2006 and filed the appeal on 16-5-2006. The appeal is, therefore, barred by 69 days. Further submits that the application moved by the appellants for condonation of delay under section 5 of the Limitation Act, 1908, is not competent in view of the fact that the law applicable to the instant appeal is the Financial Institutions (Recovery of Finances) Ordinance, 2001, which is a special law, therefore, by virtue of section 29(2) of the Act, ibid, the provisions of section 5 of the Act, ibid, are not attracted to the case. Prays that the appeal be dismissed as being barred by time. Relics on the judgment reported as Akhtar Kaleem v. Citibank N.A. through Branch Manager (2004 CLD 1361).

2. When confronted with the above, the learned counsel for the appellants submits that the application (C.M.No.1 of 2006) for condonation of delay has been filed under sections 5 and 12 of the Act, ibid, and not just under section 5 of the Act, ibid. Section 29(2) of the Act,

ibid, whilst excluding section 5 does not exclude the applicability of section 12 of the Act, ibid. Moreover, the Ordinance, ibid, does not, exclude the applicability of section 12(2) of the Act, ibid, to appeals filed under the Ordinance, ibid. Prays that the application for condonation of delay filed by the appellants may be treated as having been filed under section 12. Even otherwise, quoting of wrong law cannot come in the way of a litigant for obtaining relief.

3. The learned counsel for the appellants further submits that the circumstances under which the certified copies of the impugned judgment and decree were applied for and delivered to the appellants have been narrated in paras 3 and 4 of C.M.No.1 of 2006. He reiterates the sequence of events as given by the learned counsel' for the respondents with the exception that contrary to the provisions of section 12(5) of the Act, ibid, the Copying Agency/office of the learned Banking Court did not intimate to the appellants the date on which the certified copies would be ready for delivery. The appellants were, therefore, constrained to approach the office periodically. On each visit they were not given a definite date. Consequently, when the appellants approached the office on 27-4-2006, they were informed that the certified copies in question were ready and delivery thereof was taken by the appellants. If limitation is computed from 27-4-2006 the appeal has been filed within time. Relies on the judgments reported as Mian Muhammad Sabir v. Malik Muhammad Sadiq through Legal Heirs and others (PLD 2008 SC 577), M. Asif Ali Khan v. Ghulam Shabbir (2010 YLR 507), Noor Jahan alias Bhoori through L.Rs. Mst. Anjum Mughees and 3 others (2009 MLD 645), Messrs Pak Suzuki Motor Col. Ltd. v. Haji Ahmed Shaikh and another (2005 CLC 680) and Haji Umer and 2 others v. Province of Sindh through Secretary, Revenue Department Karachi and 5 others (PLD 2009 Karachi 247).

4. The learned counsel for the respondents contends that the appellants cannot take benefit of section 12 of the Act, ibid, as their application is in essence under section 5 of the Act, ibid. Moreover, the contention of the learned counsel for the appellants that they were not intimated the date of delivery of the certified copies is belied by the fact that a litigant has to be vigilant. If the appellants had been pursuing their case diligently they would have got the information of preparation of the certified copies. Moreover, a copy of the application form for issuance of the certified copies and/or any endorsement of the office thereon has not been placed on the record.

5. The learned counsel for the appellants reiterates that the office did not intimate any date on which the certified copies would be ready for delivery. In these circumstances the fault does not lie with the appellants. As to the contention that a copy of the application

form and/or the receipt has not been filed submits that the same were retained by the Copying Agency at the time of delivery of the certified copies.

6. Arguments heard. Record perused.

7. It is observed that C.M. No.1 of 2006 has been filed under section 5 read with section 12 of the Act, ibid, by the appellants. We find that although the provisions of section 5 of the Act, ibid, have not been made applicable to the proceedings under the Ordinance, ibid, however, the Ordinance, ibid, does not exclude the applicability of section 12 of the Act, ibid, to proceedings under the Ordinance, ibid. In absence of such an exclusion the provisions of section 12 of the Act, ibid, would be applicable to the instant case. Chairman District Evacuee Trust Committee, Rawalpindi v. Sharif Ahmad and others (PLD 1991 SC 246) refers.

We are, therefore, inclined to accept the prayer of the learned counsel for the appellants to treat C.M. No.1 of 2006 as an application filed under section 12 of the Act, ibid. The reason therefor is that even where a party has wrongly quoted the provision of law it is for the Courts to apply the correct law in view of the facts and circumstances of the case. Moreover, it is settled law that Courts have always liberally allowed conversion of proceedings of the one kind into the other and mis-description in the title of the proceedings and/or mentioning of a wrong provision of law is not considered fatal to the grant of relief if it is otherwise available under the law to an aggrieved party. Reliance in this regard is placed on the judgment reported as Margrete Williams v. Abdul Hamid Mian (1994 SCMR 1555). We also rely on the judgment reported as Muhammad Sarwar v. The State (PLD 1969 SC 278) wherein it has been, inter alia, held that a Judge must wear all the laws of the country on the sleeve of his robe, therefore, it is our duty to apply the correct law.

8. In order to resolve the controversy we deem it expedient to go through the provisions of subsections (2) and (5) of section 12 of the Act, ibid. The said provisions are, therefore, being quoted hereinbelow for ease of reference:--

"1.2. Exclusion of time in legal proceedings.

(1) .....

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded.

(3) .....

(4) .....

(5) For the purposes of subsections (2), (3) and (4), the time requisite for obtaining a copy of the decree, sentence, order, judgment or award shall be deemed to be the time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery."

(Emphasis provided)

From a bare perusal of the above it is clear that the time requisite for obtaining certified copies of the judgment and decree to be appealed against is to be excluded for the purposes of computing the period of limitation. Time requisite is deemed to be the time intervening between the day on which the application for the copy is made and the day actually intimated to the applicant for delivery of the copy. It would, therefore, follow that the Copying Agency is to intimate the date on which the copy would be ready for delivery. In the instant case, however, there is ambiguity as to whether any date for delivery of copies was communicated to the appellants or not. Indeed, the stamp of the Copying Agency does not reveal as to when the application for obtaining certified copies was made or when were the certified copies prepared or what was the date of delivery intimated to the appellants. The only date which appears with the stamp is 1-2-2006 i.e. the purported date of preparation of the certified copies. In absence of the requisite dates we are left with no alternative but to rely upon the facts narrated in C.M. No.1 of 2006. It is observed that C.M. No.1 of 2006 is duly supported by an affidavit and although the respondents have raised the objection of limitation yet they have neither filed a reply to the C.M. nor a counter-affidavit. Since no counter-affidavit has been placed on the record to controvert the narration of facts and the grounds raised in C.M. No.1 of 2006 this alone justifies the acceptance of the facts so narrated. Reliance in this regard is placed on the judgment reported as Islamic Republic of Pakistan through the Secretary Ministry of Defence, Government of Pakistan, Rawalpindi and another v. Amjad Ali Mirza (PLD 1977 SC 182).

9. Under the circumstances, we hold that the appeal has been filed by the appellants within time.

MH/G-38/L Application allowed.

2014 M L D 426

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD AKRAM---Petitioner

Versus

MUHAMMAD ILYAS CHEEMA and another---Respondents

Writ Petition No.3150 of 2013, decided on 23rd December, 2013.

Cantonments Rent Restriction Act (XI of 1963)---

----S. 17(8)---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant---Oral tenancy---Default in payment of rent---Tentative rent, fixation of---Procedure---Ordinarily tentative/ approximate rent had to be fixed on the basis of pleadings of the parties where default was alleged in payment of the same---Rent Controller was bound to pass order under S. 17(8) of Cantonments Rent Restriction Act, 1963 before framing of issues and was not bound to hold detailed inquiry while passing order of tentative rent which was to be fixed on the basis of material placed before him---Tenancy was oral, in the present case, and no receipts with regard to payment of rent had been placed on record---Tenant had failed to point out that rate of tentative rent was not according to the pleadings of the parties---Impugned order for fixation of tentative rent was not arbitrary or perverse---Actual rate of rent was yet to be determined during course of recording evidence in the ejectment proceedings---Deposit made with regard to arrear or future rent under the impugned order would be adjustable towards the final liability of tenant if any---Tenant had failed to deposit future rent as directed by the Rent Controller and committed default in payment of rent---Constitutional petition was dismissed in circumstances.

Rana Tauseer Haider for Petitioner.

ORDER

MAMOON RASHID SHEIKH, J.---Through this petition the petitioner has assailed the order dated 31-10-2013 passed by the learned Additional Rent Controller, Rawalpindi Cantt. (respondent No.2), under the provisions of section 17(8) of the Cantonments Rent Restriction Act, 1963. The petitioner has also assailed the order dated 31-1-2013 whereby respondent No.1 was allowed to amend his ejectment petition.

2. Submits that the impugned order has been passed without taking into consideration the fact that the tenancy between the parties is an oral tenancy. The monthly rent being paid by the petitioner to respondent No.1 in respect of the demised premises which are in the shape of a room on the upper storey of the building in question is at the rate of Rs.2,500 whereas through the ejectment petition respondent No.1 claimed that the current rate of rent is Rs.33,000 per month. The major ground taken up in the ejectment petition is the ground of default and it is contended that the petitioner has failed to pay rent to respondent No.1 since November, 2011. Further submits that through the impugned order dated 31-10-2013 the petitioner has been directed to deposit the exorbitant amount of Rs.6,93,180 as arrears of rent before 28-12-2013 and future monthly rent at the rate of Rs.21,780 per month before the 5th of the next month. The rent of October, 2013 to be deposited before 5-11-2013.

3. Contends that the tentative rent fixed by respondent No.2 is against the facts and the law. Respondent No.2 has failed to appreciate that the petitioner has spent a colossal amount for renovation of the demised premises and as per the oral tenancy the rate of rent is Rs.2,500 per month. The demised premises are above a shop owned by respondent No.1 on the ground floor. Respondent No.1 has filed an ejectment petition in respect of that shop too. The tentative rent for that shop has been assessed as Rs.8,500 per month. In such circumstances respondent No.2 was not justified in coming to the conclusion that the tentative rent of the demised premises should be Rs.21,780. Further contends that there was no evidence on the record for respondent No.2 to conclude that the tentative rent of the demised premises should be Rs.21,780.

4. I have considered the arguments of the learned counsel for the petitioner and have also gone through the record.

5. It is settled law that under that under the provisions of sections 17(8) & (9) of the Act, ibid, in ejectment petitions (in absence of a denial of the relationship of landlord and tenant) where default is alleged tentative/approximate rent is ordinarily fixed by the Additional Rent Controller primarily on the basis of the pleadings of the parties. It is the statutory duty of the Additional Rent Controller to pass an order under section 17(8) of the Act, ibid, before framing of issues. Whilst passing such an order the Additional Rent Controller is not bound to hold a detailed inquiry and is to fix the amount of tentative rent on the basis of the material placed before him by the parties. There is no rent deed on the record. Admittedly, the tenancy is oral and no receipts regarding payment of rent have been placed on the record. The learned counsel for the petitioner has been unable to show that the rate of tentative rent is not in accord with the pleadings of the parties. In such circumstances, the impugned order of

fixation of tentative rent under section 17(8) of the Act, ibid, does not appear to be arbitrary or perverse.

6. In any event, the actual rate of rent is yet to be determined during the course of recordal of evidence in the ejectment proceedings. Any deposits made by the petitioner by way of arrears and/or future rent under the impugned order would be adjustable towards the final liability of the petitioner, if any.

7. The learned counsel for the petitioner has also been unable to satisfy the Court that the future rent of the demised premises for the month of October has been deposited by the petitioner before, 5-11-2013 as directed by respondent No.2. It would, therefore, appear that the petitioner is already in default and the provisions of sections 17(8) & (9) of the Act, ibid, have not been complied with by the petitioner.

8. It may be pertinent to mention here that even though through the instant petition the petitioner has also challenged the order dated 31-1-2013 whereby respondent No.1 was allowed by respondent No.2 to amend the ejectment petition to the effect that the date of default has been substituted as November, 2010 instead of November, 2011, however, the learned counsel for the petitioner did not address any arguments in this respect, I would, therefore, not like to dilate upon this aspect of the case.

9. Under the circumstances, this petition fails and is dismissed accordingly with the direction that respondent No.2 shall not be influenced by any observation having been made in this order and shall proceed in the matter strictly in accordance with the law.

AG/M-12/L Petition dismissed.

2014 M L D 451

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD RAMZAN---Petitioner

Versus

Malik REHMAT ULLAH and others---Respondents

Civil Revision No.560 of 2012, heard on 1st October, 2012.

(a) Civil Procedure Code (V of 1908)---

----O.IX, Rr.7 & 13---Ex parte proceedings, setting aside of---Limitation---Only when a decree has been passed against defendant that a period of 30 days has been prescribed for making application for setting aside ex parte decree---During pendency of suit no such period has been prescribed for setting aside of ex parte proceedings.

Ghulam Muhammad and others v. Mst. Irshad Begum and others PLD 1964 (W.P.) Lah. 782 and Police Department through Deputy Inspector-General of Police and another v. Javid Israr and 7 others 1992 SCMR 1009 rel.

(b) Civil Procedure Code (V of 1908)---

----O. IX, R.7---Ex-parte proceedings, setting aside of---Wrong address of defendant---Effect---Trial Court proceeded ex parte and application for setting aside the order was dismissed---Plea raised by defendant was that summons was not served upon him as his incorrect address was mentioned on the plaint---Validity---Nothing was available on record to show that defendant was actually served in person or that his address had been correctly given in plaint and summons was served upon him in accordance with law---High Court set aside ex parte proceedings subject to payment of cost by defendant and directed the parties to appear before Trial Court and contest the suit in accordance with law---Revision was allowed in circumstances.

Nida-e-Millat, Lahore v. Commissioner of Income Tax, Zone-I, Lahore 2008 SCMR 284; Abdul Rashid v. Director-General, Post Offices, Islamabad and others 2009 SCMR 1435; Lahore Development Authority v. Mst. Sharifan Bibi and another PLD 2010 SC 705; Secretary Education Department, Government of N.-W.F.P., Peshawar and others 2008 SCMR 287 and Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen 2006 SCMR 631 ref.

Ghulam Muhammad and others v. Mst. Irshad Begum and others PLD 1964 (W.P.) Lah. 782 and Police Department through Deputy Inspector-General of Police and another v. Javid Israr and 7 others 1992 SCMR 1009 rel.

Munir Ahmad Malik for Petitioner.

Ch. Umar Hayat for Respondents.

Date of hearing: 1st October, 2012.

JUDGMENT

MAMOON RASHID SHEIKH, J.---At the outset the learned counsel for the parties are agreed and submit that although today only C.M.No.1-C/2012 is fixed for hearing, however, as a limited question of law is involved the main petition may be heard and decided today. Further submit that the main petition may be decided as a Pacca matter.

2. The office is accordingly directed to list out the main petition for today.

3. As prayed for by the parties I propose to decide the petition as a Pacca matter.

4. Through this petition the petitioner has assailed the order dated 18-6-2012 passed by the learned Civil Judge, Rawalpindi, whereby the application of the petitioner, for setting aside of the order dated 26-9-2011 initiating ex parte proceedings against the petitioner, was dismissed.

5. The brief facts necessary for the present purposes are to the effect that the respondents filed a suit against the petitioner for recovery of Rs.45,48,16,000 as damages for malicious prosecution. Summons was initially issued in the name of the petitioner whereafter the learned trial Court directed that the petitioner be served through publication of notice in the Daily 'Nawa-i-Waqt'. The petitioner despite publication failed to appear, as a consequence ex parte proceedings were initiated against him through order dated 26-9-2011. Upon coming to know about the pendency of the suit the petitioner moved an application for setting aside of the order dated 26-9-2011. The petitioner's application, however, was dismissed by the learned trial Court through the impugned order dated 18-6-2012 by holding that the petitioner did not enter appearance despite publication of notice and the fact that there were many suits pending between the parties, therefore, the petitioner was in the knowledge of the pendency of the suit, moreover, the petitioner's application was barred by time.

6. The learned counsel for the petitioner submits that the petitioner was neither served personally nor he had knowledge of the pendency of the suit. The respondents deliberately gave the wrong address of the petitioner in the title of the plaint. The petitioner is resident of House No.1429, Street No.83, Sector G-9/4, Islamabad, and the respondents are fully aware of this fact, the respondents, however, gave the address of the petitioner as House No.1429, Street No.43, Sector G-9/4, Islamabad. As a consequence, summons was issued in the name of the petitioner and sent to the wrong address. The publication of notice was also procured for the wrong address. Contends that the respondents were fully aware of the correct address of the petitioner as there are several suits pending inter se the parties wherein the correct address of the petitioner was available on the record. Further submits that the learned trial Court erred in ordering service of the petitioner through publication inasmuch as there was no report of the process serving agency regarding service of the petitioner personally and/or through affixation. This fact is borne out from the orders dated 16-5-2011, 30-6-2011 and 5-9-2011 of the learned trial Court. In view thereof the service of the petitioner through publication, wherein the wrong address of the petitioner had been given, cannot be termed as due and proper service. The petitioner became aware of the pendency of the suit on 24-3-2012 during hearing of another suit. The petitioner consequently moved an application on 4-4-2012 for setting aside of the ex parte proceedings initiated against him through the order dated 26-9-2011. The petitioner's application was within time as it had been filed by the petitioner in pending proceedings upon coming to know of the ex parte order and not against an ex parte decree. The learned trial Court has, therefore, erred in holding that the petitioner's application for setting aside of the ex parte proceedings was time barred.

7. The learned counsel for the respondents controverts the stance of the learned counsel for the petitioner. Submits that the petitioner was duly served and he deliberately stayed away from the proceedings of the suit. Moreover, the petitioner became aware of the pendency of the suit in question on 16-11-2011 whilst being cross-examined in the suit entitled `Muhammad Ramzan v. Mian Imran Khalid'. The petitioner was further made aware of the pendency of the suit when he was cross-examined during the course of hearing of the contempt petition entitled 'Muhammad Ramzan v. Malik Rehmat Ullah and others'. The petitioner, on the other hand, in his application for setting aside of the ex parte proceedings has maintained that he became aware of the pendency of the suit on 24-3-2012. The petitioner has made a deliberate misstatement. He is, therefore, liable for perjury. Contends that as the petitioner had gained knowledge of the pendency of the suit as far back as November, 2011, therefore, the petitioner's application filed in March, 2012 was

hopelessly time barred. Prays for dismissal of the application of the petitioner. The learned counsel for the respondents has submitted certified copies of the proceedings in the above suit and the contempt petition in support of his contentions. Be placed on the record.. Relies on the judgments reported as Nida-e-Millat, Lahore v. Commissioner of Income Tax, Zone-I, Lahore (2008 SCMR 284), Abdul Rashid v. Director-General, Post Offices, Islamabad and others (2009 SCMR 1435), Lahore Development Authority v. Mst. Sharifan Bibi and another (PLD 2010 SC 705), Secretary Education Department, Government of N.-W.F.P., Peshawar and others (2008 SCMR 287) and Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen (2006 SCMR 631).

8. Arguments heard. Record perused.

9. One fact is crystal clear that is to say the suit against the petitioner is still pending. No final decree has been passed. However, ex parte proceedings have been initiated against the petitioner in the suit. In such like cases as soon as the defendant enters appearance and assigns a good cause for his previous non-appearance he is normally to be relegated to the stage at which he was proceeded against ex parte. The defendant is not debarred from taking part in the subsequent proceedings if either he is not able to show good cause for setting aside of the earlier proceedings or he does not feel it necessary to set at naught whatever has transpired in his absence. There may be a case where the defendant does not require ex parte proceedings to be set aside such as where he has filed his written statement and list of witnesses but is unable to appear on a subsequent date and is thus proceeded against ex parte, his mere joining the proceedings on the date thereafter can serve the purpose to contest the suit by cross-examining the plaintiff's witnesses and producing his own evidence. The defendant also without filing a written statement can have the suit dismissed by orally raising a legal objection such as questions relating to the jurisdiction of the Court and/or limitation. It is only when a decree has been passed against the defendant then a period of 30 days is prescribed for making an application for setting aside the ex parte decree. However, during the pendency of a suit no such period has been prescribed for setting aside of ex parte proceedings. Reliance in this regard is placed on the judgments reported as Ghulam Muhammad and others v. Mst. Irshad Begum and others (PLD 1964 (W.P.) Lahore 782) and Police Department through Deputy Inspector-General of Police and another v. Javid Israr and 7 others (1992 SCMR 1009) wherein it has been, inter alia, held as under:--

"...We have considered the relevant provision of law on the subject and have gone through the rulings for and against the proposition and find ourselves in complete agreement with the reasonings and conclusions arrived at in the case of Ghulam Muhammad and others v. Mst. Irshad Begum and others referred to above followed in the

other cited judgments, which is also impliedly concurred with in the judgment of this Court in Messrs Landhi Industrial Trading Estates Limited, Karachi v. Government of West Pakistan 1970 SCMR 251. According to Order IX, R.6 where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then, if it is proved that the summons was duly served, the Court may proceed ex parte. Under the following Rule 7, if the defendant at or before such hearing, appears and assigns good cause for his previous non-appearance, he may upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. Under Order XVII, R.1, the Court has the power to adjourn the hearing of the suit from time to time and under Rule 2 of the said Order, where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. Reading Rules 6 and 7 of Order IX in conjunction, it is amply clear that if the defendant in spite of service does not appear on the day fixed in the summons, the Court may proceed with the suit notwithstanding the absence of defendant and if he, later on, is able to assign good cause for his previous non-appearance, he can be relegated to the stage at which he was proceeded ex parte, which nowhere lays down that the defendant shall be debarred to take part in the subsequent proceedings if either he is not able to show good cause for the revival of the earlier proceedings or he does not feel a necessity to undo whatever is already done in the case and simply stands in need of contesting the suit from the later stage. Since the provisions of Order IX, have been made applicable to adjourn hearing under Order XVII, therefore, there may be cases in which setting aside of the earlier proceedings may not be felt necessary, for instance, if the defendant has already written statement and list of witnesses and is unable to put in appearance on subsequent date, his mere joining the proceedings can serve the purpose to contest the suit by cross-examining the witnesses of the opposite side and producing his own evidence. Even if he has not filed written statement, he may be in a position to secure the dismissal of the suit by raising an objection, orally, to the jurisdiction of the Court, limitation etc. In the absence of any clear provisions in the Code of Civil Procedure prohibiting the appearance and taking part in the proceedings by the defendant, proceeded ex parte there can be no legal bar to allow him to defend his rights. It is the right of every defendant and also the principle of natural justice, to be given a chance of hearing before order is passed against his interest. The rules of procedure are meant to advance justice and preserve rights of litigants and they are not to be interpreted in a way as to hamper the administration of justice. As such, in the absence of any clear prohibition in the scheme of civil procedure denying the defendant of his right to take part at any stage of the proceedings after the order of ex parte proceedings, he can appear and defend the suit if somehow his application for setting aside

the ex parte proceedings does not succeed on account of his failure to show good cause for his previous non-appearance. It is, therefore, held that the defendant who had been proceeded against ex parte can take part in the subsequent proceedings as of right...."

10. When the facts of the case are looked at in the light of the judgments referred to above the impugned order dated 18-6-2012 does not appear to remain sustainable. Moreover, there is nothing on the record to show that the petitioner was actually served in person or that the address of the petitioner had been correctly given in the plaint and the summons were served upon him in accordance with the law.

11. As to the contention of the learned counsel for the respondents that the petitioner was served and chose to remain away from the proceedings suffice it to say that during the course of cross-examination referred to by the learned counsel for the respondents the respondents themselves chose to question the petitioner regarding his lack of knowledge of pendency of the instant suit. These questions themselves go to show that the petitioner had not been served and that he was unaware of pendency of the suit.

12. Under the circumstances, on the basis of the judgments cited in para 9 above the instant petition is allowed, however, subject to payment of Rs.10,000 as costs by the petitioner to the respondents. The parties are directed to appear before the learned trial Court. The petitioner shall be at liberty to file his defence and contest the suit in accordance with the law subject to, however, as aforesaid. The learned trial Court in turn is directed to proceed in the matter strictly in accordance with the law.

MH/M-4/L Revision allowed.

2014 P L C (C.S.) 413

[Lahore High Court]

Before Mamoon Rashid Sheikh, J

NIDA TAHIR

Versus

PROVINCE OF PUNJAB through Secretary Schools and 3 others

Writ Petition No.11035 of 2013, decided on 30th May, 2013.

Constitution of Pakistan---

----Arts. 25 & 199---Constitutional petition---Advertised post, eligibility for---Discrimination----Academic qualification---Provisional certificates of education---Petitioner applied for advertised post of school educator---After clearing the recruitment process and interview, petitioner's name was still not included in the final merit list as she had appended her provisional certificates of bachelor's degrees with her application and not her original academic transcripts and/or degree---Plea of petitioner that her University had not issued original academic transcripts/degrees in time when she applied for the post in question; that there was no variance between her provisional certificates and original academic transcripts; that a similarly placed candidate from another district was selected for post of school educator on basis of provisional certificates, therefore she had been discriminated against---Validity---Petitioner was declared successful by her University and in such respect a provisional certificate was issued to her, which she appended with her application at the time of applying for the post in question---Petitioner applied for the post within time---Whilst petitioner was declined appointed for lack of original academic transcripts and/or degree, a similarly placed candidate in another district was appointed to post of school educator on basis of his provisional certificate---Post in question came under the purview of Provincial Department of Education, therefore if in one district candidates could be accommodated on basis of provisional certificates, then question was why not candidates from another district---Seats for the post in question were lying vacant---High Court directed the Provincial Secretary Education (Schools) to consider the petitioner's case after affording her an opportunity of fair hearing bearing in mind that in another district similarly placed candidates had been accommodated and that seats for the post in question were lying vacant in the petitioner's district---Constitutional petition was disposed of accordingly.

Mian Tariq Hussain for Petitioner.

Hafiz Ansaar-ul-Haq, Addl. A.-G. and Ms. Safia Aslam, DEO (W-EE), Toba Tek Singh for Respondents.

ORDER

MAMOON RASHID SHEIKH, J.--- The brief facts giving rise to this petition are to the effect that respondent No.2 advertised the posts of Educators in District Toba Tek Singh in the daily "Jang" of 20-6-2012 as well as on the Internet. In response to the advertisement the petitioner applied for the post of Senior Elementary. School Educator. (Math) BS-14, [hereinafter referred to as SESE (Math)]. After going through the recruitment process the petitioner, obtained 73.313 marks and stood at serial No.2 in the first merit list. The petitioner was called for interview and was interviewed on 18-7-2012. The petitioner's name was, however, not included in the final merit list. The petitioner was informed that she had not been selected because she had only appended her provisional certificate of B.Sc. and B.Ed. issued by the University of Education, Lahore, Faisalabad Campus, along with her application form. The petitioner had appended the provisional certificates which were issued by the University of Education as the said University had not issued the academic transcripts and/or degrees to the petitioner. In the meantime, the name of one Muhammad Waqas Azam a similarly placed applicant who had applied for the post of SESE (Math) in Faisalabad District was also not included in the final merit list of selected Candidates for District Faisalabad. Feeling aggrieved the .petitioner as well as the said Muhammad Waqas Azam filed Writ Petition No.2258 of 2013 and Writ Petition No.1259 of 2013. These petitions were disposed of through orders dated 31-1-2013 and the District Coordination Officers of Toba Tek Singh as well as Faisalabad were directed to look into the grievance of the petitioner as well Muhammad Waqas Azam and to pass appropriate orders after affording them an opportunity of hearing. The District Coordination Officer, Toba Tek Singh (respondent.No.2) after considering the petitioner's case turned down her application on the grounds that the petitioner's application was incomplete as she had not appended the original transcripts/degrees with her application. On the other hand Muhammad Waqas Azam's application was accepted by the District Coordination Officer, Faisalabad, inter alia, on the grounds that no variation had been found in the provisional certificates of Muhammad Waqas Azam and his original result card, moreover, other candidates had also been accommodated on the basis of provisional certificates. The competent authority was, therefore, directed to issue an appointment letter to Muhammad Waqas Azam. Feeling aggrieved the petitioner has filed the instant petition.

2. The learned counsel for the petitioner submits that the petitioner is being penalized by the respondents for no fault of hers. She had taken her examinations on time but the University of Education authorities had not issued the original academic transcripts/degrees in time. The petitioner had consequently filed the provisional certificate along with her application. There is no veriation in the provisional certificate and her original academic transcript. On the same set of facts the DCO Faisalabad accepted the application of Muhammad Waqas Azam whereas respondent No.2 (DCO Toba Tek Singh/Chairman Recruitment Committee) took the opposing view and turned the petitioner's application down, down inter alia, for the reasons that the last date for making the applications for the post in question was 4-7-2012, the petitioner was declared pass in B.Sc. and B.Ed. Examination through Notification No.809 dated 2-8-2012 issued by the University of Education, Lahore, Faisalabad Campus, the petitioner filed her application on 4-7-2012, therefore, at that time the petitioner was only an F.Sc. and thus not eligible, moreover no applicant was selected on the basis of provisional academic certificates; the petitioner, therefore cannot be accommodated.

3. The learned counsel for the petitioner contends that the respondents have adopted a pick and chose policy. The petitioner has been discriminated against. Submits that: respondent No.2 failed to appreciate that there is, no discrepancy between the provisional certificate and academic transcript of the petitioner, both of which documents have been issued by the University of Education. The fault, if any, lies with the University of Education and not with the petitioner as the University of Education belatedly issued the petitioner's academic transcript. Further submits that although the recruitment process has been completed yet a seat of SESE (Math) is still lying-vacant in the Government Girls Elementary School, 403-J.B., Toba Tek Singh. Further submits that if the petitioner were to be appointed to that post no prejudice would be caused to any person. The learned counsel has presented photocopy of a certificate issued by the Head Mistress of the said school stating that the said vacancy exists. Be placed on the record.

4. The departmental representative submits that the petitioner's application was incomplete as she had not filed the requisite transcript along with her application, therefore, she was ineligible to apply for the post in question. Supports the decision of respondent No.2.

5. When confronted with the fact that in the adjoining, District of Faisalabad similarly placed candidates have been accommodated by the Department submits that the recruitment process in question was conducted in District Toba Tek Singh and the

petitioner is bound by the decision of the Toba Tek Singh Recruitment Committee. Further submits that no discrimination has taken place against the petitioner vis-a-vis any candidate in District Toba Tek Singh.

6. As to the contention of the learned counsel for the petitioner that a post of SESE (Math) is lying vacant in the Government Girls Elementary School, 403-J.B., Toba Tek Singh, submits that several posts are lying vacant in District Toba Tek Singh, however, unless those posts are advertised no candidate including the petitioner can be accommodated against those posts.

7. The learned counsel for the petitioner controverts the stance of the departmental representative and submits that in a similar matter the Hon'ble Supreme Court directed that the petitioner before it may be considered against vacant posts available with the Department. The learned counsel has submitted photocopies of orders dated 6-12-2010 and 9-12-2010 passed by the Hon'ble Supreme Court in C.P. No.1971 of 2010 in support of his contention.

8. The learned Additional Advocate-General submits that the orders of the Hon'ble Supreme Court being relied upon by the learned counsel for the petitioner relate to case which does not have any nexus with the instant petition. Further submits that as the petitioner, was not eligible at the time of applying for the post in question her application was rejected in accordance with the law.

9. I have considered the arguments addressed at the bar and also gone through the record.

10. Admittedly, the petitioner applied in time i.e. on 4-7-2012 for the post in question. The petitioner had taken her examination for the award of the B.Sc. and B.Ed. degrees. The petitioner had been declared successful by the University of Education, Lahore (Faisalabad Campus) and in this respect a provisional certificate had been issued and was appended to the petitioner's application. The academic transcript of the petitioner was not appended to her application as it was issued on 2-8-2012 i.e. after the cut off for filing of applications. The respondents, therefore, took the view that, since the petitioner's application was incomplete she was not eligible for the post in question. She was, therefore, not appointed.

11. It is further borne out from the record that the petitioner and one Muhammad Waqas Azam (a similarly placed candidate in District Faisalabad) upon not being selected for the

post in question in their respective Districts filed Writ Petition No.1258 of 2013 and Writ Petition No.1259 of 2013 for redress of their respective grievance. These petitions were disposed of through orders dated 31-1-200 and the DCOs. of both Districts were directed to look into the grievance of the petitioner and the said Muhammad Waqas Azam. Upon consideration of their cases whilst the petitioner was declined appointment, the said Muhammad Waqas Azam was appointed by the DCO Faisalabad. A case of discrimination has been pleaded by the learned counsel for the petitioner. The departmental representative has tried to cover up the apparent, discrimination by submitting that the recruitment process in both Districts was independent of each other. The petitioner has not been discriminated against vis-a-vis, any candidate in the District Toba Tek Singh.

12. I am afraid I am not convinced by the argument of the departmental representative. The post in question essentially comes under the purview of the Department of Education (Schools), Government of the Punjab. If in one District the candidates can be accommodated on the basis of provisional certificates then why cannot candidates in. other Districts be accommodated on the same basis. This is more so when seats/posts are admittedly lying vacant. The matter is, therefore, referred to the Secretary Education (Schools) Government of the Punjab, for consideration and decision in accordance with the law.

13. The office is directed to transmit a copy of the petition along with its annexures to the Secretary Education (Schools), Government of the Punjab, who upon receipt of the documents shall consider them as the petitioner's representation and decide it expeditiously, preferably within a month from the receipt of the documents and/or a certified copy of this order.

14. The Secretary whilst considering the petitioner's case shall afford her an opportunity of fair hearing and bear in mind that in the adjoining Faisalabad District similarly placed candidates have been accommodated and that seas are lying vacant in the District Toba Tek Singh.

15. The compliance report be filed through the Deputy Registrar (Jndl.) of this Court.

MWA/N-1/L Order accordingly.

P L D 2014 Lahore 369

Before Mamoon Rashid Sheikh, J

HIGH COURT BAR ASSOCIATION, RAWALPINDI through Taufiq Asif, President and Members Executive Committee---Petitioner

Versus

PUNJAB BAR COUNCIL through Vice Chairman and others---Respondents

Writ Petition No.452 of 2014, decided on 24th February, 2014.

Pakistan Legal Practitioners and Bar Councils Rules, 1976---

----Rr. 175-G & 175-H [inserted by Pakistan Legal Practitioners and Bar Councils (Second Amendment) Rules, 2013]---Constitution of High Court Bar Association of Rawalpindi (1981), Art. 10---Constitution of Pakistan. Art.199---Constitutional petition---Term of office---Outgoing office bearers of Rawalpindi High Court Bar Association contend that even after completion of their tenure, they were competent to decide appeals of candidates who had been disqualified at the time of filing of their nomination papers---Validity---Tenure of outgoing office-bearers could not be extended in any circumstances in view of the provision of Art.10 of Constitution of High Court Bar Association of Rawalpindi, 1981---Outgoing office-bearers were unable to establish that they had vested right to continue in office to hear appeals of disqualified candidates---Petitioner did not have any locus standi to bring petition before High Court---High Court refrained to dilate upon vires or legality of order passed by Punjab Bar Council whereby caretaker President of Bar Association had been appointed---Petition was dismissed in circumstances.

Julius Salik v. Returning Officer and 27 others 1989 CLC 2499; Anjum and 2 others v. Mst. Sufaidan and 3 others PLD 1989 Lah. 103; Shah Muhammad v. Shafey Ali Khan and others 1988 MLD 956; Abdul Wahid and another v. Din Muhammad and others PLD 1982 Lah. 168; Mian Muhammad Nawaz Sharif v. President of Pakistan and others PLD 1993 SC 473; Sajjad Ahmad Bhatti v. Federation of Pakistan through Secretary Establishment Division, Islamabad and others 2009 SCMR 1448 and Federation of Pakistan through Secretary Establishment Division v. Shahid Hayat and another 2010 SCMR 169 ref.

Taufiq Asif and Faisal Khan Niazi for Petitioner.

ORDER

MAMOON RASHID SHEIKH, J.---As per the array of parties the instant petition has been filed by the High Court Bar Association Rawalpindi through Taufiq Asif, its President and the members of the Executive Committee. Para-1 of the petition, however, maintains that the petitioner is the Executive Committee of the High Court Bar Association Rawalpindi for the year 2013-2014. I, therefore, propose to treat the petition as having been filed by the said Executive Committee which shall collectively be referred to as "the petitioner" hereinafter.

2. The petition calls into question the order dated 21-2-2014 whereby the learned Executive Committee of the Punjab Bar Council (respondent No.1) has held as under:--

"3. The contention raised by the appellants need consideration. We hereby admit the appeal for regular hearing and suspend the order 20-2-2014 of the Election Board and postpone the election till the next date of hearing as the Executive Body of the Bar Association had become factious Officio (sic) after constitution of Board, hence for running the affairs of the High Court Bar Association there is need to appoint a suitable person as Care Taker President for running the affairs of Bar Association. Accordingly in the larger interest of the High Court Bar Association, Rawalpindi, Sheikh Zamir Hussain, Senior Advocate Supreme Court of Pakistan, is appointed as Care Taker President of Lahore High Court Bar Association, Rawalpindi Bench Rawalpindi, to run the affairs of the Bar Association, further requested to record of the Election Board be requisitioned and to take control of whole election process and to produce the said record before the Executive Committee of the Punjab Bar Council on 1st March, 2014.

4. The office is directed to convey this order immediately either through fax or telephonically to the Election Board as well as to defunct President of Lahore High Court Bar Association Rawalpindi Bench, Rawalpindi, and the Secretary of the Bar Association is directed to affix/paste this order on the Notice Board of the Bar Association immediately."

3. At the outset the learned principal counsel for the petitioner, who happens to be the President of the High Court Bar Association, Rawalpindi, for the year 2013-2014, has been required .to establish the petitioner's locus standi and the maintainability of the petition in view of the fact that the tenure of the office bearers of the High Court Bar Association Rawalpindi, including the Executive Committee (the petitioner), for the year 2013-2014 ended on 22-2-2014, therefore, by virtue of the provisions of Article 10 of the Constitution

of the High Court Bar Association Rawalpindi, 1981, the said office bearers have ceased to hold office. Article 10, ibid, is being reproduced hereunder for ease of reference.

"10. President, Senior Vice President, Vice President, Secretary General, Additional Secretary (Women) Joint Secretary, Library Secretary, Finance Secretary and Auditor and five other members of the Executive Committee shall be elected at the Annual General Meeting of the members and shall hold office for one year.

Provided if no election is held before the expiry of one year of their office, the existing office bearers shall cease to hold office.

Provided that the election of the office bears of the Association held in February, 1981 shall always deemed to have been held under the provisions of this Constitution."(Emphasis supplied)

4. The learned principal counsel for the petitioner submits that the impugned order is void ab initio as respondent No.1 did not have any jurisdiction in the matter. Contends that upon addition of "Rules 175-G to 175-K in Chapter XII-A" of the Pakistan Legal Practitioners and Bar Councils Rules, 1976, by virtue of the Pakistan Legal Practitioners Bar Councils (Second Amendment) Rules, 2013, candidates contesting the Bar Council elections are required to meet the following criteria with effect from 1-1-2014:-

"175-G. Election dates of Bar Associations:---

For the purpose of creating uniformity in holding of elections to different Bar Associations and in order to avoid exercise of dual right of vote by an Advocate, the elections to the District/Tehsil/ Taluka Bar Associations in different provinces will be held on one and the same day. Likewise the elections of different High Court Bar Associations throughout the Province shall also be held on the same day as under:--

(a) Punjab:

The election to the District/Tehsil Bar Associations in the Province of Punjab shall be held on 2nd Saturday of January each year whereas the election of each of the High Court Bar Associations in Punjab shall be held on last Saturday of February each year.

(b) Sindh_____

(c) Khyber Pakhtunkhwa _____

(d) Balochistan:_____

175-H, Code of conduct for contesting Election for Bar Association:--

(a) No contesting candidate or his supporter shall canvass for votes through advertisements, pla-cards, 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 practising 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	3 years

Executive Committee]

Explanation:--

(i) To meet the requirement being of a professional practising Advocate the candidate shall file certified copies of powers of attorney at least of 15 cases as per year relating to preceding 3 years; and

(ii) The length of practice as mentioned above means practice as an Advocate of Sub-ordinate Courts for contesting election against an office of the District/Tehsil/Taluka Bar Association and practice as an Advocate of the High Court for contesting election for an office of the High Court Bar Association

5. Further submits that several candidates contesting the various Offices of the High Court Bar Association Rawalpindi for the year 2014-2015 were disqualified by the Election Board of the High Court Bar Association Rawalpindi (respondent No.3) as they did not meet the above criteria. As per Rule 7-E of the Election Rules as contained in Appendix-IV of the Constitution, ibid, an appeal against the decision of respondent No.3 lies to the Executive Committee of the High Court Bar Association, Rawalpindi. A number of disqualified candidates filed appeals which are still pending. In the meantime, however, the impugned order was passed by respondent No.1, therefore, depriving the candidates their right of appeal and in turn also depriving the Executive Committee (the petitioner) the right to hear the appeals.

6. Further submits that the applicability of the afore-referred amendments in the Rules, ibid, is sub judice before the learned Pakistan Bar Council, as also before the learned Islamabad High Court. Notwithstanding the above pendency of the matter the amended Rules, ibid, have been made applicable to the elections of various High Court Bar Associations in the Punjab which is exemplified by the fact that previously at the Bahawalpur and Multan Benches of the Lahore High Court High Court Bar Association elections were not held in the month of February, however, this year the said elections have been held contemporaneously at the Principal Seat and all Benches of the Lahore High Court, on 22-2-2014. This goes to show that the amended Rules, ibid, have been accepted by the High Court Bar Associations in the Punjab, therefore, respondent No.1 in passing the impugned order has acted illegally and with material irregularity.

7. Contends that by virtue of the provisions of section 9(1)(i) of the Legal Practitioners and Bar Councils Act, 1973, respondent No.1 is bound to comply with the directions given by

the learned Pakistan Bar Council. Similarly the provisions of Rule 184(1), (2) & (4) of the Pakistan Legal Practitioners and Bar Councils Rules, 1976, require that respondent No.1 should conform to the directions given by the learned Pakistan Bar Council. In having passed the impugned order respondent No.1 is in violation of the above provisions.

8. Contends that neither the appellants before respondent No.1 had a right of appeal nor respondent No.1 was invested with the jurisdiction to declare the petitioner as functus officio.

9. Further contends that through the impugned order the petitioner was illegally stopped from performing its functions before expiry of its tenure. Relies on "Julius Salik v. Returning Officer and 27 others" (1989 CLC 2499), "Anjum and 2 others v. Mst. Sufaidan and 3 others" (PLD 1989 Lahore 103), "Shah Muhammad v. Shafey Ali Khan and others" (1988 MLD 956) and "Abdul Wahid and another v. Din Muhammad and others" (PLD 1982 Lahore 168) to contend that an elected person cannot be restrained from performing his duties in accordance with the law.

10. Also contends that an elected person who has been stopped from performing his functions before the end of his tenure can be restored to the office to perform his functions. Relies on the judgment reported as " Mian Muhammad Nawaz Sharif vs. President of Pakistan and others" (PLD 1993 SC 473).

11. Submits that there is no provision under the Constitution, ibid, for appointment of a caretaker.

12. Contends that the impugned order is mala fide and discriminatory inasmuch as on the one hand respondent No.1 has directed that the High Court Bar Association Rawalpindi's election be not held on 22-2-2014, whereas on the other hand in case of the Islamabad High Court Bar Association's elections respondent No.1 through order dated 21-2-2014 has directed that the elections cannot be postponed as the day to day affairs of the said Bar Association cannot be left unattended. The petitioner's fundamental right under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973, has been violated.

13. Also contends that the impugned order was passed on 21-2-2014 thereby depriving the petitioner from functioning during the last two days of its tenure. Prays that the impugned order may be set aside and till such time elections are held the present petitioner be allowed to function as a caretaker body.

14. I have considered the arguments of the learned counsel for the petitioner which although are quite extensive vis-a-vis the question of the legality or otherwise of the impugned order yet they do not address the issue that once the tenure of the 2013-2014 office bearers of the High Court Bar Association, Rawalpindi (including the petitioner), was over then in what capacity can they claim to continue to remain in office as Article 10 of the Constitution, ibid, contains an express bar in respect thereof.

15. Reference by way of analogy may be made to the judgments reported as "Sajjad Ahmad Bhatti v. Federation of Pakistan through Secretary Establishment Division, Islamabad and others" (2009 SCMR 1448) and "Federation of Pakistan through Secretary Establishment Division v. Shahid Hayat and another" (2010 SCMR 169) wherein it was, inter alia, held that the retirement age of a civil servant cannot be postponed for the reason that the person remained on an erratic posting for a certain period or that he was prevented from discharging his official duties for any cause including suspension or forced leave.

16. It would, therefore, follow that tenure of the petitioner cannot be extended in any circumstances in view of the provisions of Article 10 of the Constitution, ibid, and the principle of law as laid down by the Hon'ble Supreme Court in the cases cited herein above.

17. The learned counsel has similarly been unable to establish that the petitioner has a vested right to continue in office to hear the appeals of the disqualified candidates.

18. In view thereof I find that the petitioner does not have the locus standi to bring the instant petition.

19. Under the circumstances without dilating upon the vires or legality or illegality of impugned order I hold that the instant petition is not maintainable and is dismissed accordingly in limine with the observation that respondent No.1 shall endeavour to decide the appeal pending before it with reasonable dispatch.

MH/H-7/L Petition dismissed.;

P L D 2014 Lahore 570

Before Mamoon Rashid Sheikh and

Shahid Jamil Khan, JJ

Messrs GLOBAL CNG CHAKWAL---Applicant

Versus

SUI NORTHERN GAS PIPELINES and another---Respondents

Review Application No.2-C of 2014 and Civil Revision No.84 of 2013, decided on 3rd June, 2014.

Civil Procedure Code (V of 1908)---

----0 XXX, R. 10---Proprietary firm/concern---Legal character/status--Scope---May sue in its name but cannot bring legal action in its name---"Proprietor" and "proprietary firm" one and the same person---Under provisions of 0.XXX, R.10, C.P.C. a person carrying on business in a name and style other than his own may be sued in such manner or style as if it were a firm nzme, however, the person could not sue in such name because a proprietary firm/concern did not have any legal status separate and distinct from its proprietor---For all intents and purposes it is the proprietor who is the legal person entitled to all the benefits and liable to answer for all liabilities that accrued in respect of the proprietary concern---Proprietor and proprietary firm/concern were one and the same person---Proprietary concern may be sued in its name but the proprietary concern could not bring a legal action as it did not have any legal character/status separate and distinct from its proprietor--- Where a person mistakenly sued in his trade name, then exceptionally necessary corrections/amendments were allowed subject to the law of limitation.

Girdhari Lal v. Kangra Motor Agency and others AIR 1934 Lah. 147; Ismail Haji Sulaiman v. Messrs Hansa Line and another PLD 1961 Dacca 693; Habib Bank Ltd. v. Iqbal I. Chundigar and another 1983 CLO 1464; Messrs Ahan Saz Contractors v. Pak Chromical Limited, 1999 MLD 1781; The Collector of Customs (Appraisement) Collectorate of Customs, Government of Pakistan, Customs House, Karachi and others v. Messrs Imran Enterprises through Proprietor and others 2001 CLC 419 and Messrs M.A. Majeed Khan v. Karachi Water and Sewerage Board and others (PLD 2002 Kar. 315 rel.

Syed Qalb-i-Hassan for Applicant.

Jamal Mahmood Butt for Respondents.

Date of hearing: 3rd June, 2014.

JUDGMENT

MAMOON RASHID SHEIKH, J.---This single judgment shall decide Review Application No.02-C/2014 and C.R. No.84/2013 as common questions of law and facts are involved therein.

2. Both petitions have been brought by Messrs Global CNG, Chakwal (the petitioner) against Sui Northern Gas Pipelines Limited and another (the respondents) and arise out of a suit for declaration etc. filed by the petitioner against the respondents in respect of the allegations of meter tampering/theft of gas and issuance of a detection bill.

3. The legal character/status however of the petitioner has not been explained in either of the petitions or indeed the plaint of the petitioner filed before the learned trial Court. The learned counsel for the petitioner was, therefore, at the outset required to explain the legal character/status of the petitioner in view of the fact that admittedly the petitioner is not a natural person. If it is a sole proprietorship then has the sole proprietor sued the respondents under his trade name? In case the petitioner is a partnership then is it registered with the Registrar of Firms under the Partnership Act, 1932? If the petitioner is a company limited by shares then is it registered with the Securities and Exchange Commission of Pakistan (the SECP) under the provisions of the Companies Ordinance, 1984?

4. As mentioned above the petitions as well as the plaint are silent as to the legal character/status of the petitioner. The learned counsel for the petitioner was, therefore, required to establish the maintainability of the petitions in view of the following legal position:--

(a) In case the petitioner is the trade name of a natural person i.e. a sole proprietorship then how are the petitions competent as a proprietary concern can be sued in its name but it cannot sue in its own name in view of the provisions of Order XXX, Rule 10 of the C.P.C.

(b) In case the petitioner is a partnership then as the petitions are based on contractual obligations, therefore, unless the petitioner is registered as a

partnership firm under the Partnership Act, 1932, the petitions appear to be barred under Section 69 of the said Act; and

(c) In case the petitioner is a company limited by shares then unless the institution and filing of the suit as well as the petitions was by a person duly authorized in terms of the law as laid down inter alia by the judgments reported as "Muhammad Siddiq Muhammad Umar v. Austerlasia Bank" (PLD 1966 SC 684), "Abdul Rahim and 2 others v. Messrs United Bank Ltd of Pakistan" (PLD 1997 Karachi 62) the petitions are liable to be dismissed.

5. When confronted with the above the learned counsel for the petitioner has tried to maintain that the petitions are competent as the petitions have been filed in the name of Messrs Global CNG through its attorney Syed Hasnain Shah. Relies on "Messrs Combined Enterprises v. Water and Power Development Authority, Lahore" (PLD 1988 Supreme Court 39), "Messrs Sainjee Cargo Services v. Messrs Cargo Movers and others" (1989 CLC 2229) "Zubair Ahmad and another v. Shahid Mirza and 2 others" (2004 MLD 1010) to contend that the petitioner is a firm, therefore, under the provisions of Order XXX, Rules 1 and 2 of the C.P.C. it can bring the petition in its own name through its attorney Syed Hasnain Shah. Contends that the said attorney is duly authorized to bring the instant petitions.

6. The learned counsel has, however, been unable to explain or establish the character or status of the petitioner as, "a firm." Is it a partnership firm duly registered under the Partnership Act 1932 or for that matter a Company limited by shares registered under the Companies Ordinance, 1984. No document has been placed on the record to show that the petitioner is either registered with the Registrar of Firms or with the SECP.

7. However, a photocopy of the Special Power of Attorney (the POA) executed in favour of the said Syed Hasnain Shah the purported attorney of the petitioner is on the record. The photocopy of the POA reveals that the petitioner is ostensibly owned by one Syed Iftikhar Hussain Shah who, due to his frequent absence abroad, through the POA dated 6-4-2012 appointed the said Syed Hasnain Shah as his special attorney to, inter alia, pursue the suits/litigation against the respondents. It, therefore, follows that the petitioner is a proprietary concern or in other words the said Syed Iftikhar Hussain Shah carries on business of a CNG Pump in the name and style of the petitioner.

8. It is settled law that under the provisions of Order XXX, Rule 10 of the C.P.C. a person carrying on business in a name and style other than his own may be sued in such name or

style as if it were a firm name, however, the person cannot sue in such name because a proprietary firm/concern does not have, any legal status separate and distinct from its proprietor. For all intents and purposes it is the proprietor who is the legal person entitled to all the benefits and liable to answer for all the liabilities that accrue in respect of the proprietary concern. In other words the proprietor and the proprietary firm/concern are one and the same person. However, as said above, by virtue of the provisions of Order XXX, Rule 10 of the C.P.C. a proprietary concern, may be sued in its name but the proprietary concern cannot bring a legal action as it does not have any legal character/status separate and distinct from its proprietor. Reliance in this regard is placed on the judgments reported as "Girdhari Lal v. Kangra Motor Agency and others" (AIR 1934 Lahore 147), "Ismail Haji Sulaiman v. Messrs Hansa Line and another" (PLD 1961 Dacca 693), "Habib Bank Ltd. v. Iqbal I. Chundigar and another" (1983 CLC 1464), "Messrs Ahan Saz Contractors v. Pak Chromical Limited" (1999 MLD 1781), "The Collector of Customs (Appraisement) Collectorate of Customs, Government of Pakistan, Customs House, Karachi and others v. Messrs Imran Enterprises through Proprietor and others" (2001 CLC 419) and "Messrs M.A. Majeed Khan v. Karachi Water and Sewerage Board and others" (PLD 2002 Karachi 315).

9. The learned counsel for the petitioner has tried to make out a case that the petitioner is a firm, therefore, the suit and the petitions have been brought under the provisions of Order XXX, Rules 1 and 2 of the C.P.C.. We are afraid in view of the above stated position of law the contention of the learned counsel is not tenable. Order XXX, Rule 1 of the C.P.C. primarily deals with suits to be brought by a partnership firm and as said above no material has been forthcoming to establish that the petitioner is a partnership firm. Indeed, the copy of the POA executed by Syed Iftikhar Hussain Shah in favour of Syed Hasnain Shah shows otherwise.

10. We may, however, point out that there is always the exception that in case a person mistakenly sues in his trade name the necessary corrections/amendments are normally allowed subject of course to the law of limitation, however, in the instant case neither the requisite corrections/amendments have been made nor any request in this respect has been forthcoming at the trial or the present stage.

Under the circumstances these petitions fail and are dismissed accordingly with no order as to costs.

MWA/G-39/L Petition dismissed.

2015 C L C 65

[Lahore]

Before Mamoon Rashid Sheikh, J

JUNAID JAMSHED----Petitioner

Versus

UNIVERSITY OF HEALTH SICENCES and others----Respondents

Writ Petition No.25515 of 2014, heard on 3rd October, 2014.

(a) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Scope---Matters relating to educational institution--- Interference by High Court--- Scope---Educational institutions are the best judges of their rules and regulations---High Court in exercise of its Constitutional jurisdiction normally does not interfere in such like matters as its jurisdiction cannot be invoked for obtaining decisions on merits which functionaries alone are entitled to take under law---Jurisdiction of High Court under Art.199 of the Constitution is principally meant for correcting jurisdictional errors in orders and proceedings of tribunals and executive authorities.

Muhammad Abdullah Riaz v. U.H.S. and others PLD 2011 Lah. 555 and Sahiba Dost vs. Chairman Admissions Board/Vice-Chancellor U.H.S. and others PLD 2011 Lah. 605 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Educational institution---Mistake by authorities---Factual controversy---Impairing performance---Admission to medical college---Entrance test---Petitioner was candidate for admission to medical college and due to mistake of authorities incorrect examination center was mentioned in admission card and on the day of examination petitioner had to rush to proper examination center---Plea raised by petitioner was that if he had directly been intimated about proper center well in time before the date of Enterance Test his performance would have not been impaired---Contention of authorities was that university acted promptly on the date of Entrance Test and also allowed petitioner to take Entrance Test at correct examination center, even though he arrived there after cut off time---Validity---Controversy started at the point as to when the university was aware of the mistake, and if mistake was discovered well before date of entrance test then why it did not directly communicate to petitioner in view of the fact that his contact numbers and email address were available with the university---Questions that as to whether petitioner

checked the newspapers or university's website to confirm the location of his examination center; whether the petitioner reached the examination center before and not after 9 a.m. (fixed time) on the date of Entrance Test; and that at what time correct information was communicated to petitioner were disputed questions of fact resolution whereof was not normally undertaken by High Court in exercise of Constitutional jurisdiction---University had decided to form a three member committee to probe into the matter so as to take steps to avoid such mistakes in future---No relief was decided to be given to petitioner by quoting prospectus but fact remained that university committed a mistake even though it could be taken to be an honest mistake albeit it had not been so pleaded---High Court, while using paternal jurisdiction referred the matter to Vice-Chancellor/Admission Board of the university for further consideration---Petition was disposed of accordingly.

Chairman, Board of Intermediate and Secondary Education, Lahore and another v. Ali Mir 1984 SCMR 433; Ayesha Fida v. Government of N-W.F.P. through Secretary, Home and Tribal Affairs Department at Civil Secretariat Peshawar and 7 others 2004 CLC 1160; Mst. Shazia Shafi v. University of Health Sciences and others 2011 MLD 894; Syeda Shakeela Batool v. Controller of Examinations, Baha-ud-Din Zakariya University and another 2004 YLR 1467; Farmanullah Khan v. Controller of Examination, Karachi University 2010 MLD 85; Dayyam Atta Tareen v. NUST and others 2011 CLC 211; Hafiz Husnain Raza Shah and 2 others v. Baha-ud-Din Zakariya University, Multan through Vice-Chancellor and 2 others 2011 MLD 741; Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another 2012 SCMR 6; Maryam Izhar and another v. International Islamic University and others 2012 MLD 719 and Usman Tariq v. Punjab Public Service Commission and others 2013 PLC (C.S.) 1183 ref.

Khawaja Tariq Sohail for Petitioner.

Ch. Muhammad Atiq for Respondents.

Date of hearing: 3rd October, 2014.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- With the consent of the learned counsel for the parties it is proposed to decide the instant petition as a Pacca matter on the basis of the available record.

2. The learned counsel for the respondent-University despite opportunity having been granted has declined either to file a report and parawise comments and/or a written statement and states that he shall rely upon oral submissions and the documents submitted on 26-9-2014.

3. The facts leading to filing of the instant petition are to the effect that the petitioner is desirous of joining the medical profession, therefore, he applied to the respondent-University to take the Medical/ Dental Colleges' Admission Test, 2014 ("the Entrance Test") to be held on 31-8-2014. The petitioner was issued an Admittance Card under Roll No.0014390 whereby he was informed that his examination center is situated at the University of Education, Lower Mall, Lahore. On 31-8-2014, i.e. the date of the Entrance Test when the petitioner reached the said examination center he found out that the Roll Number allotted to him was not included in the list of candidates eligible to take the Entrance Test at the examination center. The petitioner, therefore, contacted the invigilation staff and was informed that his examination center was in fact the Government Central Model School, Lower Mall, Lahore. The petitioner consequently went to the latter examination center and took the Entrance Test. The result of the Entrance Test has been announced and the petitioner has not scored marks according to his expectations.

4. The instant petition has, therefore, been brought on the premise that due to the mistake on the part of the respondent-University the petitioner went to the wrong examination center and although the petitioner was belatedly directed to go to correct examination center by the invigilation staff yet precious time was lost in the process resulting in the petitioner being stressed out, as a consequence, his performance suffered. The petitioner filed a complaint before the respondent-University for redress of his grievance but no response was received. The petitioner has, therefore, prayed as under:---

"In view of the above submissions, it is therefore, most respectfully prayed that this writ petition may kindly be accepted and appropriate directions may kindly be issued to the concerned quarters to redress the genuine grievance of the petitioner by accommodating him in any Government Medical College by awarding him grace marks, keeping in view his previous academic performance, in the larger interest of justice."

5. The learned counsel for the petitioner submits that the Policy/Procedure/ Guidelines/Rules/Regulations for taking the Entrance Test have been set out in detail in the Information Booklet ("the Booklet") issued by the respondent-University vis-à-vis the Entrance Test. Clause 15 of the Booklet states that candidates are required to be present at

the designated examination center before 8:00 a.m. as the Entrance Test begins at 9:00 a.m. sharp. Candidates are, therefore, required to reach their respective examination centers at least an hour prior to 9:00 a.m. The examination centers are to be sealed/closed at 8:15 a.m. whereafter no candidate is to be allowed to enter the examination center. Moreover, no candidate is allowed to enter the examination centre without showing the Admittance Card issued by the respondent-University.

6. Further submits that the petitioner reached the examination center mentioned in his Admittance Card according to the above schedule. Upon reaching there he was surprised to learn that his Roll Number was not included in the list of candidates eligible to take the Entrance Test at that center. The petitioner made inquiries from one of the invigilators who told the candidate to wait so that the requisite inquiries can be made. The petitioner was made to wait till 8:50 a.m. even though the petitioner kept on requesting the invigilation staff to sort out his problem but to no avail. Eventually one of the invigilators informed the petitioner at around 8:50 a.m. that his correct examination center is the Government Central Model School, Lower Mall, Lahore. The invigilator wrote the necessary information on a piece of paper and handed it over to the petitioner and directed him to go to the correct examination center. Submits that even though the petitioner was relieved to receive the information and immediately made his way to the correct examination center, however, during the period the petitioner had to wait he was mentally upset and severely stressed out which condition was compounded by the fact that the petitioner was already suffering from exam nerves. However, as directed the petitioner went to the Government Central Model School and reached there at around 9:10 a.m. The petitioner was allowed to sit for the Entrance Test by the invigilation staff. The petitioner began answering the question paper at around 9:15/9:20 a.m. Thus very precious 15/20 minutes were wasted due to the wrong information having been given to the petitioner by the respondent-University.

7. Contends that the petitioner was already stressed out and due to the delay in starting to answer the examination paper, which delay was entirely due to the respondent-University's fault, the petitioner became further stressed thus his performance suffered. As a consequence, the petitioner was unable to score as high as he could have.

8. Submits that the petitioner is a hard working student which is exemplified by the fact that he took his F.Sc. Pre-Medical Examination from the G.C. University, Lahore. Contends that the respondent-University is guilty of negligence in issuing the wrong Admittance Card to the petitioner, therefore, the respondent-University should rectify the

error by compensating the petitioner by way of awarding him compensatory/grace marks. Relies on "Chairman, Board of Intermediate and Secondary Education, Lahore and another v. Ali Mir" (1984 SCMR 433), "Ayesha Fida v. Government of N-W.F.P. through Secretary, Home and Tribal Affairs Department at Civil Secretariat Peshawar and 7 others" (2004 CLC 1160), "Mst. Shazia Shafi v. University of Health Sciences and others" (2011 MLD 894), "Syeda Shakeela Batool v. Controller of Examinations, Baha-ud-Din Zakariya University and another" (2004 YLR 1467), "Farmanullah Khan v. Controller of Examination, Karachi University" (2010 MLD 85), "Dayyam Atta Tareen v. NUST and others" (2011 CLC 211), "Hafiz Husnain Raza Shah and 2 others v. Baha-ud-Din Zakariya University, Multan through Vice-Chancellor and 2 others" (2011 MLD 741), "Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another" (2012 SCMR 6) and "Maryam Izhar and another v. International Islamic University and others" (2012 MLD 719).

9. The learned counsel for the respondent-University submits that the Booklet sets out in detail the Procedure/Rules/Regulations regarding holding of the Entrance Test. No departure can be made from the Procedure/Rules/Regulations stated therein. As per past practice Admittance Cards are issued to the candidates with their respective examination centers nominated therein. Similarly, as per routine so as to rectify any mistake having been made whilst issuing Admittance Cards the respondent-University gives out information regarding the examination centers by way of publishing of notices in the leading newspapers of the country as well as by posting the requisite information on its Website. This year such notices were published in several leading dailies including the daily "Dawn" of 24-8-2014. Information vis-à-vis examination centers was also available on the Website of the respondent-University. All candidates are advised to keep on checking the Website of the respondent-University so as to keep abreast of any development in the examination process. The petitioner was, therefore, duly informed through the notice as also through the information on the Website of his correct examination center.

10. Further submits, under instructions, that a mistake was indeed made by the respondent-University in that the wrong examination center was intimated to the petitioner through his Admittance Card. However, the said mistake was rectified through the process of publication of notice and posting of the correct information on the Website.

11. Refers to the documents filed by him on 26-9-2014 to submit that the petitioner's complaint was responded to within the requisite period by the respondent-University but the petitioner never collected the respondent-University's reply from the office. In any event a report was called for from the invigilation staff posted at the respondent-

University's examination centre known as the University of Education, Lower Mall, Lahore. They reported that when the petitioner brought the mistake to their notice, immediate steps were taken for helping him out. The control room of the respondent-University was contacted and immediately upon receipt of the correct information it was relayed to the petitioner and a handwritten clarification slip duly signed by the invigilation staff was handed over to the petitioner at around 8:20 a.m. The petitioner was at the same time advised to go to the correct examination center i.e. Central Model School, Lower Mall, Lahore. Further submits that it is important to note that both examination centers in question are situated on Lower Mall, Lahore, and are in fact adjacent to one and another, therefore, the petitioner did not lose any time in going from one center to another.

12. In any event the respondent-University accommodated the petitioner by allowing him to enter the correct examination center after the closing time. The respondent-University co-operated with the petitioner and facilitated him in taking his examination. The petitioner in fact was present at the correct examination center before 9:00 a.m. and he began attempting the question paper at 9:00 a.m. which is evident from the attendance sheet wherein the petitioner has put down his signatures at the start (9:00 a.m.) and the end (11:30 a.m.) of the examination. This factor is further exemplified by the fact that the petitioner attempted all questions, therefore, it does not lie in the mouth of the petitioner that he was unable to perform well.

13. Further submits that the petitioner passed his F.Sc. examination in the year 2013 and as per the respondent-University's record he also took the Entrance Test in the year 2013. The petitioner does not appear to have done well last year, therefore, he has re-taken the Entrance Test this year. The petitioner in fact has improved upon his last year's result. In view thereof, the petitioner cannot contend that he has not been able to perform well.

14. Contends that a candidate taking an examination is normally stressed out and suffers from exam nerves. The petitioner, therefore, cannot claim that he was extraordinarily stressed out as the problem which the petitioner faced was promptly taken care of and he was directed to the correct examination center. Moreover, by way of accommodation the petitioner was also allowed to sit for the Entrance Test even though he reached the latter examination center after closing time.

15. Refers to Clause 28.4 of the Booklet to submit that the Rules/Regulations do not allow special consideration to be given to a candidate for impaired performance on the day of the test caused by illness or unexpected personal situation. Contends that no exceptions can be made. Reiterates that the petitioner attempted the paper as a whole and answered all

questions. The petitioner answered 178 questions correctly and thus obtained 890 marks. The petitioner, however, gave incorrect answers to 42 questions. As a consequence, 42 marks were deducted from his total marks thus leaving behind 848 marks which is the final result of the petitioner. The said result is much better than the result which the petitioner was able to achieve last year. In view of the fact that the petitioner answered all questions he cannot contend that he was unable to attempt the paper due to paucity of time.

16. Further submits that all candidates are aware that in the Entrance Test 5 (five) marks are awarded for each correct answer and 1 (one) mark is deducted for each incorrect answer. In other words the Entrance Test also entails negative marking. The petitioner answered 42 questions incorrectly, therefore, 42 marks were deducted from the marks obtained by him in respect of his correct answers. The petitioner, therefore, cannot blame the respondent-University for not bearing in mind that when in doubt it is better to not answer a question rather than answering it incorrectly and thus earning negative marks.

17. Further contends that the petitioner is guilty of concealment of facts inasmuch as both examination centers are situated on the Lower Mall, Lahore, and are adjacent to each other. In fact they are part of the same building. However, the petitioner has deliberately given incomplete addresses of both examination centers in the petition and has thus tried to create the impression that the examination centers are situated far away from one another. This act of the petitioner amounts to abuse of the process of the Court.

18. Contends that there are disputed questions of fact involved in the petition, which cannot be determined by this Court in the instant proceedings.

19. Relies on "Usman Tariq v. Punjab Public Service Commission and others" (2013 PLC (C.S.) 1183).

20. The learned counsel for the petitioner submits that the respondent-University has admitted its mistake. Contends that it is not a mistake simpliciter. The respondent-University has been negligent in passing on the information to the petitioner regarding his examination center. The negligence on the part of the respondent-University was wilful, arbitrary and unjustified. The respondent-University has tried to cover up its mistake by citing its Rules/Regulations. Contends that in such like circumstances this Court in the exercise of its constitutional jurisdiction can correct the wrong.

21. Further submits that the respondent-University should have intimated the petitioner about the mistake and/or the correct examination center by communicating directly with

the petitioner especially given the fact that the petitioner's contact numbers and email address were available with the respondent-University.

22. Heard. Record perused.

23. The controversy in the instant petition revolves around the fact that wrong information was communicated to the petitioner vis-à-vis his examination center. The respondent-University has admitted its mistake but has taken the stance that the mistake was rectified by way of publication of notice and posting of the correct information on the Website of the respondent-University. Moreover, on the date of the Entrance Test the petitioner was immediately informed about his correct examination center and was directed thereto. It has been further asserted that the petitioner was allowed to take the Entrance Test even though he arrived at the correct examination center after the cut-off time. On the other hand, it is the case of the petitioner that due to the mistake on the part of the respondent-University, which according to the petitioner borders on mala fide, the petitioner's performance was impaired thus he was unable to achieve better marks.

24. The learned counsel for the respondent-University has relied on Clause 28.4 of the Information Booklet to contend that no special consideration can be given to a candidate for impaired performance on the day of the test due to illness or unexpected personal situation. The same argument was advanced by the learned counsel for the respondent-University on 29-9-2014. At that time the learned counsel was informed that "the situation" was apparently caused by a mistake on the part of the respondent-University and was not "an unexpected personal situation". The learned counsel was, therefore, required to obtain further instructions in this respect. Today the learned counsel submits that no departure can be made from the Rules/Regulations contained in the Booklet. However, a three member committee is being formed to probe into the matter and to suggest ways to avoid such incidents in future.

25. A perusal of the Booklet shows that Clause 28.4 thereof reads as under:---

"28.4. It is NOT possible to give special consideration for impaired performance on the day of the test caused by illness or other unexpected personal situation."

As will be clear the Clause states that no special consideration can be given to a candidate for impaired performance on the date of the test "caused by illness or other unexpected personal situation". The Clause, however, does not cater for the circumstances prevailing in

the instant case. Herein "the situation" is not one which is relatable to the petitioner in his personal capacity rather it is a situation of the respondent-University's own making.

26. It is settled law that educational institutions are the best judges of their Rules and Regulations. This Court in the exercise of its constitutional jurisdiction normally does not interfere in such like matters as its jurisdiction cannot be invoked for obtaining decisions on merits which the functionaries alone are entitled to take under the law. The jurisdiction of this Court under Article 199 of the Constitution is principally meant for correcting jurisdictional errors in the orders and proceedings of tribunals and executive authorities. Reliance in this respect is placed on "Usman Tariq's case (supra), "Muhammad Abdullah Riaz v. U.H.S. and others" (PLD 2011 Lahore 555) and "Sahiba Dost v. Chairman Admissions Board/Vice-Chancellor U.H.S. and others" (PLD 2011 Lahore 605).

27. In the instant case, however, as observed above, the Rules/ Regulations as contained in the Booklet do not appear to cater for the situation in hand. This Court appreciates the fact that every year the respondent-University arranges for the Entrance Test which is taken by thousands of students and despite the large number of candidates involved their papers are checked and their results posted on the Website of the respondent-University in a matter of days. This is no mean achievement. However, at the same time this Court cannot help but notice that the respondent-University has not set up a mechanism whereby a mistake such as the one committed in the instant case can be discovered and rectified in time or indeed, information thereof can be given directly to a candidate.

28. It is the petitioner's case that had he been directly intimated about the mistake well in time before the date of the Entrance Test his performance would have not been impaired. The respondent-University to its credit did act promptly on the date of the Entrance Test and also allowed the petitioner to take the Entrance Test at the correct examination center, even though he arrived there after the cut-off time. The controversy, however, starts at this point that is to say when did the respondent-University become aware of the mistake. If the mistake was discovered well before the date of the Entrance Test then why was it not directly communicated to the petitioner given the fact that his contact numbers and email address were available with the respondent-University. Did the petitioner check the newspapers or the respondent-University's website to confirm the location of his examination center. In case the mistake was discovered by the respondent-University on the date of the Entrance Test itself then at what time the correct information was communicated to the petitioner. Moreover, did the petitioner reach the correct examination center before and not after 9:00 a.m. as contended by the respondent-University. All these

factors are disputed questions of fact resolution whereof is not normally undertaken by this Court in the exercise of its constitutional jurisdiction. It may be further noted that the respondent-University has decided to form a three member committee to probe into the matter so as to take steps to avoid such mistakes in the future. However, no relief has been decided to be given to the petitioner by quoting Clause-28.4 of the Booklet. But the fact remains that the respondent-University did commit a mistake even though it may be taken to be an honest mistake albeit it has not been so pleaded.

29. Under the circumstances, I am persuaded to refer the matter to the Vice-Chancellor/Admissions Board of the respondent-University for further consideration whilst exercising their parental jurisdiction in the matter.

30. It is expected that the Vice-Chancellor/Admissions Board shall proceed in the matter with reasonable dispatch and shall afford the petitioner an opportunity of fair hearing.

31. In case the Vice-Chancellor/Admissions Board does not have jurisdiction in the matter, then they shall refer the matter for further consideration to the competent authority who in turn shall proceed in the matter as mentioned hereinabove.

32. Disposed of accordingly.

MH/J-26/L Order accordingly.

2015 C L C 89

[Lahore]

Before Mamoon Rashid Sheikh, J

ABDUL GHANI----Petitioner

Versus

GHULAM ABBAS TAMANNA and others----Respondents

Writ Petition No.18359 and C.Ms. Nos.2, 3 of 2013, decided on 23rd October, 2013.

(a) Constitution of Pakistan---

---Art. 199--- Constitutional jurisdiction--- Scope--- Exercise of Constitutional jurisdiction of High Court is discretionary in nature and one who seeks equity must do equity.

Abdur Rashid v. Pakistan and others 1969 SCMR 141; Waheed Azmat Sheikh v. Chairman, Habib Bank Limited and 2 others 2002 CLC 929; Messrs Trade Lines through Managing Partner and others v. Bank of Punjab through General Manager and another 2002 CLD 1776; Lahore Development Authority through Director-General, LDA, Lahore v. Mst. Shamim Akhtar and another 2003 MLD 1543 and Rehmat Din and others v. Mirza Nasir Abbas and others 2007 SCMR 1560 rel.

(b) Civil Procedure Code (V of 1908)---

----S. 47---Executing Court---Jurisdiction---Executing Court cannot go beyond the decree.

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

----S. 8--- Civil Procedure Code (V of 1908), S.47---Constitution of Pakistan, Art.199---Constitutional petition---Execution of decree---Objection petition---Suit for recovery of immovable property was decreed by High Court in exercise of revisional jurisdiction in favour of plaintiff---Plea raised by petitioner was that objection petition was filed by him in furtherance of the order passed by Supreme Court and decree could only be executed through partition of land as it was part of joint Khata---Validity---Petitioner concealed material facts and did not raise such point as a ground in petition and it appeared as an afterthought---Petitioner was unable to point out any illegality or material irregularity having been committed by Courts below whilst passing order in question---Petitioner was also unable to point out any exercise of excess of jurisdiction by Courts below or to show that order in question was perverse---High Court in exercise of Constitutional jurisdiction declined to interfere in the order passed by Executing Court---Petition was dismissed in circumstances.

Ch. Imtiaz Ahmad Kamboh for Petitioner.

Mian Subah Sadiq Klasson for Respondent No.1.

ORDER

Main case

C.M. No.2 of 2013

C.M. No.3 of 2013

MAMOON RASHID SHEKH, J.--- The instant petition has been brought by the petitioner against the orders dated 14-3-2013 and 5-6-2013 passed by the learned Civil Judge/executing Court, Okara (respondent No.3) and the learned Additional District Judge, Okara (respondent No.2) respectively, whereby the petitioner's objection petition in the execution petition filed by respondent No.1 has been dismissed.

2. The brief facts relevant for the present purposes are to the effect that respondent No.1 purchased land measuring 2-Kanals, 15-Marlas comprising Khasra No.52/20/1 in Mauza Depalpur, Tehsil Depalpur, District Okara, through a registered sale-deed dated 12-3-1977. The said land formed part of a joint khata and was sold to respondent No.1 by one Barkat Ali the father of the present petitioner. It appears that at the time of entering the factum of sale in the Revenue Record through Mutation No.3164, attested on 20-1-1978, only 5/6th of the said land equivalent to 2-Kanals, 6-Marlas was mutated in favour of respondent No.l. It further appears that the other co-owner of the joint khata one Mst. Rashidan Bibi the sister of the said Barkat Ali later transferred the balance 9-Marlas land in favour of the present petitioner.

3. Feeling aggrieved respondent No.1 filed a suit for possession of the balance 9-Marlas against Barkat Ali and the present petitioner. The suit as well as respondent No.1's appeal were dismissed. Respondent No.1 was, therefore, constrained to file a revision petition (C.R.No.1134-D of 1986 entitled `Chaudhry Ghulam Abbas v. Barkat Ali and another') before this Court. C.R.No.1134-D of 1986 was accepted through judgment dated 24-5-1999 passed by Mr. Justice Maulvi Anwarul Haq (as he then was) and the suit of respondent No.1 was decreed in the following terms:---

"...It appears that in order to present a fate accompli the respondent No.1 managed alienation of the remaining 9 marlas of land in favour of his son respondent No.2 by Mst. Rashidan Bibi. It also appears from the record that the petitioner also transferred some land in favour of his wife Mst. Siddiqua Begum on the basis of the said transaction in his favour. In the light of the factual and legal position of the case the transaction evidenced by Exh.P1 cannot be held to be illegal or void. The transaction has taken legal effect and was to remain in force subject to adjustment at the time of partition. It further appears from the record that Barkat Ali and his sister effected a partition of this khata without including the Khasra number sold to the petitioner. It is a matter of record that the petitioner was not a party to the said partition effected by way of a family settlement i.e. a private partition given effect

by the Revenue Officer through Mutation No.2852 attested on 30-3-1981. Needless to say that the partition evidenced by this mutation is ineffective upon the rights of the petitioner as well as respondent No.2.

5. The up-shot of the above discussion is that the sale evidenced by document Exh.P1 in favour of the petitioner is valid. The partition effected by means of Mutation No.2852 dated 30-3-1981 is of no legal consequence and of no effect on the rights of the petitioner as well as respondent No.2 who were neither parties to the said partition nor, in fact, land in suit was included therein. It is trite law that a partition cannot be effected without including of the joint land or property, as such, a partition is bad in law being partial partition. The petitioner as well as respondent No.2 are co-sharers to the extent of lands transferred to them by the two co-sharers i.e. Barkat Ali and Mst. Rashidan Bibi respectively. The 9 marlas of land shall be adjustable against the other holding of Barkat Ali in the said khata. The matter of possession will be determined as and when the said partition of the entire joint khata takes place at the instance of any of the parties. With these observations, this civil revision is allowed. The judgments and decrees of the learned Courts below are set aside and the suit of the petitioner is decreed to this effect that he is a valid transferee of 2 kanals and 15 marlas of land in the khata measuring 65 kanals 4 marlas with reference to Register Haqdaran Zamin for the year 1975-76. The sale of 9 marlas in favour of respondent No.2 by Mst. Rashidan Bibi shall be deemed to be from the column of ownership making him an owner in the khata to the extent of 9 marlas. The excess of 9 marlas in Khasra No.52/20/1 shall be adjustable from the other holding of Barkat Ali and Mst. Rashidan Bibi in the joint khata at the time of partition as and when apply for by any of the parties. The private partition affected by Mutation No.2852 attested on 30-3-1981 with respect to the said khata (199) shall be of no legal effect on the rights of the petitioner as well as respondent No.2 and this khata shall be subject to partition at the instance of petitioner or the respondent No.2 or Mst. Rashidan Bibi, the vendor of respondent No.2. The matter of possession will be adjusted as and when the said partition is applied for and takes place. Parties are left to bear their own costs."

4. The learned counsel for the petitioner submits that the decree dated 24-5-1999 passed in C.R.No.1134-D of 1986 could only be executed through partition of the land as it is part of a joint khata and the warrant of possession in respect of the balance 9-Marlas cannot be executed without partition of the land in question. The learned Courts below have, therefore, erred in dismissing the petitioner's objection petition.

5. At the outset, the learned counsel for respondent No.1 calls into question the maintainability of the petition by inter alia submitting that the instant petition has been filed by concealment of material facts.

6. The learned counsel refers to the written statement and the documents attached thereto filed by respondent No.1 in response to the instant petition and submits that the judgment dated 24-5-1999 passed in C.R.No.134-D of 1986 was not assailed by either party, therefore, it attained finality. Respondent No.1, therefore, filed an execution petition for execution of the decree dated 24-5-1999. The petitioner filed an objection petition therein which was disposed of by the learned executing Court on 1-11-2000 with the following observation:---

"It is crystal clear that the matter about possession is to be settled initially in the partition suit and not in the execution petition. It has been specifically ordered that the matter of possession is to be adjusted as and when the said partition is applied to and takes place. It was pointed out by the respondent side that the suit has been filed in which the decree holder has to make appearance."

7. Further submits that the partition proceedings brought by the present petitioner were firstly dismissed by the Tehsildar Depalpur, District Okara, through order dated 22-11-2000 whereafter the petitioner's suit for partition was also dismissed by the Civil Judge, Depalpur. The petitioner did not assail either finding, therefore, the said dismissal has attained finality.

8. Submits that thereafter the learned executing Court issued warrants of possession in favour of respondent No.1 through order dated 13-4-2001. The present petitioner challenged the said order through a revision petition. During the course of proceedings in the said revision petition, on 19-5-2001, the learned counsel for the present petitioner made a statement before the learned Additional District Judge, Okara, to the following effect:---

"I have no objection if the possession of land measuring 2-kanals, 15-marlas bearing Khasra No.52/20/I situated in Depalpur may be handed to the petitioner decree-holder."

9. As a consequence, the learned Additional District Judge, Okara, appointed the Tehsildar Depalpur as a Local Commissioner in order to demarcate the land measuring 2 Kanals, 15 Marlas bearing Khasra No.52/20/1 situated at Mauza Depalpur, District Okara, and to hand over the possession thereof to respondent No.l.

10. Further submits that the Local Commissioner gave a favourable report in favour of respondent No.1, however, the matter kept on pending as the petitioner filed repeated objection petitions. Eventually the petitioner's objection petition was dismissed by the learned executing Court through order dated 26-6-2006 and the petitioner was directed to hand over the possession of the land in question to respondent No.1 till 21-7-2006. The petitioner's appeal against the order dated 26-6-2006 was dismissed through the order dated 24-7-2006 by the learned Additional District Judge, Okara. The petitioner challenged

the orders dated 26-6-2006 and 24-7-2006 through C.R. No.1770 of 2006. The said petition was dismissed by Mr. Justice Maulvi Anwarul Haq (as he then was) through the order dated 3-10-2007 in the following terms:---

"This civil revision involves interpretation of my judgment dated 21-5-1999 (sic) in C.R.No.1134 of 1986. The dispute arose during the course of execution on objections filed by the petitioners, the learned Executing Court concluded that according to the said judgment of this Court first a partition will have to be effected and then possession of the land found to be validly purchased by the respondent is to be given. This was done vide order dated 1-11-2000. A learned Additional District Judge, Okara, allowed the first appeal filed by the respondents holding that possession is to be given and is to be retained by the respondent till such time that the Khata is partitioned.

2. Learned counsel for the petitioner contends that the learned Executing Court had correctly interpreted the judgment while learned counsel appearing for the respondent are of the opinion that the interpretation placed on the judgment by the learned Additional District Judge is correct.

3. I have gone through the said judgment as also the decree prepared by the office pursuant thereto that the facts of the case are recorded therein and correctness thereof has not been questioned by any of the learned counsel. Having examined the said judgment dated 21-5-1999 (sic) in C.R.No.1134 of 1986. I have no manner of doubt in my mind that the learned Additional District Judge has very correctly interpreted the judgment. As explained by me in detail therein the land was held to be lawfully sold to the respondent by Barkat Ali deceased vide registered sale deed Exh.P.1 was to be delivered to him, while the land later sold in that particular Khasra number by Mst. Rashidan Bibi in favour of Abdul Ghani petitioner was to be adjusted to his credit in the column of ownership. The matter of retention of possession and the extent thereto was to be ultimately decided in a suit for partition. This was the true spirit of the judgment. Needless to note that the respondent had throughout been fighting for possession of the land purchased by him in the specific Khasra number. The civil revision accordingly is dismissed. No orders as to costs."

11. Further submits that the petitioner challenged the order dated 3-10-2007 before the Hon'ble Supreme Court through C.P.No.1600-L of 2007. The said C.P. was dismissed as withdrawn through the order dated 16-3-2011. Further submits that in the meantime the execution proceedings were adjourned sine die. Upon dismissal of the petitioner's C.P. No.1600-L of 2007 the execution proceedings were revived and through order dated 4-6-2012 the learned executing Court issued warrants of possession. This order was challenged in appeal by the petitioner, however, the petitioner's appeal was dismissed by the learned Additional District Judge, Okara, through order dated 25-9-2012. The petitioner challenged

the orders dated 4-6-2012 and 25-9-2012 before this Court. Respondent No.1, however, does not know the fate of those proceedings as he was away for performance of Hajj.

12. The present petitioner later on filed the objection petition which was dismissed through the impugned order dated 14-3-2013. The petitioner's revision against the order dated 14-3-2013 was dismissed through the order dated 5-6-2013 by the learned Additional District Judge, Okara.

13. Contends that the matter has been finally decided by the Hon'ble Supreme Court. The petitioner has filed repetitive objection petitions on frivolous grounds. The instant petition is liable to be dismissed forthwith as the petitioner has deliberately concealed the above mentioned facts. As the petitioner has not approached this Court with clean hands, therefore, he is not entitled to any discretionary relief.

14. When confronted with the above the learned counsel for the petitioner submits that there was no requirement for disclosing the above facts as the petitioner had approached the learned executing Court on a new point at the execution stage.

15. Submits that the proceedings before the Hon'ble Supreme Court were withdrawn on the statement of the learned counsel which was to the effect that the petitioner does not press C.P.No.1600-L of 2007 in order to avail proper remedy under the law. Contends that the present objection petition before the learned executing Court is the said remedy.

16. The learned counsel for respondent No.1 submits that the order dated 16-3-2011 whereby the Hon'ble Supreme Court dismissed as withdrawn the petitioner's C.P.No.1600-L of 2007 was to the following effect:---

"Learned counsel for the petitioners, after arguing this petition at some length, opted to withdraw this petition in order to avail proper remedy under the law. Accordingly, it is dismissed as having been withdrawn."

Contends that the fresh proceedings before the learned executing Court amount to an abuse of the process of the Court. Moreover, the said proceedings are not even otherwise maintainable as the partition proceedings earlier brought by the petitioner were dismissed for non-prosecution and the petitioner did not take any steps for restoration of the same. The said dismissal has, therefore, attained finality.

17. I have considered the arguments addressed at the bar and have also gone through the record. I find force in the contention of the learned counsel for respondent No.1 that the instant petition has been filed by concealment of material facts. Indeed, the major sequence of events vis-a-vis the litigation between the parties and passing of repeated adverse orders against the petitioner have not been mentioned in the petition. The learned counsel for the

petitioner has tried to justify non-disclosure by submitting that the latest objection petition filed by the petitioner before the learned executing Court is the remedy which the petitioner has availed of in furtherance of the order dated 16-3-2011 passed by the Hon'ble Supreme Court in C.P.No.1600-L of 2007. This contention of the learned counsel is without force as no ground to this effect has been taken in the petition, moreover, the petitioner has not even vaguely referred to passing of the order dated 16-3-2011 by the Hon'ble Supreme Court. Not only has the petitioner concealed the factum of filing of C.P.No.1600-L of 2007 and the dismissal thereof by way of withdrawal but he has also concealed the factum of filing of C.R.No.1770 of 2006 and the dismissal thereof through the order dated 3-10-2007. The petitioner has also concealed the fact that his learned counsel made a statement before the learned Additional District Judge, Okara, on 19-5-2001 to the following effect:---

"I have no objection if the possession of land measuring 2-kanals, 15-marlas bearing Khasra No.52/20/1 situated in Depalpur may be handed to the petitioner decree-holder."

18. It is a settled principle of law that the exercise of the constitutional jurisdiction of this Court is discretionary in nature. It is a further settled principle of law that one who seeks equity must do equity. Reliance in this regard is placed on the judgments reported as "Abdur Rashid v. Pakistan and others" (1969 SCMR 141), "Waheed Azmat Sheikh v. Chairman, Habib Bank Limited and 2 others" (2002 CLC 929) "Messrs Trade Lines through Managing Partner and others v. Bank of Punjab through General Manager and another" (2002 CLD 1776), "Lahore Development Authority through Director-General, LDA, Lahore v. Mst. Shamim Akhtar and another" (2003 MLD 1543) and "Rehmat Din and others v. Mirza Nasir Abbas and others" (2007 SCMR 1560).

19. As mentioned above, the petitioner has not even taken the trouble of mentioning any of the facts or passing of the adverse orders against him as brought to the notice of the Court by the learned counsel for respondent No.1. In view thereof, I am not inclined to exercise my discretion in favour of the petitioner.

20. As to the merits of the case one only needs to go through the judgment and decree dated 24-5-1999 passed in C.R.No.1134-D of 1986 and the "interpretation" thereof made through the order dated 3-10-2007 passed in C.R.No.1770 of 2006. Both judgment and order (the relevant portions whereof have been quoted in Paras-3 and 10 above) have been passed by Mr. Justice Maulvi Anwarul Haq (as he then was) and are self explanatory. It is a settled principle of law that an executing Court cannot go beyond the decree. The learned Courts below have followed this principle whilst passing the impugned orders. As already observed the contention of the learned counsel for the petitioner that the latest objection petition has been filed by the petitioner before the learned executing Court in furtherance of the order dated 3-10-2007 passed by the Hon'ble Supreme Court in C.P.No.1600-L of 2007

is not tenable primarily for the reason that the petitioner has concealed material facts and equally importantly for not having raised this point as a ground in the petition. Indeed, the stance of the petitioner appears to be an afterthought.

21. Moreover, the learned counsel for the petitioner has been unable to point out any illegality or material irregularity having been committed by the learned Courts below whilst passing the impugned order. He has similarly been unable to point out any exercise of excess of jurisdiction by the learned Courts below or to show that the impugned orders are perverse.

22. Under the circumstances, the petition fails and is dismissed accordingly.

There is no order as to costs.

MH/A-169/L Petition dismissed.

2015 M L D 229

[Lahore]

Before Mamoon Rashid Sheikh and Shahid Jamil Khan, JJ

AMNA SHARIF and another---Petitioners

Versus

POF BOARD through Director Industrial and Commercial Relations (DICR) and others---Respondents

Writ Petition No.475 of 2014, decided on 28th May, 2014.

(a) Constitution of Pakistan---

----Art.199---Constitutional petition---Admission in medical college---Criteria, non-fulfilment of---Petitioners were studying in MBBS first year and their admissions were cancelled on the ground that their results were not accepted by Pakistan Medical and Dental Council and University of Health Sciences---Validity---Petitioners were required to take Medical Colleges Admission Test (MCAT) conducted by NTS, instead the petitioners took National Aptitude Test (NAT-IM) conducted by NTS---NAT-IM Test was not recognized by Pakistan Medical and Dental Council as it was a monthly test and was not geared for gaining admission to medical/dental educational institutions---Petitioners had not met the basic eligibility criteria for gaining admission in medical college as laid down by authorities---Petitioners were only granted 'provisional' admission subject to verification of

their antecedents and registration with authorities, therefore, petitioners could not claim to have acquired a vested right to continue with their studies in medical college---Petitioners failed to point out any jurisdictional error nor it had been shown that decision of authorities was perverse or arbitrary---High Court declined to interfere in the matter---Petition was dismissed in circumstances.

1997 SCMR 15 Bashir Ahmed Solangi v. Chief Secretary, Government of Sindh, Karachi and 2 others 2004 SCMR 1864; Neelam Khan and others v. University of Health Sciences, Lahore through vice-Chancellor/Registrar and others 2013 MLD 701; Ammaris Mehtab Chaudhry v. Vice-Chancellor, Sargodha University and others 2013 CLC 1080; The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and another v. Jalaluddin PLD 1992 SC 207; Nadir Khan and others v. Principal, Khyber Medical College, Peshawar and others 1995 SCMR 421; Aqib Rasheed and 3 others v. Government of the Punjab through Secretary Health and 4 others PLD 2011 Lah. 1; Zubair Azam v. Pakistan Medical and Dental Council through Chairman and another 2005 YLR 1462; Junaid Intizar v. UHS and others 2009 MLD 684 and Memoona Noureen v. Vice-Chancellor, Fatima Jinnah Women University Rawalpindi 2011 CLC 230 ref.

Muhammad Abdullah Riaz v. University of Health Sciences (UHS). Lahore and another PLD 2011 Lah. 555; Sahiba Dost v. Chairman Admission Board/Vice-Chancellor, UHS, Lahore PLD 2011 Lah. 605 and Usman Tariq v. Punjab Public Service Commission and others 2013 PLC (C.S.) 1183 ref.

(b) Educational institutions---

----Prospectus---Scope---Educational institutions are bound by policy laid down in their prospectus.

(c) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction--- Scope--- Educational institution---Admission--- High Court in exercise of its constitutional jurisdiction does not interfere in matters of examinations and/or admissions to educational institutions---Authorities concerned are sole judges of criteria laid down by institutions in their prospectus and/or calendar unless an ex-facie case of jurisdictional error is pointed out.

Muhammad Owais for Petitioners.

Nemo for Respondent No. 1 and 2.

Nemo for Respondent No.3.

Amjad Hussain Ghauri for Respondent No.4.

ORDER

MAMOON RASHID SHEIKH, J.---This petition has been brought by the petitioners who are 1st year students reading for the MBBS Degree in the Wah Medical College (respondent No.2). The grievance of the petitioners is that through letter No.WMC/787/SA dated 25-2-2014 respondent No.2 has declared that the petitioners' admissions have become invalid for the reason that the Pakistan Medical and Dental Council (respondent No.3) and the University of Health Sciences (respondent No.4) have not accepted the results of the petitioners' NAT-1M Test conducted by the National Testing Service (the NTS) to be valid for the purposes of obtaining admission in a medical college in the Punjab.

2. The learned counsel for the petitioners submits that the petitioners belong to the Sindh Province. They are the daughters of employees of Pakistan Ordnance Factories (the POF) and are based at Wah Cantt. The petitioners passed their F.Sc. Pre-Medical Examination from the Federal Board of Intermediate and Secondary Education, Islamabad, and being desirous of joining the medical profession applied to respondent No.2 for admission in the MBBS 2013-2014 Session against ten open merit seats reserved for wards of all POF employees. As per the advertisement got published by respondent No.2 in the daily "Jang" the eligibility criteria for admission in respondent No.2 was inter alia to the following effect:--

(i) F.Sc. (Pre-Medical) with minimum 60% marks or equivalent foreign qualification; and

(ii) Those who appeared in entry test Conducted by the Provincial Governments/NTS, SAT-II and MCAT.

3. Further submits that the petitioners accordingly took the National Aptitude Test (NAT-1M) conducted by the NTS. And on the basis of their F.Sc. and NAT-1M result they were given admission by respondent No. 2. The petitioners paid the requisite fee and joined the classes of MBBS 1st year being conducted by respondent No.2.

4. The learned counsel for the petitioners contends that the petitioners were granted admission to read for the MBBS degree by respondent No.2 on the basis of their eligibility. The petitioners fulfilled the admissions criteria as laid down by respondent No.2. The petitioners' documents were fully scrutinized and verified by the high level committee of respondent No.2. It, therefore, does not lie in the mouth of respondent

No.2 to say that the admissions of the petitioners are invalid. Contends that respondent No.2 in fact wants to oblige some blue eyed students, therefore, the admissions of the petitioners have been declared to be invalid. Alleges mala fide on the part of respondent No.2.

5. Further contends that it is settled law that once admission has been granted to a student in an educational institution after considering the student's case and the requisite fee is also accepted by the educational institution and thereafter the student attends classes the educational institution cannot turn around and say that the admission of the student was invalid due to some administrative oversight. Once admission has been given to a student a vested right is created in his favour.

6. Submits that in addition to the NAT-1M Test conducted by the NTS the petitioners also took the NTS (Federal Medical and Dental College Admission Test) and the National University of Science and Technology, Islamabad's entrance test in order to read for their MBBS degrees. In case the petitioners result of the NAT-1M Test is not acceptable, the respondents may be directed to rely on the results of the other tests taken by the petitioners. Contends that the impugned order is a non-speaking order and has been passed in violation of section 24-A of the General Clauses Act, 1897.

7. Relies on the judgments reported as 1997 SCMR 15, "Bashir Ahmed Solangi v. Chief Secretary, Government of Sindh, Karachi and 2 others" (2004 SCMR 1864) "Neelam Khan and others v. University of Health Sciences, Lahore through vice-Chancellor/Registrar and others" (2013 MLD 701), "Ammaris Mehtab Chaudhry v. Vice-Chancellor, Sargodha University and others" (2013 CLC 1080).

8. The report and parawise comments have been filed on behalf of respondents Nos.1 and 2 wherein it is admitted that the petitioners were granted admission in the MBBS 1st year Class in the 2013-2014 Session, however, the petitioners' admission was "provisional". This fact was communicated to the petitioners at the time of their admissions through the Offer of Admission Letters No.WMC/787/SA dated 24-12-2013. Para-1 of the said letters is to the following effect:--

"It is a matter of immense pleasure for the College Administration that you have been granted admission in Wah Medical College. The admission, however, is provisional till verification of your original antecedents and registration by the PM&DC as well as University of Health Sciences Lahore. The classes, Inshallah shall start with effect from 30

Dec 2013. Therefore, you are advised to join the college maximum by 07:45 AM on Monday 30 Dec 2013 positively, for reception ceremony along with your parents."

(Emphasis supplied)

9. It is further maintained in the report and parawise comments of respondents Nos.1 and 2 that during the course of verification of the petitioners documents respondents Nos.3 and 4 found that the petitioners had not taken the requisite entrance test to qualify for admission in a medical college in the Province of the Punjab. Respondent No.3 does not recognize the NAT-1M Test conducted by the NTS to be a valid test for admission in a medical college. Upon receipt of the letter from respondent No.3 informing respondent No.2 re the invalidity of the NAT-1M Test taken by the petitioners for the purposes of admission in respondent No.2 a representation was made to respondent No.3 on behalf of the petitioners but the same was turned down by respondent No.3.

10. The report and para wise comments have been filed on behalf of respondent No.4 wherein it is inter alia maintained that the NAT-1M Test is not a valid test for entry into a medical/dental college in the Province of the Punjab. The learned counsel for respondent No.4 submits that for the purposes of medical/dental education in the Province of the Punjab respondent No.4 is the regulatory body. It lays down the criteria for admission to medical and dental colleges/institutions in the Province of the Punjab. Respondent No.4 in turn has to follow the Regulations laid down by respondent No.3 which is the Statutory Regulatory Body in respect of the medical and dental profession in Pakistan. As per the Regulations of respondent No.3 as also the Regulations of respondent No.4 the NAT-1M Test conducted by NTS is not a valid test for admission to a medical/dental college/institution in the Punjab.

11. Further submits that as per the Policy Guidelines laid down in respondent No.4's Prospectus for the 2013/2014 Session, "Only those candidates who have appeared in the Entrance Test conducted by the University of Health Sciences, Lahore, for year 2013, shall be considered eligible for admission to Public/Private Sector Medical/ Dental Institutions of the Punjab".

12. Contends that in view of the Policy Guidelines the petitioners are not eligible to be granted admission in respondent No.2, therefore, during scrutiny of their papers their admissions were not considered to be valid and they were informed accordingly.

13. Relies on the judgments reported as "The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and another v. Jalaluddin" (PLD 1992 S.C. 207), "Nadir Khan and others v. Principal, Khyber Medical College, Peshawar and others" (1995 SCMR 421) "Aqib Rasheed and 3 others v. Government of the Punjab through Secretary Health and 4 others" (PLD 2011 Lahore 1), "Zubair Azam v. Pakistan Medical and Dental Council through Chairman and another (2005 YLR 1462), "Junaid Intizar v. UHS and others" (2009 MLD 684), "Muhammad Abdullah Riaz v. University of Health Sciences (UHS). Lahore and another" (PLD 2011 Lahore 555) and "Memoona Noureen v. Vice-Chancellor, Fatima Jinnah Women University Rawalpindi" (2011 CLC 230).

14. Heard. Record perused.

15. The petitioners gained admission in respondent No.2 on the basis of the marks obtained by them in their F.Sc. pre-medical examination conducted by the Federal Board of Intermediate and Secondary Education, Islamabad, and the NAT-1M Test conducted by the NTS. However, as mentioned in their admission letters quoted in Para-8 above their admissions were on provisional basis subject to verification of antecedents and registration with respondents Nos. 3 and 4.

16. It is settled law that respondent No.3 is the Statutory Regulatory Authority in respect of the medical/dental profession in Pakistan. "Aqib Rasheed's case (supra) refers. In that capacity respondent No.3, inter alia, lays down the criteria for admissions in medical/dental colleges/ institutions. Respondent No.4 is the medical/dental degrees awarding authority in the Province of the Punjab. Its Prospectus for the 2013-14 Session lays down the minimum eligibility criteria for admissions in the public/private sector medical/dental colleges/institutions in the Punjab in 2013-14 Session. According to the said criteria only those candidates shall be considered eligible for admission to a public and/or private sector medical/dental institution in the Province of the Punjab who have taken the entrance test conducted by respondent No.4 in 2013. In other words the Medical College Admission Test (MCAT) conducted by respondent No. 4. As said above this criteria was effective for the 2013-2014 Session and the petitioners were required to take the MCAT. The petitioners instead took the NAT-1M Test conducted by the NTS. The record further shows that the NAT-1M Test is not even recognized by respondent No. 3 as it is a monthly test and is not geared for gaining admission to medical/dental institutions.

17. The petitioners, therefore, do not appear to have met the basic eligibility criteria for gaining admission in a medical college in the Province of the Punjab as laid down by respondents Nos.3 and 4. As mentioned above the petitioners were only granted

"provisional" admission subject to verification of their antecedents and registration with respondents Nos.3 and 4, therefore, the petitioners cannot claim to have acquired a vested right to continue with their studies in respondent No.2.

18. It is settled law that educational institutions are bound by the Policy laid down in their prospectus. Students are also required to follow the Policy. It is further settled law that this Court in the exercise of its constitutional jurisdiction does not interfere in the matters of examinations and/or admissions to educational institutions as the authorities concerned are the sole judges of the criteria laid down by the institutions in their prospectus and/or calendar unless an ex facie case of jurisdictional error is pointed out. In the instant case no such jurisdictional error has been pointed out nor has it been shown that the decision of the respondents is perverse or arbitrary. Reliance in this regard is placed on the judgments reported as "Muhammad Abdullah Riaz v. University of Health Sciences (UHS) Lahore and another" (PLD 2011 Lahore 555), "Sahiba Dost v. Chairman Admission Board/Vice-Chancellor, UHS, Lahore" (PLD 2011 Lahore 605) and "Usman Tariq v. Punjab Public Service Commission and others" (2013 PLC (C.S.) 1183).

19. Under the circumstances the petition fails and is dismissed accordingly.

20. There is no order as to costs.

MH/A-168/L Petition dismissed.

P L D 2015 Lahore 208

Before Mamoon Rashid Sheikh, J

TASAWAR HUSSAIN---Petitioner

Versus

Mst. FARZANA KAUSAR and others---Respondents

Writ Petition No.540 of 2014, decide don 3rd June, 2014.

(a) Muslim Family Laws Ordinance (VIII of 1961)--

----S. 6(5)---West Pakistan Family Courts Act (XXXV of 1964), S.5, Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Polygamy---Payment of dower in case husband contracted a second marriage without permission of Arbitration Council---Scope---

Suit for recovery of maintenance allowance, and dower was decreed inter alia on the ground that the husband had taken a second wife without obtaining permission of the Arbitration Council in terms of S.6(5) of the Muslim Family Laws Ordinance, 1961---Contention of the husband/petitioner was that suit for recovery of downer could not be decreed as the dower was deferred and not prompt---Held, that language of S.6(5)(a) of the Muslim Family Laws Ordinance, 1961 was very clear that in case a man contracted a second marriage without the requisite permission from the Arbitration Council concerned, he shall be liable to immediately pay to the existing wife/wives, the entire amount of the dower due, whether the same was prompt or deferred---In the present case, nothing was on record which showed that the husband/petitioner obtained the necessary permission from the Arbitration Council concerned---No illegality, therefore, existed in the impugned order---Constitutional petition was dismissed, in circumstances.

Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others PLD 2011 SC 260 and Saadia Usman and another v. Muhammad Usman Iqbal Jadoon 2009 SCMR 1458 distinguished.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Concurrent findings of fact by courts below---In absence of a jurisdictional defect, High Court in exercise of its constitutional jurisdiction, normally did not interfere in concurrent findings of fact arrived at by courts below, unless a case of grave miscarriage of justice was made out. [p. 213] B

Waqar Haider Butt v. Judge, Family Court and others 2009 SCMR 1243; Shamshad Begum v. Mst. Huma Begum and others 2008 SCMR 79; Arshad Mehmood v. Additional District Judge, Rawalpindi and 5 others 2001 SCMR 516; Haji Abdullah and 10 others v. Yahya Bakhtiar PLD 2001 SC 158 and Hanif and others v. Malik Ahmad Shah and another 2001 SCMR 577 rel.

Malik Altaf Hussain Kandwal for Petitioner.

ORDER

MAMOON RASHID SHEIKH, J.---The petitioner has brought the instant petition against the judgment and decree dated 3-6-2013 passed by the learned Judge Family Court Sohawa District Jhelum (respondent No.3) and the consolidated judgment and decree dated 3-1-2014 passed by the learned Addl. District Judge Jhelum (respondent No.2) whereby

respondent No.1's suit for recovery of maintenance, dowry, gold jewellery and dower has been partially decreed against the petitioner and the petitioner's counter claim for restitution of conjugal rights has also been decreed albeit conditional upon payment of maintenance/dower to respondent No.1 .

2. The facts relevant for the present purposes are to the effect that the Nikah ceremony of the parties was performed on 24-1-2005 and Rukhsati took place on 13-12-2009. The parties do not have any children. The marital relationship between the parties is stated to be not a happy one. The petitioner is stated to have taken a second wife without permission of respondent No.1. Separation took place between the parties in or around August, 2011 whereafter respondent No.1 is stated to be residing with her parents. Subsequently, respondent No.1 filed the aforementioned suit against the petitioner who contested it by filing his defence and also seeking a decree for restitution of conjugal rights. Issues were framed and evidence recorded and through the impugned judgment dated 3-6-2013 respondent No.3 passed decrees in favour of the parties in the following terms:—

> "For what has been discussed above, the suit of the plaintiff is hereby decreed in her favour in such manner that she is entitled for the recovery of her maintenance allowance since 18-8-2011 till the date @ Rs.2500/- per month and onwards at the same rate with 10% annual increase.
>
> The suit of the plaintiff for recovery of dowry articles is also decreed in her favour in such a manner that she is entitled for the recovery of dowry articles in accordance with list Exh.P.1 minus certain articles mentioned at serial Nos.96, 101 and 102 or in the alternative prices of the said dowry articles. In case of payment of the prices of any of the dowry articles 20% depreciation charges withheld.
>
> That suit of the plaintiff for the recovery of dower of a house mentioned in column No.16 of the Nikahnama or in the alternative price thereof as Rs.100000/- is also decreed in her favour.
>
> The suit of the defendant for the restitution of conjugal rights is also decreed in his favour provided he pays the plaintiff previous maintenance amount since 18-8-2011 till date @ Rs.2500/- per month and delivers her possession of the house mentioned in the nikahnama in column No.16 or in alternative prices thereof Rs.100000/-."

3. Feeling aggrieved both parties filed appeals. The appeals were, however, dismissed by respondent No.2 through the impugned consolidated judgment and decree(s) dated 3-1-2014.

4. The learned counsel for the petitioner submits that the impugned judgments and decrees have been passed by respondents Nos.2 and 3 by misreading and non-reading the evidence brought on the record. Respondents Nos.2 and 3 further erred by not considering the fact that the claim of respondent No.1 vis-a-vis her dower was based on a forged and fabricated Nikahnama. Contends that in any event a decree for recovery of dower could not have been passed in favour of respondent No.1 as the dower on the face of it was deferred and not prompt. Respondents Nos.2 and 3 have, therefore, fallen into error.

5. Further submits that the impugned judgments and decrees are arbitrary, perverse and based on conjectures and surmises. Respondents Nos.2 and 3 failed to appreciate that respondent No.1 had adopted family planning methods against the wishes of the petitioner and had thus forced the petitioner to take a second wife. Indeed, respondent No.1 gave her consent to the petitioner's second marriage. Further contends that respondents Nos. 2 and 3 have further erred by passing a conditional decree for restitution of conjugal rights in the petitioner's favour whereas the facts and circumstances of the case warranted that an unconditional decree for restitution of conjugal rights be passed in the petitioner's favour.

6. Relies on "Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others PLD 2011 SC 260 and Saadia Usman and another v. Muhammad Usman Iqbal Jadoon" 2009 SCMR 1458 in support of his contentions.

7. I have considered the arguments of the learned counsel for the petitioner and have also gone through the record.

8. Respondents Nos.2 and 3 have considered the evidence brought on the record at considerable length before passing the impugned judgments and decrees. Their decisions, in no small measure, are based on the admissions made by the petitioner himself and his witnesses. Besides making admissions vis-à-vis respondent No.1's dowry the petitioner also admitted that a private complaint is pending against him for taking a second wife without the requisite permissions. The petitioner has further admitted that he has not paid any maintenance to respondent No.1 since 18-8-2011. The learned counsel for the petitioner has tried to make out a case of misreading and non-reading of evidence. The learned counsel has, however, been unable to point out any such instance from the impugned judgments or to show that the afore-referred admissions have not been made by the petitioner and/or his

witnesses. The learned counsel has similarly been unable to substantiate any of his contentions re the Nikahnama being forged or containing interpolations.

9. The record further reveals that the petitioner kept both wives in the same dwelling house which resulted in souring of relations between the petitioner and respondent No.l. Respondents Nos.2 and 3 have, therefore, come to the concurrent conclusion that this act of the petitioner made the life of respondent No.1 quite miserable, therefore, she was justified in refusing to go back to the marital home and to demand that her maintenance and dower be paid to her. As mentioned above, the petitioner has admittedly not paid any maintenance to respondent No.1 since 18-8-2011. The dower as per the Nikahanama was to be paid by the petitioner in the form of a house or Rs.100000/- in lieu thereof. It was in this perspective that the conditional decree for restitution of conjugal rights was passed in favour of the petitioner.

10. The learned counsel for the petitioner has vehemently argued that in any event the entry in column No.16 of the Nikahnama relating to dower clearly shows that the dower is deferred and not prompt. In view thereof a decree for recovery of dower or indeed the conditional decree for restitution of conjugal rights could not have been passed. I am afraid this contention of the learned counsel for the petitioner is not tenable in the eye of the law as it has been established on the record that the petitioner entered into his second marriage without obtaining the requisite permission from the Arbitration Counsel concerned. He is being prosecuted for taking a second wife without the requisite permission(s). The learned counsel for the petitioner has placed reliance on the purported permission (Mark-E) given by respondent No.1 to the petitioner. to enter into the second marriage.. Mark-E does not come to the aid of the petitioner firstly for the reason that respondent No.1 was never confronted with the said document and secondly it was brought on the record in the statement of the learned counsel for the petitioner and was not formally proved. Moreover, the petitioner has not brought any document on the record to show that he had obtained the requisite permission from the Arbitration Counsel concerned for entering into his second marriage. Resultantly, the petitioner is liable to forthwith pay the dower to respondent No.1, even if, the argument of the learned counsel for the petitioner is accepted that the dower was deferred and not prompt. Reliance in this regard is placed on the provisions of Section 6(5) (a) of the Muslim Family Laws Ordinance, 1961. For ease of reference the provisions of Section 6 of the Ordinance, ibid., are being reproduced hereunder:--

"6. Polygamy.-- (1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage, contracted without such permission be registered under this Ordinance.

(2) An application for permission under subsection (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee and shall state the reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of the application under subsection (2) the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period and on payment of the prescribed fee, prefer any application for revision to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

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

(a) Pay immediately the entire amount of the 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; and

(b) On conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both." (emphasis supplied)

As will be clear the language of Section 6(5) (a), ibid., is very clear and does not admit of any interpretation other than the one that in case a man contracts a second marriage without obtaining the requisite permission from the Arbitration Council concerned then he shall be liable to immediately pay to his existing wife/wives the entire amount of the dower

due, whether prompt or deferred. As mentioned above there is nothing on the record to show that the petitioner obtained the necessary permission from the Arbitration Council concerned. The contention of the learned counsel for the petitioner is, therefore, repelled.

11. The judgments cited at the bar by the learned counsel for the petitioner are not applicable in the facts and circumstances of the case.

12. Needless to add that it is a case of concurrent findings of fact. It is settled law that in absence of a jurisdictional defect this Court in the exercise of its constitutional jurisdiction normally does not interfere in concurrent findings of fact arrived at by the learned Courts below unless a case of grave miscarriage of justice is made out. Reliance is placed on the judgments reported as Waqar Haider Butt v. Judge, Family Court and others (2009 SCMR 1243), (Shamshad Begum v. Mst. Huma Begum and others (2008 SCMR 79), Arshad Mehmood v. Additional District Judge, Rawalpindi and 5 others (2001 SCMR 516), Haji Abdullah and 10 others v. Yahya Bakhtiar (PLD 2001 SC 158) and Hunif & others v. Malik Ahmad Shah and another (2001 SCMR 577).

13. I find that the impugned judgments do not suffer from any jurisdictional defect or that they are arbitrary or perverse.

14. Under the circumstances the petition fails and is accordingly dismissed in limine.

KMZ/T-1/L Petition dismissed.

2016 Y L R 969

[Lahore]

Before Mamoon Rashid Sheikh, J

AMANAT ALI---Petitioner

Versus

Mst. NASEEM AKHTAR and others---Respondents

W.P. No.9661 of 2014, decided on 20th April, 2015.

Family Courts Act (XXXV of 1964)---

----S.5 & Sched.---Suit for recovery of maintenance---Source of income of father, proof of---Family Court decreed the suit for maintenance of minors with ten per cent annual increase---Father took the plea that the maintenance had not been determined keeping in view his source of income---Validity---Trial Court had passed the impugned judgment and decree after detailed appreciation of the evidence brought on record---Defendant claimed to be a driver in government hospital, however, his pay slip stated that he was a Naib Qasid---Said pay slip was, therefore, questionable---No infirmity or illegality in the impugned judgment and decree existed---Defendant failed to point out the circumstances to warrant exercise of Constitutional jurisdiction---Constitutional petition was dismissed in circumstances.

Ch. Muhammad Tufail for Petitioner.

Muhammad Umar Malik for Respondent No.1.

ORDER

MAMOON RASHID SHEIKH, J.--The instant petition is directed against the judgment and decree dated 31.10.2013 passed by the learned Judge Family Court, Zafarwal, District Narowal (respondent No.2) and the judgment and decree dated 24.03.2014 passed by the learned Additional District Judge, Zafarwal, District Narowal (respondent No.3), whereby respondents Nos.1 to 1(e)'s suit against the petitioner for recovery of maintenance and dowry has been decreed in the terms that the minor respondents Nos.1(a) to 1(e) have been held entitled to recover maintenance from the petitioner at the rate of Rs.2000/- per month per minor w.e.f. 1-1/2 months prior to the institution of the suit till their marriage in the case of respondents Nos.1(a) to 1(c) and till their age of majority in the case of respondents Nos.1(d), and 1(e) with 10% annual increase, respondent No.1 has, however, not been held entitled to recover maintenance, she has, however, been held entitled to recover certain articles of her dowry as per list (Exh.P.4) or Rs.70,000/- in lieu thereof.

2. The learned counsel for the petitioner submits that the impugned judgments and the decrees are the result of misreading and non-reading of evidence. The impugned judgments and decrees are based on conjectures and surmises. They have been passed in violation of the principle of law that although a father is bound to maintain his minor children, however, according to his source of income.

3. Further submits that the petitioner was able to establish on the record that he was working as a driver in one of the Government Hospitals at Lahore and the total take, home pay of the petitioner is Rs.14,716/-. This fact was proved by petitioner by placing his pay slip on the record. Further submits that the petitioner has remarried, therefore, he cannot afford to maintain the minors according to the impugned decrees.

4. The learned counsel for respondents Nos.1 to (e) supports the impugned judgments and decrees and contends that the petitioner has concealed his actual income. Prays for dismissal of the petition.

5. Heard. Record perused.

6. I find that the impugned judgments and decrees have been passed after a detailed appreciation of the evidence brought on the record. I further find that if on the one hand respondents Nos.1 to 1(e) were unable to prove the extent of the actual income of the petitioner then on the other hand the petitioner has done his best to conceal his real income. It may be worth noting in this respect that although the petitioner claims to be a driver in a Government Hospital, however, his pay slip states that he is a Naib Qasid. The petitioner's pay slip, therefore, becomes questionable. In such circumstances, I do not find any infirmity or illegality in the impugned judgments and decrees vis-à-vis the maintenance of the minors.

7. I further find that although the learned counsel for the petitioner has tried to establish a case of misreading and non-reading of evidence. He has, however, been unable to point out any instance warranting interference by this court in the exercise of its constitutional jurisdiction.

8. The learned counsel for the petitioner has similarly been unable to establish that the impugned judgments and decrees suffer from exercise of jurisdiction or that they are perverse.

9. Under the circumstances, the petition fails and is accordingly dismissed with no order as to costs.

SL/A-22/L Petition dismissed.

2017 C L C 375

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD AWAIS----Petitioner

Versus

ISLAMIC REPUBLIC OF PAKISTAN and another----Respondents

Writ Petition No.4939 of 2016, decided on 26th October, 2016.

Civil Procedure Code (V of 1908)---

----Ss. 47 & 104---Punjab Civil Courts Ordinance (II of 1962), S.18 [as amended by S.6 of Punjab Civil Courts (Amendment) Act, (XXXVIII of 2016)]---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Conversion of proceedings---Alternate and efficacious remedy---Petitioner was aggrieved of order passed under S.47, C.P.C. and instead of availing remedy of appeal, invoked Constitutional jurisdiction of High Court---Plea raised by petitioner was that non-filing of appeal was not fatal as order in question was illegal and was passed without any lawful authority---Appeal lay in the matter under the provisions of S.104(1)(ff), C.P.C. and petitioner failed to prove that the same was neither efficacious nor speedy---High Court directed the office to convert Constitutional petition into appeal as the same had been filed within the period of limitation and remit the appeal to concerned Court for decision---Constitutional petition was disposed of accordingly.

Mehboob Alam v. Federation of Pakistan through Secretary Finance and 2 others 2003 CLC 1705; Precision Engineering Ltd. and others v. The Grays Leasing Limited PLD 2000 Lah. 290; Pakistan through Military Estates Officer, Military Estate Office, Rawalpindi v. Abdul Aziz and another 2001 CLC 1086 and Abdul Basit Zahid v. Modaraba Al-Tijarah through Chief Executive and 2 others PLD 2000 Kar. 322 ref.

Syed Waqar Hussain Naqvi for Petitioner.

Muhammad Mahmood Khan, Deputy Attorney-General for Pakistan.

Capt. Shoaib Ahmed, Headquarter Military Farm Group Okara.

ORDER

MAMOON RASHID SHEIKH, J.--- Through the instant petition the petitioner has called into question the order dated 04.02.2016 passed by the learned executing Court

(respondent No.2); in the petition filed by respondent No.1 for execution of the judgment and decree, dated 26.11.2011, passed by the Civil Judge 1st Class, Okara, for recovery of Rs.7,361,219/- plus profit at the rate of 10% per annum from the date of decree till realization; whereby upon the petitioner's failure to pay the decretal amount he was sent to prison for a period of one year.

2. The petitioner has challenged the order dated 04.02.2016 inter alia on the grounds that before passing the order respondent No.2 did not follow the mandatory provisions of law as contained in Section 51, read with Order XXI Rule 40 of the C.P.C. inasmuch the petitioner was not given an opportunity of showing cause as to why he should not be committed to prison. It is further contended that in absence of a show cause notice the impugned order could not have been passed. Reliance in this is placed on the judgments reported as "Mehboob Alam v. Federation of Pakistan through Secretary Finance and 2 others (2003 CLC 1705), "Precision Engineering Ltd. and others v. The Grays Leasing Limited" (PLD 2000 Lahore 290) Pakistan through Military Estates Officer, Military Estate Office, Rawalpindi v. Abdul Aziz and another" (2001 CLC 1086) and "Abdul Basit Zahid v. Modaraba Al-Tijarah through Chief Executive and 2 others" (PLD 2000 Karachi 322).

3. The learned DAG submits that, without prejudice to respondent No.1's stand on merits, the instant petition is not maintainable as the petitioner has approached this Court without exhausting the statutory remedy of appeal. Contends that by virtue of the provisions of Section 47 of the C.P.C. all questions arising between the parties in execution proceedings are to be regulated by Section 47 and any order passed under Section 47 is appealable under Section 104(1) (ff) of the C.P.C. Reiterates that as the petitioner has not filed the appeal as envisaged by the said provisions, the instant petition is not maintainable and is liable to be dismissed.

4. The learned counsel for the petitioner submits that the impugned order is patently illegal. There is nothing on record to show that the requisite show cause notice was given to the petitioner. Contends that in such circumstances the non-filing of the appeal before filing of the instant petition is not fatal to the petitioner's case.

5. The learned DAG submits that the petitioner has not approached this Court with clean hands inasmuch as on 01.02.2012 during the hearing of the petitioner's RFA No.18/2012 against the decree the petitioner in order to obtain interim relief made a statement that he is a man of means and undertook to furnish a surety bond against immovable property owned by him. The petitioner, however, failed to do so, hence, his arrest in accordance with the law. The petitioner has now taken the stand that he

cannot afford to pay the decretal amount nor does he own any immovable property to be submitted as security. The petitioner's appeal (RFA No.18/2012) has, however, been remitted to the District Judge, Okara, due to the change in pecuniary jurisdiction of appeal Courts brought about by the amendment in Section 18 of the Punjab Civil Courts Ordinance, 1962, through Section 6 of the Punjab Civil Courts (Amendment) Act, 2016.

6. Having considered the arguments of the learned counsel for the petitioner and the learned DAG and after going through the record I am persuaded by the arguments of the learned DAG that in essence the impugned order has been passed in furtherance of Section 47 of the C.P.C., therefore, an appeal lies in the matter under the provisions of Section 104(1) (ff) of the C.P.C. The learned counsel for the petitioner has tried to make out a case that the non-filing of the appeal by the petitioner is not fatal to his case as the impugned order is illegal and has been passed without any lawful authority. That may be so, however, the fact remains that an appeal lies in the matter and the petitioner has been unable to establish that the remedy of appeal is neither efficacious nor speedy.

7. In the interest of justice, however, and in view of the fact that the petition was filed within the period of limitation, it is directed that the office shall treat the instant petition as the petitioner's appeal under Section 104(1)(ff) of the C.P.C. and re-register the petition as such, subject to payment of Court-fee, if any. And in view of the afore-referred amendment in the Ordinance, ibid., the office shall thereafter remit the appeal to the learned District Judge, Okara to be entrusted to the Court of competent jurisdiction.

8. It is further directed that the learned Court seized of the appeal shall decide the appeal expeditiously and purely on merits without being influenced by any observation having been made in this order.

9. Order accordingly.

There is no order as to costs.

MH/M-5/L Order accordingly.

2017 C L C 389

[Lahore]

Before Muhammad Khalid Mehmood Khan and Mamoon Rashid Sheikh, JJ

Mian TARIQ MAQSOOD and others----Appellants

Versus

PROVINCE OF PUNJAB and another----Respondents

R.F.A. No.162 of 2010, heard on 29th October, 2014.

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

----Ss. 4, 18 & 23---Acquisition of land---Compensation---Determining factors---Delay in decision---While assessing compensation of land/property, Land Acquisition Collector and also the Courts are to bear in mind that under S.23 of Land Acquisition Act, 1894, market value of land alone is not to be considered---Potential value of land/property has to be calculated and/or figured out---If there is a considerable delay between notification under S.4 of Land Acquisition Act, 1894, and date of announcement of Award, then delay is also to be factored in whilst calculating potential value of land/property as prices of land/property may have escalated during intervening period---High Court observed that it would be unjust to owner of land if he is not given the benefit of escalation.

Province of Punjab through Land Acquisition Collector and another v. Begum Aziza 2014 SCMR 75 rel.

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

----Ss. 4 & 18---Acquisition of land---Compensation---Delay in decision---Land owned by appellant was acquired by authorities for public purpose---Reference filed by appellant was dismissed by Referee Court---Plea raised by appellant was that there was delay of more than 17 years between acquisition of land and announcement of award---Validity---Prices of land had escalated during intervening period---Such escalation was not factored into the potential value of land as determined by Land Acquisition Collector---High Court set aside the award and order passed by Referee Court and remanded the matter to Referee Court for decision afresh---Appeal was allowed accordingly.

Province of Sindh through Collector of District Dadu and others v. Ramzan and others PLD 2004 SC 512; Government of N.-W.F.P. v. Mst. Taj Begum 2003 MLD 1865 and Muhammad Saeed and others v. Collector, Land Acquisition and others 2002 SCMR 407 ref.

Province of Punjab through Land Acquisition Collector and another v. Begum Aziza 2014 SCMR 75 rel.

S.M. Mohsin Zaidi for Appellants.

Malik Abdul Aziz Awan, A.A.-G., Zahoor Ahmad, DFO, Lahore/Sheikhupura and Ishtiaq Yunus SDFO, Jallo for Respondents.

Date of hearing: 29th October, 2014.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- This is a regular first appeal calling into question the judgment/decree dated 20.01.2010 passed by the learned Referee Court/the Senior Civil Judge, Lahore, whereby the appellants' Reference under Section 18 of the Land Acquisition Act, 1894 (the Act) in respect of the land/property in question has been dismissed.

2. The facts relevant for the present purposes are to the effect that the Forest Department, Government of the Punjab, has set up a Safari/Forest Park in Mauza Jallo, District Lahore. The said park is known as the Jallo Park. An approach road (the Road) leads from the main Canal Bank Road to the Jallo Park. For the purpose of providing a green belt along both sides of the Road the Forest Department decided to acquire private land/property. A preliminary Notification No.LAC/6047 dated 06.04.1985 gazetted on 10.04.1985 was issued by the then Commissioner, Lahore Division Lahore, under Section 4 of the Act. Subsequent thereto, Notification No.LAC/36 dated 12.09.1985 under Section 17(4) of the Act was issued by the Commissioner which was gazetted on 24.09.1985. Initially it was proposed that the green belt would expand to 200 feet on both sides of the Road thus a total area of 169-Kanals 9-Marlas situated in Mauza Manawan and Mauza Jallo was proposed to be acquired in the public interest. However, owners of the land challenged the acquisition proceedings through W.P.No.4352 of 1985. This petition was disposed of through the order dated 21.12.1987 passed by Mr. Justice M.A. Lone (as he then was) on the basis of a compromise having been effected between the Government and the land owners. As a consequence, the Government agreed to confine the acquisition of land to 75 feet instead of 200 feet on either side of the road provided the land owners/writ petitioners withdrew the writ petition and dropped the other litigation against the Government.

3. As a consequence, Corrigendum Nos.LAC/15398 dated 13.08.1991 and LAC/734 dated 13.01.1992 were issued in the above Notifications and were gazetted on 05.09.1991

and 23.01.1992 respectively with the effect that the land to be acquired was reduced to 67-Kanals 8-Marlas. Out of this land 9-Kanals and 6-Marlas are situated in Mauza Manawan whereas 58-Kanals and 2-Marlas are situated in Mauza Jallo, Tehsil Cantt. District Lahore. The land of the appellants is situated in Mauza Jallo. Subsequent to the publishing of the Corrigenda the appellants are stated to have filed objection petitions before the Land Acquisition Collector. The Award was finally announced on 16.12.2002 whereby despite the appellants' claim for a higher price the Land Acquisition Collector fixed the price of the land in question at the rate of Rs.700/- per Marla for the land situated in Mauza Manawan and Rs.350/- for the land situated in Mauza Jallo with 15% compulsory acquisition charges.

4. Feeling aggrieved the appellants filed the Reference in question against the respondents. On the basis of the pleadings of the parties the learned Referee Court framed the following issues:-

> "1. Whether the reference is not maintainable and is liable to be dismissed with cost? OPR
>
> 2. Whether the Award dated 16.12.2002 has been announced in accordance with the law? OPR
>
> 3. Whether the disputed land was acquired for establishment of green belt on either side of approach road to Jallo Park, Lahore? OPP"
>
> 4. Whether price assessed by the Land Acquisition Collector is not the market value which is now not less than Rs.90,000/- per marla and the LAC has not assessed the correct value of the land? OPP
>
> 5. Whether the Land Acquisition Collector has not assessed value of trees, building over the land? OPP
>
> 6. Whether the petitioners are entitled to the relief as prayed for on the grounds mentioned in the petition? OPP
>
> 7. Relief.

5. During the pendency of the Reference although the respondents filed their defences yet they absented themselves, therefore, ex parte proceedings were initiated against them.

6. The appellants led evidence which went un-rebutted. The learned Referee Court, however, on the basis of the evidence led decided all issues against the appellants with the

result that through the impugned judgment/decree dated 20.10.2010 the appellants' Reference was dismissed.

7. The learned counsel for the appellants submits that the learned Referee Court has erred whilst passing the impugned judgment/decree inasmuch as it has not considered the evidence brought on the record. The learned Referee Court failed to appreciate that the Notification under Section 4 of the Act was gazetted on 10.04.1985 and the Award was announced on 16.12.2002 i.e. after a passage of more than seventeen (17) years. The intervening period which by no stretch of the imagination is a reasonable period should have been factored in by the Land Acquisition Collector as also the learned Referee Court whilst deciding the potential value of the land in the appellants' case. Further submits that the learned Referee Court also failed to appreciate that the respondents had not led any evidence in rebuttal whereas the appellants had brought on record cogent and confidence inspiring evidence both oral and documentary in support of their case. The learned Referee Court, however, failed to appreciate the evidence so brought on the record.

8. Contends that the impugned judgment/decree suffers from mis-reading and non-reading of evidence. Further contends that it is settled law that whilst assessing the compensation to be awarded to an affectee under Section 23 of the Act the market value of the land is to be taken into consideration. Market value does not mean the actual market value but the potential value of the land/property in question. The market value is only one factor which has to be decided by the Land Acquisition Collector and the Courts. The price should be determined inter alia on the principle that what price a willing purchaser would give to a willing seller. Similarly, if there is an inordinate delay in the publication of the Notification under Section 4 of the Act and announcement of the Award, benefit of the delay is to be given to the affectees. The learned Referee Court has failed to appreciate these settled principles of law. Relies on "Province of Sindh through Collector of District Dadu and others v. Ramzan and others" (PLD 2004 Supreme Court 512), "Government of N.-W.F.P. v. Mst. Taj Begum" (2003 MLD 1865) and "Muhammad Saeed and others v. Collector, Land Acquisition and others" (2002 SCMR 407).

9. The learned A.A-G. submits that the land in question has been acquired for establishing of a green belt on both sides of the road. The land cannot be put to any other use, therefore, the Land Acquisition Collector as also the learned Referee Court have come to the just conclusion as to the compensation to be awarded to the appellants. Further submits that the delay in announcement of the Award in fact was caused by the appellants. A writ petition was filed in the year 1985 which was decided through the order dated 21.12.1987 and the area of the land which was to be acquired was reduced on account of a

compromise arrived at between the affectees and the Government of the Punjab. The Corrigenda in the Notifications was issued as a result thereof. Thereafter the process of hearing objection petitions was started by the Land Acquisition Collector, however, different affectees kept on approaching various Courts and obtained stay orders. The litigation in this respect still continues and it was in this scenario the Award was announced on 16.12.2002.

10. Contends that there is no delay on the part of the Land Acquisition Collector. In fact the delay, if any, was caused by the litigation started initially by the appellants and the other affectees.

11. Further submits that the learned Referee Court after assessing the evidence brought on the record by the appellants came to the right conclusion that the market value of the land in question was as determined by the Land Acquisition Collector.

12. Further submits that the land in any case cannot be put to any other use. Under the law no construction can be raised on the berm of the road as both sides of the road are to be kept clear of all encroachments. As such the land does not have a high value, potential or otherwise.

13. Further contends that the appellants cannot claim a higher rate of compensation as the land till today remains in their possession and they have been deriving benefit therefrom. The appellants, therefore, cannot say that they have been denied possession of the land and have not been adequately compensated. The appellants on the other hand are liable to pay mesne profits to the respondents.

14. Further submits that the learned Referee Court erred by proceeding ex parte against the respondents with the result that the respondents have been condemned unheard. Pleads violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.

15. We have considered the arguments of the learned counsel and have also gone through the record. We find that the Notification under Section 4 was gazetted on 10.04.1985 and the Award was announced on 16.12.2002. It is a matter of concern as to why such a long time was taken by the Land Acquisition Collector to hear the objection petitions and announce the Award. The explanation given by the learned A.A.-G. seems to hold force that the acquisition in question was subject matter of litigation before various Courts and is even to-date under litigation. That reason may be persuasive but at the same time a duty was imposed upon the Land Acquisition Collector to proceed in the matter with reasonable dispatch. We have noted the same pattern in a number of cases where after the publication

of the initial Notification under Section 4 of the Act the matter keeps on lingering on and the Award is announced after a number of years whereas the scheme of the Act envisages prompt action where the land is to be acquired for a public purpose that is construction of a road, school, hospital, etc. The Government and the Acquiring Agencies always plead urgency and issue Notifications under Sections 17(4) and 6 of the Act to take over the immediate possession of the land/property on the grounds that the project is of utmost public importance and is to be completed within a stipulated period, however, at the same time adequate and prompt compensation is not awarded to the affectees.

16. We agree with the contention of the learned counsel for the appellants that while assessing the compensation of the land/property in question the Land Acquisition Collector as also the Courts are to bear in mind that under Section 23 of the Act the market value of the land alone is not to be considered. The potential value of the land/property has to be calculated and/or figured out. Moreover, if there is a considerable delay between the Notification under Section 4 of the Act and the date of announcement of the Award (which delay in the instant case is more than seventeen (17) years) then the delay is also to be factored in whilst calculating the potential value of the land/property as prices of the land/property may have escalated during the intervening period. It would, therefore, be unjust to the owner of the land if he is not given the benefit of escalation. There are ample precedents on this point. The latest being the judgment reported as "Province of Punjab through Land Acquisition Collector and another v. Begum Aziza" (2014 SCMR 75). For ease of reference the relevant portion thereof is being reproduced hereunder:-

> 6. Admittedly the suit land is located about 25 karams away from Murree Road and opposite to the office of Survey of Pakistan. P.W.1 Sardar Khan, Deputy MEO admitted in cross¬-examination that there are shops on one side of the said office as well as on its back; that adjacent to the land is the Ojhri Camp; that across the said camp also there are shops and that on the other side of the road are commercial as well as residential properties including a petrol pump. Muhammad Riaz A.W.2 an official of the office of Deputy Commissioner, Rawalpindi, admitted that as per the valuation table issued by the office of the Deputy Commissioner, the commercial land is assessed at Rs. 2,25,000 per marla whereas the residential land is assessed as Rs.35,000 per marla in the said area. The valuation table was prepared and notified in terms of section 27-A of the Stamp Act, 1899. This valuation table by itself may not furnish conclusive evidence qua the value of the property but this can be taken note of particularly in absence of any evidence to the contrary regarding the value of the property and other factors reflected in the evidence with regard to the potential value of the property. While assessing the compensation, the Collector has not only

to consider the market value of the land in question but its potential value. The market value is normally taken up as one existing on the date of notification under section 4(1) of the Land Acquisition Act under the principle of willing buyer and willing seller while the potential value was the value to which similar lands could be put to any use in future. Thus in determining the quantum of compensation the exercise may not be restricted to the time of the aforesaid notification but its future value may be taken into account. In Abdur Rauf Khan v. Land Acquisition Collector/D.C. (1991 SCMR 2164) this court while dilating upon the question of rate of compensation laid down following principles germane to section 23 of the Land Acquisition Act which may be kept in view. Those are as follows:--

"(i) That an entry in the Revenue Record as to the nature of the land may not be conclusive, for example, land may be shown in Girdawari as Maira, but because of the existence of a well near the land, makes it capable of becoming Chahi land;

(ii) That while determining the potentials of the land, the use of which the land is capable of being put, ought to be considered;

(iii) That the market value of the land is normally to be taken as existing on the date of publication of the notification under section 4(1) of the Act but for determining the same, the prices on which similar land situated in the vicinity was sold during the preceding 12 months and not 6-7 years may be considered including other factors like potential value etc."

7. The afore-referred ratio was reiterated with greater depth in Murad Khan v. Land Acquisition Collector (1999 SCMR 1647) wherein the court found that though the expression "market value" appearing in section 23 of the Land Acquisition Act has not been defined but its import can be appreciated from the precedent case-law. The Court deduced from the precedent case-law the following principles:--

(i) The data from which the market value of the land can be estimated is given in Rule 13 of the North-West Frontier Province Circular No.54 issued presumably under section 55 of the Act. (Premier Sugar Mills Limited v. Hayatullah Khan (PLD 1956 (W.P.) Pesh. 67).

(ii) The best method to work out the market value is the practical method of a prudent man laid down in section 3 of the Evidence Act to examine and analyse all the material and evidence available on the point and to determine the price which a willing purchaser would pay to willing seller of the acquired land. "The Land

Acquisition Collector, Rawalpindi v. Lieut. General Wajid Ali Khan Burki (PLD 1960 (W.P.) Lah. 469).

(iii) Subsection (1) of section 23 of the Act provides that in determining the amount of compensation the Court shall take into consideration the market value, loss by reason of severing such land from his other land, acquisition injuriously affecting his other property or his earning in consequence of change of residence or place of business and damage, if any, resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land. This, however, is not exhaustive of other injuries or loss which may be suffered by an owner on account of compulsory acquisition. (Province of West Pakistan and another v. M. Salim Ullah and others (PLD 1966 SC 547).

(iv) The best method of determination of the market price of the plots of land under the acquisition is to rely on instances of sale of it near about the date of notification under section 4(i) of the Act. The next best method is to take into consideration the instances of sale of the adjacent lands made shortly before and after the notification. When the market value is to be determined on the basis of the instances of sale of land in the neighbouring locality, the potential value of the land need not be separately awarded because such sales cover the potential value. (Jogendra Nath Chatterjee and others v. State of West Bengal (AIR 1971 Calcutta 458).

(v) It is obvious that the law provides determination of compensation not with reference to classification or nature of land but its market value at the relevant time. No doubt, for determining the market value, classification or the nature of land may be taken as relevant consideration but that is not the whole truth. An area may be Banjar Qadeem or Barani as in the present case but its market value may be tremendously high because of its location, neighbourhood, potentiality or other benefits. (Pakistan and another v. Rehm Dad and another (1980 CLC 574).

(vi) According to the well-settled principle, while determining the value of the compensation the market value of the land at the time of requisition/acquisition and its potentiality have to be kept in consideration. (Pakistan v. Din Muhammad and others (1983 CLC 1281).

(vii) Consideration should be had to all the potential uses to which the land can be put, as well as all the advantages, present or future, which the land possesses in the

hands of the owners. (Mst. Khatu and others v. Barrage Mukhtiarkar, Thatta (PLD 1977 Kar. 203).

(viii) In determining the quantum of fair compensation the, main criterion is the price which a buyer would pay to a seller for the property if they voluntarily entered into the transaction. (Din Muhammad v. General Manager, Communication and others (PLD 1978 Lah. 1135).

(ix) The measure of fair compensation is the value of the property in open market which a seller voluntarily entering into a transaction of sale can reasonably demand from a purchaser this means that we, have to determine the value of the land in the open market at the relevant time on the assumption that the notification of acquisition did not exist. (Province of Punjab v. Sher Muhammad and another (PLD 1983 Lah. 578).

(x) While determining the value of the land acquired by the Government and the price which a willing purchaser would give to the willing seller, only the past sales' should not be taken into account but the value of the land with all its potentialities may also be determined by examining (if necessary as Court witness) local property dealers or other persons who are likely to know the price that the property in question is likely to fetch in the open market. In appropriate cases there should be no compunction even relying upon the oral testimony with respect to market value of the property intended to be acquired, because even while deciding cases involving question of life and death, the Courts rely on oral testimony alone and do not insist on the production of documentary evidence. The credibility of such witnesses would, however, have to be kept in mind and it would be for the Court in each case to determine the weight to be attached to their testimony. It would be useful and even necessary, to examine such witnesses while determining the market prices of the land in questions because of the prevalent tendency that in order to save money on the purchases of stamp papers and to avoid the imposition of heavy gain tax levied on sale of property, people declare or show a much smaller amount as the price of the land purchased by them than the price actually paid. The previous sales of the land, cannot, therefore, be always taken to be an accurate measure for the determining the price of land intended to be acquired. (Fazalur Rehman and others v. General Manager, S.I.D.B. and another (PLD 1986 SC 158).

(xi) The sale-deed and mutation entries do serve as an aid to the prevailing market value. (Government of Pakistan v. Maulvi Ahmed Saeed (1983 CLC 414).

(xii) It is a well-settled law that in cases of compulsory acquisition effort has to be made to find out what the market value of the acquired land was or could be on the material date. While so venturing the most important factor to be kept in mind would be the complexion and character of the acquired land on the material date. The potentialities it possessed on that date are also to be kept in view in determining a fair compensation to be awarded to the owner who is deprived of his land as a result of compulsory acquisition under the Act. (Central Government of Pakistan v. Sardar Fakhar-e-Alam and another (1985 CLC 2228).

(xiii) The value of the land of the adjoining area which was simultaneously acquired and for which different formula of compensation has been adopted, should be taken into consideration. (Raza Muhammad Abdullah through his Legal Heirs v. Government of Pakistan and others (1986 MLD 252).

(xiv) The phrase "market value of the land" as used in section 23(1), of the Act means "value to the owner" and, therefore, such value must be the basis for determination of compensation. The standard must be no, subjective standard but an objective one. Ordinarily, the objective standard would be the price that owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser. The property must be valued not only with reference to its condition at the time of the determination but its potential value must be taken into consideration. (Abdul Wahid and others v. The Deputy Commissioner (1986 MLD 381)."

8. The learned Referee Court neither adverted to the afore-mentioned principles nor appreciated the evidence in proper perspective. There is yet another aspect of the matter which may have a bearing on the value of the property. The notification under section 4 of the Act was published on 27-4-1981; two corrigenda were issued on 6-10-1982; notification under section 5 was published on 20-7-1983; the declaration under section 6 was published on 1-2-1984 and the award was announced on 28-3-1985. Thus it took four years for appellants to complete the acquisition proceedings. The prices may have escalated during this period and this escalation has to be kept in view while assessing the potential value of the land. This is in line with the law laid down by this Court in Province of Sindh v. Ramzan (PLD 2004 SC 512), Abdul Majeed etc. v. Muhammad Subhan etc. (1999 SCMR 1245 at 1255) and Pakistan Burma Shell Limited v. Province of N-W.F.P. etc. (1993 SCMR 1700).

9. For what has been discussed above, we are of the view that the judgment of the Lahore High Court is in consonance with the spirit of section 23 of the Land

Acquisition Act and is in accord with the principles laid down by this Court. We do not find any merit in these appeals, which are dismissed with no order as to costs."

17. In the instant case we find that the above principles of law especially the principle relating to factoring in the delay between the Notification issued under Section 4 of the Act and announcement of the Award have neither been considered nor followed by the Land Acquisition Collector as also the learned Referee Court whilst determining the potential value of the land/property in question. There is an admitted delay of more than seventeen (17) years between the Notification under Section 4 of the Act and the announcement of the Award. Prices of land have indeed escalated during the intervening period. The said escalation has not been factored into the potential value of land as determined by the Land Acquisition Collector. We, therefore, find that the Land Acquisition Collector as also the learned Referee Court have erred in law.

18. We further find that whilst discussing Issues Nos.2 and 4 the learned Referee Court has placed reliance on the findings of the Land Acquisition Collector and has completely ignored the evidence brought on the record by the appellants. We, therefore, feel that the learned Referee Court has erred in law.

19. At the same time we note that the contention of the learned A.A.-G. that since the land has admittedly remained in the possession of the appellants, therefore, they appear to have derived benefit therefrom also has some force. This factor has also not been of taken note by the Land Acquisition Collector and/or the learned Referee Court.

20. We also note that the respondents were proceeded against ex parte before the learned Referee Court. We, therefore, in view of the contention of the learned A.A.-G. that the respondents have been denied the opportunity to set up their defence or to lead evidence, are of the view that in the facts and circumstances of the case the respondents deserve the opportunity of hearing.

21. In view of the above, we set aside the impugned order/decree dated 20.01.2010 and remand the matter to the learned Referee Court for decision afresh.

22. The Reference of the appellants shall be deemed to be pending before the learned Referee Court. The respondents shall be given the opportunity to file their defence to the Reference if not already filed. The appellants as well as the respondents shall be given the opportunity to lead evidence. The learned Referee Court shall on the basis of the evidence so led decide the appellants' Reference in the light of the guidelines given by the Hon'ble Supreme Court in the judgment reported as "Province of Punjab through Land Acquisition Collector and another v. Begum Aziza" (2014 SCMR 75) and the judgments cited at the bar by the learned counsel for the appellants.

23. In view of the order of remand we hold that the costs of the appeal shall be borne by the parties.

24. We further direct that the learned Referee Court shall decide the Reference within four (4) months from the receipt of the copy of the order/record under intimation to this Court.

25. The office is directed to remit the record forthwith.

MH/T-2/L Case remanded.

2017 C L C 411

[Lahore]

Before Mamoon Rashid Sheikh, J

SUI NORTHERN GAS PIPELINES LTD. through Authorized Attorney----Petitioner

Versus

NASIR MEHMOOD KHAN and 2 others----Respondents

Writ Petitions Nos.8862, 8857 to 8860, 8863, 12987 and 12988 of 2015, decided on 30th June, 2015.

(a) Oil and Gas Regulatory Authority Ordinance (VII of 2002)---

----S. 42(e)---Complaint Resolution Procedure (for Natural Gas Liquefied Petroleum Gas (LPG), Compressed Natural Gas (CNG) and Redefined Oil Products) Regulations, 2003---Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order (1 of 1983), Arts.2(2) & 11---Wafaqi Mohtasib, Jurisdiction of---Scope---Complaint before Wafaqi Mohtasib (Ombudsman)---Sui Northern Gas Pipelines Company was aggrieved of assuming of jurisdiction by Wafaqi Mohtasib (Ombudsman) in the matters pertaining to issuance of detection bills to consumers---Validity---Executability of an order or decree could be raised and it was open to the party against whom it was sought to be executed to show that it was null and void or had been made without jurisdiction or that it was incapable of execution---Petitioner company had not raised question of jurisdiction of Wafaqi Mohtasib (Ombudsman) earlier yet petitioner was not estopped from raising the question of lack of jurisdiction for the first time before High Court---High Court directed consumers to approach Oil and Gas Regulatory Authority for redress of their respective grievances and

set aside the orders passed by Wafaqi Mohtasib (Ombudsman)---Constitutional petition was allowed in circumstances.

SNGPL v. Wafaqi Mohtasib and others 2015 MLD 1029; M/s Rana Textiles Limited v. Sui Northern Gas Pipelines Limited and others 2016 YLR 1 and Islamic Republic of Pakistan v. Muhammad Saeed PLD 1961 SC 192 rel.

(b) Jurisdiction---

----Consent of parties---Waiver/estoppel---Scope---Where a Court or forum lacks inherent jurisdiction, no amount of consent or acquiescence in the proceedings can invest such court or forum with requisite jurisdiction---Question of waiver or estoppel does not arise in such situations---Jurisdiction of court or Tribunal is to be conferred by law and not by consent of parties express or implied---Parties to a lis by way of their consent cannot take away or confer jurisdiction upon a court and/or forum.

Muhammad Hussain and another v. Muhammad Shafi and others 2004 SCMR 1947; Munawar Hussain and 2 others v. Sultan Ahmed 2005 SCMR 1388 and Multan Electric Power Company Ltd. through Chief Executive and another v. Muhammad Ashiq and others PLD 2006 SC 328 rel.

Umer Sharif for the Petitioner-SNGPL.

Muhammad Zikria Sheikh, Deputy Attorney-General for Pakistan.

Raja Asif Ali for respondent No.1.

Rana Muhammad Yasin for respondent No.1 (in W.P.No.8857/2015).

M. Nadeem Tusawar Consultant (Legal), Wafaqi Mohtasib Respondent No.2.

ORDER

MAMOON RASHID SHEIKH, J.--- The instant petition (W.P.No.8862/2015) and W.Ps. Nos.8857, 8858, 8859, 8860, 8863, 12987 and 12988 of 2015 are proposed to be decided through this single order as common questions of law and facts arise therein.

2. The private respondents in W.Ps. Nos. 8859, 12987, and 12988 of 2015 were proceeded against ex parte through orders dated 17.06.2015. The private respondents in W.Ps. Nos.8860 and 8863 of 2015 have been proceeded against ex parte through separate orders of even date (30.06.2015).

3. For the sake of convenience, insofar as the context so permits, the parties shall hereinafter be referred to as given in the title of the instant petition.

4. The learned counsel for the petitioner submits that all the petitions pertain to issuance of detection bills by the petitioner-SNGPL to the private respondents/consumers in respect of the gas connections installed at their respective premises. All the private respondents upon issuance of the detection bills approached the learned Wafaqi Mohtasib (respondent No.2) by filing complaints under Article 2(2) read with Article 11 of the Wafaqi Mohtasib (Ombudsman) Order, 1983 (the Order). Respondent No.2 assumed jurisdiction in the matter and found in favour of the private respondents, inter alia, in the terms that the detection bills were declared to be unjustified and were directed to be withdrawn/cancelled. Any excess amounts paid by the private respondents were directed to be credited to them against future bills. The petitioner-SNGPL was directed to file the compliance report within 30-days of the passing of the order by the respondent No.2.

5. Further submits that feeling aggrieved the petitioner-SNGPL filed representations before the President of Pakistan under Article 32 of the Order. The petitioner-SNGPL's representation were, however, rejected by the President.

6. Submits that the impugned orders have been passed by respondent No.2 without jurisdiction and lawful authority. Further submits that the Regulatory Authority in the matter, is the Oil and Gas Regulatory Authority (OGRA) which was established by the Federal Government under the Oil and Gas Regulatory Authority Ordinance, 2002 (the Ordinance). Further submits that Section 42(e) of the Ordinance provides for establishment of a complaint resolution mechanism. Such a mechanism has been established by OGRA and is known as the Complaint Resolution Procedure [for Natural Gas, Liquefied Petroleum Gas (LPG) and Compressed Natural Gas (CNG)] Regulations, 2003 (the Regulations).

7. Further submits that the Ordinance and the Regulations are a special law which provide for a mechanism for dispute resolution between a consumer and the licensee/gas supplier (the petitioner-SNGPL) vis-à-vis overbilling, detection bills, disconnection, removal of meters etc. As such OGRA has exclusive jurisdiction in the matter. The jurisdiction of respondent No.2 is, therefore, ousted in such matters. These disputes do not come within the purview of maladministration as defined in Article 2(2) of the Order.

8. Contends that in view thereof the impugned orders have been passed by respondent No.2 without jurisdiction and are of no legal effect.

9. Relies on the judgment dated 26.11.2014 passed by a learned Single Judge in Chambers of this Court in W.P.No.19826/2013 (2015 MLD 1029), entitled "SNGPL v. Wafaqi Mohtasib and others" and the judgment dated 03.06.2015 passed by a learned Division Bench of this Court in ICA No.146\ of 2015, (2016 YLR 1 entitled) "M/s Rana Textiles Limited v. Sui Northern Gas Pipelines Limited etc.".

10. Submits that the question of jurisdiction of respondent No.2 was directly and substantially in issue in W.P.No.19826/2013 (2015 MLD 1029) and other connected petitions. The judgment dated 26.11.2014 conclusively dealt with the said question and it was declared that:-

> "40 _____
>
> (1) The ombudsman does not have the authority and power under section 9 of the Order in matters covered by the special laws and the powers of the Ombudsman are excluded to that extent.
>
> (2) The proceedings pending before the Ombudsman with regard to SNGPL and LESCO and impugned herein are without lawful authority and of no legal effect.
>
> (3) Proceedings for an alleged maladministration can only be undertaken in the limited circumstances alluded to in this judgment."

11. Further submits that the private respondents in the afore-referred petitions filed appeals which were dismissed through the judgment dated 03.06.2015 passed in ICA No.146/2015 (2016 YLR 1) and the connected appeals with the result that the judgment dated 26.11.2014 passed in W.P.No.19826/2013 (2015 MLD 1029) was maintained.

12. Further submits that ICA No.146/2015 (2016 YLR 1) was in part decided on the statement of the learned counsel for the Office of respondent No.2 which was to the following effect:-

> "21. As regards the other appeals, as the learned counsel for the office of the Ombudsman has admitted that the office of the Ombudsman can only deal with the cases pertaining to mal-administration as contemplated in the Order and cannot transgress or interfere with the matters falling within the ambit of dispute resolution mechanism provided under OGRA Ordinance and NEPRA Act, it is, therefore, clarified that the cases, to the extent of maladministration can be looked into and decided by the office of the Ombudsman, however, the issues which fall within the ambit of dispute resolution mechanism provided under the OGRA

Ordinance and NEPRA Act, the same are to be adjudicated upon and decided by the available fora."

13. Contends that since the question of jurisdiction stands conclusively decided in favour of the petitioner, therefore, the impugned orders are liable to be set aside.

14. The learned counsel for respondent No.1 in W.P.No.8862/2015 submits that the instant petitions are not maintainable inter alia for the reason that the question of jurisdiction of respondent No.2 has been raised for the first time through these petitions. The jurisdiction of respondent No.2 was not questioned by the petitioner either before respondent No.2 or respondent No.3. The petitioner, therefore, cannot maintain that respondent No.2 does not have jurisdiction in the matter.

15. Submits that the judgments dated 26.11.2014 and 03.06.2015 passed in W.P.No.19826/2013 and ICA No.146/2013 respectively are not attracted to the facts and circumstances of the case. Further submits that the petitioner failed to appreciate that respondent No.1 was running a restaurant. Respondent No.1, however, closed down the restaurant in the month of March, 2009 and was, therefore, not consuming gas at the previous rate. The petitioner, however, issued a detection bill in the sum of Rs.441,040/- to respondent No.1 which was far in excess of the petitioner's actual consumption. Feeling aggrieved respondent No.1 filed a complaint before respondent No.2 under Article 2(2) read with Article 9 of the Order. Contends that the matter in issue between the petitioner and respondent No.1 was duly considered by respondent No.2 and decided in accordance with the Order/law.

16. Contends that the acts of omission and commission of the petitioner come under the purview of maladministration as defined through Article 2(2) of the Order. Further contends that there was no dispute relating to the meter, therefore, the matter was one of mal-administration. The jurisdiction, therefore, lay with respondent No.2. Reiterates that the judgments dated 26.11.2014 and 03.06.2015 passed in W.P.No.19826/2013 and ICA No.146/2015 respectively are not attracted in the facts and circumstances of the case.

17. The learned counsel for respondent No.1 in W.P.No.8857/2015 adopts the arguments of the learned counsel for respondent No.1 in W.P.No.8862/2015 vis-a-vis the jurisdiction of respondent No.2 in the matter.

18. The learned counsel for respondent No.1 in W.P.No.8858/2015 also adopts the arguments of the learned counsel for respondent No.1 in W.P.No.8862/2015.

19. The learned counsel for the office of respondent No.2 contends that respondent No.2 has jurisdiction, in the matter. Further contends that the petitioner is estopped from raising the question of jurisdiction in the present proceedings as the petitioner had not raised the question of jurisdiction earlier. Also contends that the judgments dated 26.11.2014 and 03.06.2015 passed in W.P.No.19826/2013 and ICA No.146/2015 respectively are not attracted in the facts and circumstance of the case.

20. The learned counsel for the petitioner submits in rebuttal that it is settled law that there is no estoppel and waiver qua jurisdiction. Mere submission to a forum does not confer jurisdiction. A void or an illegal order is to be attacked like a legal order. The petitioner is within its rights to challenge the jurisdiction of respondent No.2 before this Court even though the matter was not raised before respondents Nos.2 and 3. Relies on the judgments reported as "Munawar Hussain and 2 others v. Sultan Ahmad" (2005 SCMR 1388), and "Multan Electric Power Company Ltd. through Chief Executive and another v. Muhammad Ashiq and others" (PLD 2006 SC 328).

21. Reiterates that the Ordinance/Regulations provide for a comprehensive mechanism for dispute resolution in matters pertaining to detection bills, excessive billing, etc. In any event the private respondents were involved in tampering of meters and theft of gas, therefore, the detection bills were issued for recovering the pilfered amount.

22. The learned D.A-G. also relies on the judgments dated 26.11.2014, and 03.06.2015 passed in W.P.No.19826/2013 and ICA No.146/2015 respectively to contend that respondent No.2 does not have jurisdiction in the matter, therefore, the, remedy, if any, of all the private respondents lies in approaching the OGRA under the Ordinance/Regulations.

23. Heard. Record perused.

24. On the basis of the arguments of the learned counsel for the parties and the learned D.A-G. two questions arise which require determination by this Court.

25. The first question being whether the petitions are maintainable in view of the admitted position that the question of respondent No.2's jurisdiction has been raised for the first time in these petitions?

26. The second question which arises is that whether respondent No.2 has jurisdiction in the matter?

27. Adverting to the first question I find that, "... even in execution proceedings questions relating to the executeability of an order or decree can be raised and it is open to

the party against whom it is sought to be executed to show that it is null and void or had been made without jurisdiction or that it is incapable of execution. This has been so held by the Hon'ble Supreme Court of Pakistan in the judgment reported as "Islamic Republic of Pakistan v. Muhammad Saeed" (PLD 1961 SC 192). It would, therefore, follow that if the arguments of the learned counsel for the petitioner vis-a-vis the lack of jurisdiction of respondent No.2 in the matter are accepted then the petitioner would be within its rights to object to the enforcement of the impugned orders.

28. There is another aspect of the matter which is to the effect that where a Court or forum lacks inherent jurisdiction then no amount of consent or acquiescence in the proceedings can invest such Court or forum with the requisite jurisdiction. In such circumstances (as has been contended by the learned counsel for the petitioner) the question of waiver or estoppel shall not arise. However, where a Court does not lack in its inherent jurisdiction but the procedure or mode of hearing adopted by it is defective or irregular then if a party submits to the jurisdiction of such Court or forum without raising any objection as to such defect or irregularity which touches upon the Court's or the forum's jurisdiction, that party cannot be subsequently allowed to challenge the jurisdiction of the Court or forum when the result of the case goes against it. Reliance in this regard is placed on the judgment reported as "Muhammad Hussain and another v. Muhammad Shafi and others" (2004 SCMR 1947). The above judgment has been followed and reinforced through the judgment relied upon by the learned counsel for the petitioner and reported as "Munawar Hussain and 2 others v. Sultan Ahmed" (2005 SCMR 1388).

29. It is a further settled proposition of law that jurisdiction of a Court or Tribunal is to be conferred by law and not by consent of parties express or implied. Parties to a lis by way of their consent cannot take away or confer jurisdiction upon a Court and/or forum. "Munawar Hussain's case (supra) refers. Reliance is also placed upon the judgment cited by the learned counsel for the petitioner and reported as "Multan Electric Power Company Ltd. through Chief Executive and another v. Muhammad Ashiq and others" (PLD 2006 SC 328).

30. However, before I proceed to answer the first question a reply to the second question is required on the basis of the ratio of "Islamic Republic of Pakistan's case (supra). The inherent jurisdiction of respondent No.2 in the matter has been challenged by the petitioner on the touchstone of the afore-referred judgments dated 26.11.2014 and 03.06.2015 passed in W.P.No.19826/2013 and ICA No.146/2015 respectively. The said judgments have dealt with the question of respondent No.2's jurisdiction and it has been held that respondent No.2 does not have jurisdiction in the matter at hand. Indeed, the judgment in ICA No.146/2015 has in no small measure been rendered on the basis of the admission of the

learned counsel for the office of respondent No.2. The relevant portions of both the said judgments have been reproduced in Paras 10 and 12 above and are self-explanatory.

31. Under the circumstances I hold that respondent No.2 does not have jurisdiction in the matter. The second question posed in Para-25 above is answered accordingly.

32. On this view of the matter I further hold that albeit the petitioner had not raised the question of respondent No.2's jurisdiction earlier that is to say either before respondent No.2 or respondent No.3 yet on the basis of the judgments of the Hon'ble Supreme Court cited hereinabove the petitioner is not estopped from raising the question of respondent No.2's lack of jurisdiction for the first time before this Court. The first question (posed in Para-24 above) is, therefore, answered in the affirmative.

33. As a consequence, all the petitions mentioned in Para-1 above are accepted and the impugned orders are set aside with the observation that the private respondents in all the petitions may approach the OGRA for redress of their respective grievances, if so advised.

There is no order as to costs.

MH/S-3/L Petition allowed.

2017 C L C 513

[Lahore]

Before Mamoon Rashid Sheikh, J

Dr. SHAMSHAD HUSSAIN SYED----Petitioner

Versus

MUHAMMAD YASEEN and another----Respondents

Transfer Application No.253 of 2016, decided on 3rd November, 2016.

(a) Civil Procedure Code (V of 1908)---

----S. 24---Transfer of case---Pre-condition---Superior Court cannot pass an order of transfer of suit under S.24, C.P.C., unless the Court from which transfer of suit is sought to be made has pecuniary as well as territorial jurisdiction to try.

Mst. Razia Shafi v. Major M.S. Malik PLD 1971 SC 247 rel.

(b) Civil Procedure Code (V of 1908)---

----Ss. 19, 24 & O.VII, R.10---Transfer of case---Principle---Defendant sought transfer of suit pending before Court at place "B" to Court at place "L"---Plea raised by defendant was

that Court at place "B" had no jurisdiction to adjudicate upon the suit---Validity---Upon defendant's own showing, Civil Courts at place "B" did not have jurisdiction in the matter, therefore, application under section 24, C.P.C. was not competent---Defendant could first move application under O.VII, R.10, C.P.C. for return of plaint before Trial Court at place "B"---High Court directed Trial Court at place "B" to first decide question of territorial jurisdiction, if such application was filed---Application was dismissed accordingly.

Mst. Razia Shafi v. Major M.S. Malik PLD 1971 SC 247 rel.

Ashfaq Qayyum Cheema and Morris Nadeem for Petitioner.

Shahzad Hameed Bhatti for Respondents.

ORDER

MAMOON RASHID SHEIKH, J.--- The instant petition has been moved by the petitioner under Section 24 read with Section 19 of the C.P.C. for transfer of the respondent's suit, against the petitioner, for recovery of Rs.25,00,000/-, as damages, entitled "Muhammad Yasin v. Dr. Shamshad Hussain Syed", pending in the Court of Mr. Malik Atif Bin Saeed, Civil Judge 1st Class, Burewala, District Vehari, to a Court of competent jurisdiction at Lahore.

2. The facts relevant for the present purposes are to the effect that the respondent has filed the afore - noted suit against the petitioner, the Chief Physician of Canal View Diagnostic Center, Lahore (the Center), inter alia, on the grounds that whilst conducting the Anti HCV test of the respondent's son (Muhammad Usman Naz) due to negligence and acts of omission and commission done by the petitioner and the Center the result of the respondent's son's said test was declared to be Anti-HCV "reactive" whereas tests done by various other laboratories on or around the same time showed the respondents Anti HCV "non-reactive". However, as the report of the Center was to be only considered by the respondent's son's foreign employers, therefore, the respondent's son could not go to Saudi Arabia to join service. As a consequence. respondent suffered financially as well as emotionally, hence the petitioner should pay the respondent Rs.25,00,000/- as damages.

3. The learned counsel for the petitioner submits that the petitioner is ordinarily resident at Lahore and also works for gain at Lahore. The Center is admittedly situated at Lahore and the test in question was also conducted in the Center at Lahore. Contends that in view thereof the jurisdiction in the matter lies exclusively with the Civil Courts at Lahore. In support of his contentions relies on Section 19 of the C.P.C. which reads as under:-

"19. Suits for compensation for wrongs to person or movable.---Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts."

4. Further contends that the respondent has deliberately filed the suit at Burewala, even though, the cause of action, if any, which in any case is denied, accrued to the respondent at Lahore as the medical test in question was carried at Lahore. Admittedly the petitioner not only resides but also works for gain at Lahore. Moreover, the entire evidence of the case is at Lahore. Reiterates that the jurisdiction in the matter lies exclusively with the Civil Courts at Lahore.

5. The learned counsel for the respondent submits that the respondent resides at Burewala and the cause of action has also arisen to the respondent at Burewala, therefore, the Civil Courts at Burewala have exclusive jurisdiction in the matter.

6. Heard. Record perused.

7. It is settled law that an application under Section 24 of the C.P.C. for transfer of a suit can only be competent if the Court seized of the suit is competent to try it. Moreover, competency for this purpose includes not only pecuniary competency but also territorial competency. In other words superior Courts cannot pass an order for transfer of a suit under Section 24 of the C.P.C. unless the Court from which the transfer of the suit is sought to be made has pecuniary as well as territorial jurisdiction to try it. Reliance in this regard is placed on the judgment reported as "Mst. Razia Shafi v. Major M.S. Malik" (PLD 1971 SC 247).

8. In the instant case upon the petitioner's own showing the Civil Courts at Burewala do not have jurisdiction in the matter. If that be so, then on the basis of the afore-referred judgment the instant petition is not competent. And it is held accordingly.

9. The petition is accordingly disposed of with the observation that the petitioner may move an application under Order VII, Rule 10 of the C.P.C., for return of the plaint, before the learned trial Court at Burewala, if so advised. And as and when such an application is moved the learned trial Court shall first decide the question of its territorial jurisdiction without being influenced by any observation having been made in this order.

10. Order accordingly.

There is no order as to costs.

MH/S-4/L Order accordingly.

2017 C L C 518

[Lahore]

Before Mamoon Rashid Sheikh, J

Messrs SIXON PAKISTAN PRIVATE LIMITED----Petitioner

Versus

GHULAM FAREED ZAHID----Respondent

Transfer Application No.232 of 2016, heard on 13th December,2016.

(a) Civil Procedure Code (V of 1908)---

----Ss. 9 & 20---Transfer of Property Act (IV of 1882), S.28---Concurrent jurisdiction of Trial Court---Consent of parties---Principle---When two or more Courts have concurrent jurisdiction in the matter and parties to a contract/dispute choose to confer jurisdiction upon one of such Courts, then such agreement is not violative of law---Court so chosen assumes jurisdiction in the matter.

State Life Insurance Corporation of Pakistan v. Rana Muhammad Saleem 1987 SCMR 393 rel.

(b) Civil Procedure Code (V of 1908)---

----Ss. 19, 24 & O.VII, R.10---Transfer of case---Principle---Defendant sought transfer of suit pending before Court at place "M" to Court at place "L"---Plea raised by defendant was that Court at place "M" had no jurisdiction to adjudicate upon the suit---Validity---Territorial jurisdiction of Trial Court, before whom the suit sought to be transferred was pending, had to be determined before the suit was transferred---Suit could only be transferred under S.24, C.P.C., from a Court competent to try it---Territorial competency/jurisdiction of Trial Court at place "M" was a contentious issue, which could not be determined in such proceedings---High Court directed that Trial Court at place "M" should first determine question of its territorial jurisdiction before proceeding further in the matter---Application was dismissed accordingly.

Standard Insurance Co. v. Pak Garments Ltd. 1998 SCMR 1239 ref.

Mst. Razia Shafi v. Major M.S. Malik PLD 1971 SC 247 rel.

Muqtedir Akhtar Shabir for Petitioner.

Ch. Saleem Akhtar Warraich for Respondent.

Date of hearing: 13th December, 2016.

JUDGMENT

MAMOON RASHID SHEIKH, J.--- The instant petition has been moved by the petitioner under Section 24 of the C.P.C. seeking transfer of the respondent's suit, against the petitioner, for rendition of accounts entitled "Ghulam Farid Zahid v. M/s Sixon Pakistan (Pvt.) Limited and three others" pending in the Court of Ms. Mehnaz Hayat, Civil Judge 1st Class, Multan, to the Court of Mr. Farooq-e-Azam Sohal, Civil Judge, Lahore, before whom the petitioner's suit, against the respondent, for recovery of Rs.6.276 Million is pending.

2. The learned counsel for the petitioner submits that the head office of the petitioner, a private limited company, is situated at Lahore. The contract between the parties, whereby the respondent was appointed as the petitioner's Marketing Development Manager, was executed at Lahore on 21.12.2014. The petitioner does not have any Regional Office at Multan. Moreover, Clause 1(vii) of the contract dated 21.12.2014 stipulates that the jurisdiction in the matter shall be before the Courts at Lahore. Further contends that Section 20 of the C.P.C. is applicable to the instant case. The jurisdiction in the matter, therefore, lies exclusively with the Courts at Lahore. The respondent's suit may, therefore, be withdrawn from the Civil Court at Multan and may be entrusted to the Civil Court at Lahore wherein the petitioner's suit against the respondent is pending.

4. The learned counsel has relied on "State Life Insurance Corporation of Pakistan v. Rana Muhammad Saleem" (1987 SCMR 393) and "Standard Insurance Co. v. Pak Garments Ltd." (1998 SCMR 1239) in support of his contentions.

4. The learned counsel for the respondent controverts the stance of the learned counsel for the petitioner. Submits that the respondent was appointed by the petitioner as its Marketing Manager in the Region Multan and Sahiwal through the appointment letter dated 25.11.2014. Further submits that the Regional Accountant of the petitioner operates from the petitioner's office in the Industrial Estate, Phase-I, Multan. Submits that the petitioner has taken on lease the premises in the Industrial Estate Multan for establishing a warehouse of its products. The learned counsel has submitted a photocopy of the lease deed. Be placed on the record.

5. Contends that the Civil Courts at Multan have exclusive jurisdiction in the matter.

6. Further submits that the question of jurisdiction of the Civil Courts at Multan has been raised before the trial Court at Multan. Indeed, the respondent's suit is currently pending for determining the territorial jurisdiction in the suit.

7. The learned counsel for the petitioner submits that the respondent has filed his suit by concealment of facts and by giving a wrong description of the petitioner and the other defendants in the title of his plaint. Refers to the copy of the respondent's plaint (Annexure-F) to contend that the petitioner has been arrayed as one of the defendants but the petitioner's address has not been mentioned in the title of the plaint. Further submits that a director of the petitioner has been impleaded as defendant No.3. His address has also not been given in the plaint. Further contends that the respondent has deliberately mis-described the particulars of the petitioner in his plaint so as to establish that the jurisdiction in the matter lies with the Civil Courts at Multan.

8. I have considered the arguments of the learned counsel for the parties and have also gone through the record. Admittedly the petitioner employed the respondent as its Marketing Development Manager and/or Marketing Manager. As per the copy of the contract dated 21.12.2014 placed on the record by the petitioner (Annexure-B) the respondent was appointed to that post in the Head Office of the petitioner at Lahore. The contract also contains Clause 1(vii) wherein it has been agreed that, "... the place of jurisdiction shall be at Lahore."

9. It is further established from the record that the petitioner in its capacity as principal has sued the respondent, its agent, for recovery of Rs.6.276 Million. The respondent in turn in his capacity of being an agent of the petitioner has sued the petitioner as principal for rendition of accounts. The respondent's suit, therefore, appears to be hit by the rule of law that a principal cannot be ordered to render accounts to an agent unless liability to account is established. However, this controversy is not before this Court. The question which requires determination is as to whether the respondent's suit should be transferred to Lahore purely on the basis of the ground that the Civil Courts at Multan do not have jurisdiction in the matter.

10. As noted above lengthy arguments have been addressed by the learned counsel for the parties to establish that the Civil Courts at Multan do not or do have exclusive jurisdiction in the matter.

11. It may, however, be noted that it is a settled proposition of law that Civil Courts exercise their jurisdiction under the provisions of the C.P.C. If a Civil Court does not possess such jurisdiction under C.P.C. then it cannot be conferred upon it through mutual agreement between the parties to a dispute. However, where two or more Courts have jurisdiction to try a suit under the C.P.C. then an agreement between the parties to the dispute to the effect that only one of such Courts shall try such a dispute cannot be considered contrary to public policy as the said agreement would not violate the provisions of Section 28 of the Contract Act, 1872, nor the provisions of Sections 9 and 20 of the

C.P.C. State Life Insurance Corporation of Pakistan's case, supra, refers. In other words if two or more Courts have concurrent jurisdiction in the matter then if the parties to a contract/dispute choose to confer jurisdiction upon one of such Courts then such an agreement is held to be not violative of the law. And resultantly the Court so chosen assumes jurisdiction in the matter.

12. In the instant case, however, neither of the parties have taken the stance that the Civil Courts at Multan and Lahore have concurrent jurisdiction in the matter. The learned counsel for the petitioner vehemently argued that the exclusive jurisdiction in the matter lies with the Civil Courts at Lahore whereas on the other hand the learned counsel for the respondent has strongly argued that the exclusive jurisdiction in the matter lies with the Civil Courts at Multan.

13. There is another aspect of the case that is to say a perusal of the documents placed on the record shows that the question of territorial jurisdiction of the Civil Courts at Multan is a contentious one. Reference in this regard is firstly made to the copy of the contract dated 21.12.2014 (Annexure-B), which apparently has been executed by the parties at Lahore. The contract lays down that the respondent has been appointed as the petitioner's Marketing Development Manager to serve in the head office of the petitioner, which is admittedly at Lahore. The contract through Clause 1(vii) stipulates that the said appointment and the associated contracts shall be governed by the law of Pakistan. It is further stipulated that the place of jurisdiction shall be at Lahore. Reference may also be made to Annexures-C, D and E, which are photocopies of the show-cause notice, suspension letter and termination letter of the respondent. All of these documents refer to the contract dated 21.12.2014. It may be further noted that the learned counsel for the petitioner has denied that the petitioner has any Regional Office at Multan.

14. The respondent on the other hand in his plaint has relied upon a contract dated 25.11.2014. A copy whereof has, however, not been placed on the record by either party. However, from the copy of the rent deed, submitted by the learned counsel for the respondent, it appears that the petitioner has a warehouse in the Industrial Estate at Multan. There is denial in this respect from the petitioner's side. Moreover, the learned counsel for the respondent has asserted that the petitioner has a Regional Office at Multan.

15. When the above facts are considered in juxtaposition then it is established that the question of the territorial jurisdiction of the trial Court at Multan is a contentious issue and cannot be determined summarily. Moreover, admittedly arguments for determination of the territorial jurisdiction of the learned trial Court at Multan are due to be heard by the said Court.

16. In the above scenario, therefore, on the basis of the settled principle of law that an application for transfer of a suit under Section 24 of the C.P.C. is only competent if the trial Court before whom the suit in question is instituted/filed is competent to try it. It is further settled law that competency for this purpose includes not only pecuniary competency but also territorial competency. In other words the territorial jurisdiction of the trial Court before whom the suit, sought to be transferred, is pending has to be determined before the suit is transferred, as the suit under Section 24 of the C.P.C. can only be transferred from a Court competent to try it. Reliance in this regard is placed on the judgment reported as "Mst. Razia Shafi v. Major M S. Malik" (PLD 1971 SC 247).

17. As observed above the territorial competency/jurisdiction of the trial Court at Multan is a contentious issue, which cannot be determined in these proceedings, therefore, following the law as laid down in Mst. Razia Shafi's case, supra, the instant petition is disposed of with the direction that the trial Court at Multan shall first determine the question of its territorial jurisdiction before proceeding further in the matter. The petitioner may thereafter seek its remedy in accordance with the law.

18. Disposed of accordingly.

19. There is no order as to costs.

MH/S-5/L Order accordingly.

2018 C L D 1233

[Lahore]

Before Mamoon Rashid Sheikh and Ch. Muhammad Iqbal, JJ

Mst. IRSHAD BEGUM---Appellant

Versus

STATE LIFE INSURANCE CORPORATION OF PAKISTAN through Chairman and another---Respondents

Insurance Appeal No. 404 of 2014, heard on 6th March, 2017.

Insurance Ordinance (XXXIX of 2000)---

----Ss. 118, 121 & 122---Limitation Act (IX of 1908), S. 14 & Art. 86(a)---Civil Procedure Code (V of 1908), O.VII, R. 11---Insurance claim---Computation of period of limitation after promulgation of the Insurance Ordinance, 2000 but before establishment of the Insurance Tribunals under the Insurance Ordinance, 2000---Exclusion of time spent by a claimant pursuing claim via means of Constitutional petition and other modes of litigation---Scope---Claimant could not be penalized due to omission/ inaction of the Government in not timely establishing the Insurance Tribunals under the Insurance Ordinance, 2000---With the view of doing substantial justice, Insurance Tribunal would be in error in not excluding time spent by a claimant in pursuing claim through means of Constitutional petition and other modes, in absence of the establishment of Insurance Tribunals.

Mst. Irshad Begum v. State Life Insurance Corporation and others 2006 YLR 1186; Mst. Rabina Bibi v. State Life Insurance and others 2013 CLD 477 and Haji Abdul Sattar and others v. Farooq Inayat and others 2013 SCMR 1493 ref.

Liaqat Ali Butt for Appellant.

Ibrar Ahmad for Respondents.

Date of hearing: 6th March, 2017.

JUDGMENT

MAMOON RASHID SHEIKH, J.---The instant appeal under section 124 of the Insurance Ordinance, 2000 (the Ordinance), calls into question the order, dated 17.03.2014, passed by the Insurance Tribunal, Punjab, Lahore (the Tribunal), whereby the appellant's application for exclusion of time under Section 14 of the Limitation Act, 1908,

read with section 151 of the C.P.C. has been dismissed and the respondents' application under Order VII, Rule 11, read with section 151 of the C.P.C., has been accepted, with the result that the appellant's insurance claim/application under Section 118 of the Ordinance for recovery of insurance policy proceeds along with liquidated damages has been rejected being barred by law.

2. The learned counsel for the appellant submits that the appellant's husband, namely Muhammad Tufail, purchased an insurance policy bearing No.50757515161-0 in the sum of Rs.75,000/- from the respondents. The commencement date of the insurance policy was 01.12.2000. The appellant's husband died on 28.09.2004. As a consequence, the appellant lodged the insurance claim with the respondents on 18.11.2004. The appellant's claim was repudiated/rejected by the respondents on 15.02.2005. At the relevant time, even though, the Ordinance had been promulgated, however, the Insurance Tribunals, as envisaged by section 121 of the Ordinance were yet to be established by the Government. As the jurisdiction of the Civil Courts in the matter was barred under the Ordinance and the Insurance Tribunals were yet to be established, the appellant was left with no option but to challenge the order of repudiation, dated 15.02.2005, through W.P. No.16995/2005. The said petition was accepted through the order, dated 15.11.2005, and the matter was remitted to the respondents for decision afresh in the light of the said order. Further submits that the said order has been reported as "Mst. Irshad Begum v. State Life Insurance Corporation and others" (2006 YLR 1186).

3. Upon remand the respondents once again repudiated the appellant's claim through the letter, dated 15.02.2006. At that point in time also the Insurance Tribunals were yet to be established. The appellant was, therefore, constrained to file yet another writ petition (W.P. No.1735/2006). During the pendency of the said petition the Tribunal was established through the Notification, dated 20.06.2006. Subsequent thereto the appellant withdrew W.P. No.1735/2006, on 02.04.2009, in order to pursue the appellants remedy before the Insurance Tribunal. The appellant thereafter, filed the claim before the Tribunal on 15.04.2009.

4. Further submits that along with the claim the appellant had filed an application under section 14 of the Limitation Act, 1908 (the Act), read with section 151 of the C.P.C. for exclusion of the time spent by the appellant in the afore-referred litigation. The respondents on the other hand filed an application under Order VII, Rule 11 read with section 151 of the C.P.C., for rejection of the appellant's claim. The appellant's application was dismissed whereas the respondents' application was allowed and the appellants claim

was rejected being barred by law through the impugned order, dated 17.03.2014, passed by the Tribunal.

5. Further submits that the impugned order, dated 17.03.2014 has been passed by the Tribunal without appreciating the facts obtaining in the case and the provisions of section 14 of the Act. Contends that it was a fit case for condonation of delay under section 14, ibid., as at the time of death of the appellant's husband the Insurance Tribunals had not been established by the Government. The appellant was, therefore, constrained to firstly file W.P. No.16995/2005 and thereafter W.P. No.1735/2006 for redress of her grievance. The appellant diligently and under good faith pursued her case through the constitutional jurisdiction of this Court. The time, therefore, spent by the appellant in pursuing the afore-referred petitions should have been excluded by the Tribunal whilst considering the question of limitation. Further submits that the impugned order has been passed in violation of the law as laid down in the judgment reported as "Mst. Robina Bibi v. State Life Insurance and others"(2013 CLD 477).

6. Further contends that even otherwise the Issue of limitation was a mixed question of law and facts, which could not have been determined without recording of evidence. Submits that, on 27.10.2009, Issues were framed in the matter including Issue No.1 on the question of limitation. Submits that in view thereof the Tribunal was required under the law to determine the said Issue after recording of evidence instead of summarily rejecting the appellant's claim being barred by law. Relies on the judgment reported as "Haji Abdul Sattar and others v. Farooq Inayat and others" (2013 SCMR 1493).

7. The learned counsel for the respondents supports the impugned order. Submits that admittedly the appellant's husband (the insured) died on 28.09.2004. Under Article 86(a) of the First Schedule to the Act, the period of limitation prescribed for bringing the claim was three (3) years from the date of the death of the insured. The appellant filed her claim before the Tribunal, on 15.04.2009, therefore, her claim was patently barred by time and was thus rejected by the Tribunal in accordance with the law. Relies on the judgment reported as "Mst. Robina Bibi v. State Life Insurance and others" (2013 CLD 477).

8. We have considered the arguments of the learned counsel for the parties and have also gone through the record with their assistance. It is an admitted position that the appellant's husband died on 28.09.2004. It is also admitted that the appellant lodged the insurance claim with the respondents, on 18.11.2004. Her claim was repudiated/rejected by the respondents, on 15.02.2005. It is a further admitted position that at that time albeit the Ordinance had been promulgated yet the Insurance Tribunals as envisaged by section 121

of the Ordinance had not been established by the Government. Moreover, the jurisdiction of the Civil Courts was expressly barred in the matter under section 122(3) of the Ordinance. We, therefore, tend to agree with the learned counsel for the appellant that in such circumstances the appellant was left with no option but to file a constitutional petition against the repudiation/rejection of her claim by the respondents. The appellant consequently filed W.P. No.16995/2005, which was accepted, on 15.11.2005, in the terms that the respondents were directed to decide the matter afresh in the light of the said order. Upon remand the respondents, however, once again repudiated the appellant's claim through the letter, dated 15.02.2006. The appellant, therefore, once again approached this Court through W.P. No.1735/2006. In the meantime the Tribunal was established on 20.06.2006. As a consequence, the appellant withdrew W.P. No.1735/2006, on 02.04.2009 and filed her claim before the Tribunal on 15.04.2009.

9. The above facts go to show that the appellant was all along pursuing her claim with due diligence and in good faith both before the respondents and also before this Court through the afore-referred petitions. The learned counsel for the respondents has been unable to establish otherwise.

10. It is further observed that the appellant cannot be penalized due to the omission/inaction of the Government in timely establishing the Insurance Tribunals in terms of the Ordinance.

11. In view, therefore, of the peculiar facts and circumstances obtaining in the case and with a view to doing substantial justice we hold that the Tribunal erred in not excluding the time spent by the appellant in pursuing the matter through the said petitions in absence of the establishment of the Insurance Tribunals.

12. Under the circumstances the impugned order, dated 17.03.2014, passed by the Tribunal is set aside and the matter is remanded to the Tribunal for decision afresh. The claim of the appellant shall be deemed to be pending before the Tribunal and shall be decided afresh strictly in accordance with the law after recording of evidence of the parties.

13. It is further directed that the Tribunal shall endeavor to decide the appellant's claim within four months from the date of receipt of a certified copy of this order.

KMZ/I-8/L Order accordingly.

2018 Y L R 2292

[Lahore]

Before Mamoon Rashid Sheikh and Ch. Muhammad Iqbal, JJ

STATE LIFE INSURANCE CORPORATION OF PAKISTAN through Zonal Head/Attorney and another---Appellants

Versus

Mst. SHAHIDA PARVEEN---Respondent

Insurance Appeal No.15 of 2017, heard on 5th April, 2017.

Civil Procedure Code (V of 1908)---

----O.XVI, R.1 & O.XVII, R.3---Insurance Ordinance (XXXIX of 2000), Ss.118, 122, 123 & 124---Recovery of insurance claim---Striking of right to produce evidence---Insurance company was aggrieved of order passed by Insurance Tribunal closing right to produce evidence on the ground that its witnesses had failed to appear in court---Validity---When a party filed its list of witnesses within statutory period and thereafter regularly deposited diet money and other necessary expenses for summoning of witnesses named in the list through process of Court and had filed application under O. XVI, R. 1, C.P.C. for that purpose, then it was for the Court to ensure presence of witnesses by all means available to it including moving its coercive machinery instead of penalizing party for non-appearance of witnesses---Insurance Tribunal exercised its jurisdiction illegally and with material irregularity by invoking provisions of O. XVII, R. 3, C.P.C., and closing right of insurance company to lead further evidence---High Court set aside order in question and remanded the matter to Insurance Tribunal for decision afresh after recording of evidence---Appeal was allowed accordingly.

Hakim Habibul Haq v. Aziz Gul and others 2013 SCMR 200 ref.

Mst. Bashir Bibi v. Aminuddin and 9 others PLD 1973 SC 45 and Saleem-ud-Din and others v. Government of the Punjab through Secretary Education and others 2009 MLD 635 rel.

Ibrar Ahmad for Appellants.

Liaqat Ali Butt for Respondent.

Date of hearing: 5th April, 2017.

JUDGMENT

MAMOON RASHID SHEIKH, J.---The instant appeal under Section 124 of the Insurance Ordinance, 2000 (the Ordinance), is directed against the judgment, dated 14.12.2016, passed by the learned Insurance Tribunal Punjab, Lahore (the Insurance Tribunal), whereby the respondent's application for recovery of Life Insurance Policy (LIP) Proceeds, in respect of LIP bearing No.608034338-9, in the sum of Rs.500,000/- with accrued bonuses, along with liquidated damages, under Section 118, of the Ordinance, has been partially accepted in the following terms:--

> "In view of my findings on above issues, the claim of the applicant has been found to be proved. Hence, the claim application of the applicant under sections 122, 123 of Insurance Ordinance for recovery of insurance claim is accepted in favour of the applicant and against the respondents amounting to Rs.5,00,000/- along with liquidated damages as provided under Section 118(2) of Insurance Ordinance, 2000 from the date of death of the insured i.e. 21.03.2008 till its realization at monthly rests @ 5% higher than the prevailing base rate. The respondents will bear the costs of the case...

2. The learned counsel for the appellants has raised a number of grounds to assail the impugned judgment but for the present purposes we are only going to examine the question as to whether the case of the appellants was prejudiced when through the order, dated 02.07.2016, the Insurance Tribunal closed the right of the appellants to lead further evidence under the provisions of Order XVII, Rule 3 of the C.P.C.

3. The learned counsel for the appellants submits that the evidence of some of the appellants' witnesses, as per the appellants' list of witnesses, had been recorded. And for the remaining witnesses, included in the list, the appellants approached the Insurance Tribunal for summoning the said witnesses through process of the Court. The appellants had deposited the process fee, the necessary expenses and diet money for calling the witnesses, however, the witnesses despite being summoned/served did not appear. As a consequence, coercive measures were adopted by the Insurance Tribunal for summoning the witnesses but the witnesses failed to appear. Ultimately non-bailable warrants of arrest of the witnesses in question were issued but with the same result. The Insurance Tribunal instead of exhausting all the means at its disposal to summon the witnesses proceeded to close the right of the appellants to lead further evidence by invoking the provisions of Order XVII, Rule 3 of the C.P.C.

4. Further submits that it is settled law that if a party files the list of witnesses within the stipulated period and also deposits the diet money and other necessary expenses within the

stipulated period for summoning the witnesses named in the list, through process of the Court, then it is the duty of the Court to summon the witnesses and the party cannot be held responsible for non-service of the witnesses or the failure of the witnesses to appear and adduce evidence. In the instant, case the appellants had performed their duty as required under the law but the Insurance Tribunal in violation of the law as laid down by the superior Courts of the country proceeded to close the right of the appellants to lead evidence. Inter alia relies on the judgment reported as "Hakim Habibul Haq v. Aziz Gul and others" (2013 SCMR 200) to contend that the impugned order has been passed by illegal exercise of jurisdiction.

5. Further contends that by denying the appellants the right to lead their evidence the Insurance Tribunal has prejudiced the appellants' case.

6. The contentions of the learned counsel for the appellants on the factual plane are borne out from the record. The learned counsel for the respondent has been unable to establish otherwise.

7. We are in further agreement with the learned counsel for the appellants that it is settled law that when a party files its list of witnesses within the statutory period and thereafter regularly deposits diet money and other necessary expenses for summoning the witnesses, named in the list, through the process of the Court and files an application under Order XVI, Rule 1, of the C.P.C., for the said purpose then it is for the Court to ensure presence of the witnesses by all the means available to it including moving its coercive machinery instead of penalizing the party for non-appearance of the witnesses. Reliance in this regard is placed on "Hakim Habibul Haq's case (supra), cited at the bar by the learned counsel for the appellants and the judgments reported as "Mst. Bashir Bibi v. Aminuddin and 9 others (PLD 1973 Supreme Court 45) and "Saleem-ud-Din and others v. Government of the Punjab through Secretary Education and others" (2009 MLD 635).

8. It is accordingly held that the Insurance Tribunal exercised its jurisdiction illegally and with material irregularity by invoking the provisions of Order XVII, Rule 3, of the C.P.C. and closing the right of the appellants to lead further evidence. The question posed in para 2 above is answered accordingly.

9. Under the circumstances, the impugned judgment, dated 14.12.2016, passed by the Insurance Tribunal is set aside. The matter is remanded to the Insurance Tribunal for decision afresh. The respondent's suit shall be deemed to be pending before the Insurance Tribunal and shall be decided after recording the appellants' evidence and the respondent's evidence in rebuttal, strictly in accordance with the law, including the judgments cited

hereinabove. It is further directed that the Insurance Tribunal shall endeavor to decide the matter within four (4) months from the date of receipt of a certified copy of this order.

10. The office is directed to remit the record of the case to the Insurance Tribunal forthwith.

There is no order as to costs.

MH/S-36/L Case remanded.

PLJ 2018 Lahore 554 (DB)

***Present*: MAMOON RASHID SHEIKH AND ABDUL RAHMAN AURANGZEB, JJ.**

ZARAI TARAQIAT BANK LTD.--Appellant

versus

FAIZ BAKHSH--Respondent

R.F.A. No. 49 of 2015, decided on 10.10.2017.

Financial Institutions (Recovery of Finances) Ordinance, 2001 (XLVI of 2001)--

----Ss. 22, 24(2)(9) & 10(1)--Limitation Act, 1908 (IX of 1908), S. 3--Finance facilities--Property mortgaged--Suit for recovery of--Outstanding amounts--*Ex-parte* proceedings--Limitation--No application for condonation of delay--dismissed--challenge to--It is settled law that where a suit is instituted after expiration of the prescribed period of limitation and exemption from such period of limitation is claimed then the plaint is required to show the ground on which such exemption is sought--It is further settled law that under the provisions of Section 24(2) of the FIO a suit for recovery filed under Section 9 of the FIO may be entertained by the Banking Court after the expiry of period of limitation if the plaintiff is successful in satisfying the Banking Court that it had sufficient cause for not filing the suit within the period of limitation--Banking Court appears to have applied Section 3, *ibid.*, however, at the same time it has failed to take note of the fact that the question of limitation in the appellant's suits was a mixed question of law and facts--Appeals were accepted. [Pp. 556 & 557] A, B & C

Syed Shahid Hussain, Advocate for Appellant.

Nemo for Respondent.

Date of hearing: 10.10.2017.

JUDGMENT

Mamoon Rashid Sheikh, J.--Through this single judgment we propose to decide the instant appeal (RFA No. 49/2015) and RFAs No. 50/2015, 51/2015 and 53/2015 as common questions of law and facts arise therein.

2. All the appeals have been filed under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the FIO), and are directed against the judgments and decrees passed by the learned Banking Court No. II, Multan, whereby the appellant-bank's four (4) separate suits, against the respondents, have been dismissed The instant appeal (RFA No. 49/2015) is directed against the judgment and decree, dated 29.09.2014, RFA No. 50/2015 is directed against the judgment and decree, dated 23.10.2014, RFA No. 51/2015 is directed against the judgment and decree, dated 23.10.2014 and RFA No. 53/2015 is directed against the judgment and decree, dated 22.09.2014.

3. The respondents in all the appeals did not enter appearance despite publication of notices. As a consequence, *ex parte* proceedings were initiated against them on the last date of hearing (02.10.2017). The appeals have been repeatedly called today. All the respondents remain unrepresented. *Ex parte* arguments of the learned counsel for the appellant have consequently been heard.

4. The facts relevant for the present purposes are to the effect that the respondents in all the appeals are customers of the appellant. The respondents applied for and obtained finance facilities from the appellant. The respondents secured the finance facilities by, *inter alia*, creating mortgages on their respective properties. All the respondents defaulted in repaying the finance facilities, hence, the appellant filed four (4) separate suits for recovery, of the outstanding amounts, against the respondents. All the respondents failed to enter appearance despite, service of notices through ordinary modes and publication of notices in two national dailies. Consequently, *ex parte* proceedings were initiated against the respondents. *Ex parte* arguments were heard. However, the appellant's suits were dismissed through the impugned judgments and decrees, on the sole ground of limitation. The learned Banking Court held that under the provisions of Article 132 of the First Schedule to the Limitation Act, 1908, the limitation for filing the suits was twelve (12) years. The suits were, however, filed by the appellant beyond the prescribed period of limitation and no application for condonation of delay had been filed in any of the suits.

5. The learned counsel for the appellant submits that the learned Banking Court erred in law in dismissing the appellant's suits through the impugned judgments and decrees.

Submits that the impugned judgments and decrees have been passed against the facts and law of the case. They are based on conjectures and surmises.

6. Further submits that under Section 10(1) of the FIO it was mandatory upon the learned Banking Court to give an opportunity to the appellant to further document the suit.

7. Contends that the point of limitation in all the suits was a mixed question of law and facts which could not have been decided without recording of evidence. The learned Banking Court, however, failed to give an opportunity to the appellant to lead evidence on the question of limitation, therefore, the learned Banking Court erred in law.

8. Lastly refers to Section 24 of the FIO, which reads as under:

"24. Application of the Limitation Act, 1908 (Act IX of 1908).--

(1) Save as otherwise provided in this Ordinance, the provisions of the Limitation Act, 1908 (Act IX of 1908) shall apply to all cases instituted or filed in a Banking Court after the coming into force of this Ordinance.

(2) A suit under Section 9 may be entertained by a Banking Court after the period of limitation prescribed therefore, if the plaintiff satisfies the Banking Court that he had sufficient cause for not filing the suit within such period."

Contends that under sub-section (2) of Section 24 it was mandatory for the learned Banking Court to have provided an opportunity to the appellant to satisfy the Banking Court that the appellant had sufficient cause for not filing the suits within the period of limitation.

9. We have considered the arguments of the learned counsel for the appellant and have also gone through the impugned judgments and decrees. We have also examined the record of all the appeals. We find that the judgments in all the suits are identical in nature. Indeed, they appear to be cyclostyle copies with the minor variation of party names and the detail of the sanction letter of the finance facility of each respondent and the date of repayment of the finance facility.

10. As observed above, the appellant's suits were dismissed on the sole ground of limitation. It is settled law that where a suit is instituted after expiration of the prescribed period of limitation and exemption from such period of limitation is claimed then the plaint is required to show the ground on which such exemption is sought. Reference in this regard is made to Order VII, Rule 6, of the CPC.

11. It is further settled law that under the provisions of Section 24(2) of the FIO a suit for recovery filed under Section 9 of the FIO may be entertained by the Banking Court after the expiry of period of limitation if the plaintiff is successful in satisfying the Banking Court that it had sufficient cause for not filing the suit within the period of limitation.

12. In view of the above position of law the point of limitation, therefore, becomes a mixed question of law and facts. Reliance in this regard is placed on the judgment reported as *Union Bank Ltd. through Attorney vs. Messrs B.R.R. International Modaraba and 8 others* (2009 CLD 1656).

13. It is further settled law that when a suit is instituted then under Section 3 of the Limitation Act, 1908, it is mandatory upon the Court to check if the suit has been filed within the period of limitation, even though the question of limitation has not been set up as a defence. In the instant case, the learned Banking Court appears to have applied Section 3, *ibid.*, however, at the same time it has failed to take note of the fact that the question of limitation in the appellant's suits was a mixed question of law and facts. Moreover, the provisions of Section 24(2) of the FIO made it incumbent upon the learned Banking Court to require the appellant to satisfy the Banking Court that the appellant had sufficient cause for not filing the suits within the period of limitation. No such opportunity appears to have been provided to the appellant in either of the suite. We, therefore, find that the learned Banking Court has erred in law.

14. Under the circumstances, we accept the appeals and set aside all the impugned judgments and decrees and remand the cases to the learned Banking Court No. II, Multan, for decision afresh. The suits of the appellant shall be deemed to be pending and shall be decided, in accordance with the afore-referred law.

15. The appellant is directed to appear before the learned Banking Court No. II Multan, on 01.11.2017, without further notice. The office is directed to remit the record of the suits to the said Court, forthwith.

16. Order accordingly.

There is no order as to costs. (M.M.R.) Appeals accepted

2019 CLC 362

[Lahore]

Before Mamoon Rashid Sheikh, J

ASIFA AYAZ TOOSY----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others----Respondents

W.P. No. 55236 of 2017, heard on 7th August, 2018.

Civil Procedure Code (V of 1908)---

----O. XVI, Rr. 1, 7-A & 8---Suit for declaration---List of witnesses---Summoning of witnesses through process of Court---Scope---Affirmative evidence on behalf of plaintiff was recorded and right to produce evidence in rebuttal was reserved---Plaintiff moved application for summoning of witnesses through process of Court---Application was dismissed on the ground that plaintiff had not mentioned the reason as to why the evidence of said witnesses was relevant to the matter in issue---Validity---Party to a lis to be successful in leading evidence was to file firstly its list of witnesses within seven days of framing of issues---Plaintiff filed list of witnesses within seven days of the framing of issues---Plaintiff was yet to lead her evidence in rebuttal in the present case---Application of plaintiff for summoning of witnesses was supported by an affidavit whereas defendants' reply was not supported by a counter affidavit---Mere non-filing of counter affidavit by the defendants was sufficient to accept the reason set forth by the plaintiff in her application for summoning the witnesses through process of Court---Party seeking summoning of witnesses named in the list through process of Court was required to file requisite application and to deposit the diet money/process fee at least fourteen days prior to the date of hearing---Plaintiff filed her application for summoning of witnesses before she began to lead her evidence in rebuttal---Plaintiff had filed application in accordance with law---If a party was unable to produce the attendance of its witnesses then it could resort to the machinery of the Court for summoning the witnesses provided it had moved an application within stipulated period---Once an application was moved and allowed and diet money/process fee was deposited then Court was to summon the witnesses---If witnesses did not appear despite service then it was for the Court to employ its coercive machinery in order to procure the attendance of said witnesses---Court could not require the party to produce the attendance of the witnesses on its own recognition or on its own responsibility---Courts below had erred in law and facts in refusing to allow the plaintiff to summon her witnesses through process of Court---Impugned orders passed by the Courts below were

set aside and prayer of plaintiff for summoning the witnesses through process of Court was allowed---Constitutional petition was allowed accordingly.

Naeem Akhtar v. Additional District Judge and others 2005 MLD 1713; Iqbal Parekh and 4 others v. Karachi Building Control Authority (K.B.C.A.) through Chief Controller of Buildings (C.C.O.B.), Karachi and 4 others 2008 CLC 1334; Ikram Ullah v. Mst. Farkhanda Habib and 3 others 2012 CLC 569; Khurram Ali Shah and 2 others v. Bahadar Khan 2014 YLR 1025 and Bank of Punjab through Chief Manager v. Messrs Anmol Textile Mills Limited through Chief Executive and 3 others 2016 CLD 1566 ref.

Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255; Islamic Republic of Pakistan v. Amjad Ali Mirza PLD 1977 SC 182; Mst. Bashir Bibi v. Aminuddin and 9 others PLD 1973 SC 45 and Saleem-ud-Din and others v. Government of the Punjab 2009 MLD 635 rel.

Jawad H. Tarar for Petitioner.

Aish Bahadur Rana for Respondent No.3.

Sheraz Zaka along with Respondents Nos.2 and 3 and Dr. Shehla Toosy.

Nemo for Respondents Nos.4 to 7.

Date of hearing: 7th August, 2018.

JUDGMENT

MAMOON RASHID SHEIKH, J.----The instant petition is directed against the order, dated 09.06.2017, passed by the Addl. District Judge, Lahore (respondent No.1), whereby the petitioner's revision petition; against the order, dated 08.03.2017, passed by the Civil Judge, 1st Class, Lahore (respondent No.8), dismissing her application, under Order XVI, rule 1, of the C.P.C., for summoning of witnesses through the process of Court; has been dismissed.

2. Before setting out the facts of the case it may be noted that the petitioner has contended that she has impleaded respondents Nos.4 to 7 as pro forma respondents as she is not seeking any relief against them.

3. The brief facts giving rise to the petition, as ascertained from the record and the arguments of the learned counsel for the parties, are to the effect that the petitioner and respondents Nos. 2, 3 and 5 to 7 are the sons and daughters of one Dr. Muhammad Hafeez Toosy. The said parties have filed three suits against each other in respect of the properties in dispute. The detail of the suits is being given hereunder for ease of reference:-

(i) "Shahid Hafeez Toosy and others v. Tahir Hafeez Toosy and others", suit for declaration, permanent and mandatory injunction and partition;

(ii) "Dr. Tahir Hafeez Toosy v. Shahid Hafeez Toosy and others", suit for restoration of possession with consequential relief, and

(iii) "Dr. Tahir Hafeez Toosy v. Shahid Hafeez Toosy", suit for declaration with permanent injunction.

Proceedings were primarily held in the suit listed at (i) above. Issues in the said suit were framed on 03.03.2016. Evidence of the parties was being recorded on the said Issues, however, through the order, dated 24.04.2015, all the three suits were consolidated. Subsequently, through the order, dated 13.05.2015, it was directed that since the suit listed at (i) above was filed prior to the other two suits, therefore, proceedings shall be held in the said suit and the parties shall be treated as given in the title of the said suit. Subsequent thereto through the order, dated 09.12.2016, respondent No.8 observed that although through the order, dated 01.10.2015, it was directed that consolidated Issues be framed in all the three suits, yet the consolidated Issues have not been framed. Respondent No.8, therefore, in the interest of justice, proceeded to frame consolidated Issues on 09.12.2016. Respondent No.8 further directed the parties to file their lists of witnesses as well as certificates of readiness to produce evidence within seven days from the said date. The petitioner and respondents Nos.5 to 7 filed their list(s) of witnesses and reserved their right to lead evidence in rebuttal after conclusion of respondents Nos.2 and 3's evidence on the newly added/consolidated Issues. On 06.01.2017, after respondents Nos.2 and 3 had closed their evidence, the said respondents raised an objection that the petitioner and respondents Nos.5 to 7 have no right to adduce evidence to the extent of the newly added/consolidated Issues. Respondent No.8, however, allowed the petitioner and respondents Nos.5 to 7 to lead evidence in rebuttal through the order, dated 06.01.2017, inter alia on the grounds that the petitioner and respondents Nos.5 to 7 had filed their lists of witnesses within time after framing of the newly added/consolidated Issues.

Subsequent thereto on 30.01.2017, the petitioner filed an application for summoning five (5) witnesses, through process of the Court. The said witnesses were included in the list of witnesses filed by the petitioner after consolidation of Issues. The detail of the said five (5) witnesses is as under:-

"a. Malik Asad, son of Nawab Amir Mohammad Khan, Resident of Ka House, Street 62, F6 Ataturk Road, Islamabad;

b. Malik Waheed, Nawab of Kalabagh, son of Malik Muzzaffar, resident of Kalabagh Estate, Kalabagh, near Mianwali;

c. Malik Idrees, son of Malik Muzzaffar, Resident of Kalabagh Kalabagh, near Mianwali;

d. Sub Registrar Lahore, with record of sale deed No.7378 17/07/1962

e. Director or Representative (C&1) LDA, Lahore with record"

The petitioner's application was resisted by respondents Nos.2 and 3. The application was dismissed by respondent No.8 through the order, dated 08.03.2017, inter alia on the ground that the petitioner had not mentioned the reason as to why the evidence of the witnesses was relevant to the matter in issue in the suits and what facts were sought to be proved through their evidence. It was further held that the evidence of the official witnesses was not required as the sale deeds in question had been admitted by the parties.

Feeling aggrieved the petitioner filed a revision petition which was dismissed by respondent No.1 through the impugned order, dated 09.06.2017, on the same grounds which found favour with respondent No.8. Respondent No.1 also observed that in case the petitioner wishes to adduce the evidence of the witnesses in question she can do so on her own.

4. The learned counsel for the petitioner submits that respondents Nos.1 and 8 have erred in passing the impugned orders. The petitioner had set forth the reasons for summoning the witnesses in Para-4 of her application. The reasons were to the effect that although all the witnesses are named in the list of witnesses filed by the petitioner after framing of the consolidated Issues, yet the witnesses have refused to attend the Court on the petitioner's behalf. One of the witnesses, namely Malik Asad, has refused to appear on account of his frail physical condition whilst the other witnesses are reluctant to appear as witnesses.

5. Contends that sufficient reason and good cause had been established by the petitioner in her application, however, respondents Nos.1 and 8 failed to appreciate this fact.

6. Further submits that through the order, dated 06.01.2017, respondent No.8 had allowed the petitioner to lead evidence of the witnesses by holding that she was legally entitled to produce her evidence in respect of the (fresh) consolidated Issues framed, on 09.12.2016, as per the list of witnesses submitted by her on 16.12.2016. However, when the petitioner moved the application for summoning of the witnesses through process of

the Court, respondent No.8 in contradiction of the order, dated 06.01.2017, declined to allow the petitioner to summon the witnesses through process of the Court by holding that the petitioner had failed to establish the relevance of the evidence of the witnesses. Contends that respondent No.1 compounded this error by stating that the petitioner should produce the witnesses on her own responsibility or under her own initiative.

7. Submits that the impugned order has been passed by illegal exercise of jurisdiction and is in violation of the express provisions and spirit of the law.

Relies on the judgments reported as "Naeem Akhtar v. Additional District Judge and others" (2005 MLD 1713), "Iqbal Parekh and 4 others v. Karachi Building Control Authority (K.B.C.A.) through Chief Controller of Buildings (C.C.O.B.), Karachi and 4 others" (2008 CLC 1334), "Ikram Ullah v. Mst. Farkhanda Habib and 3 others" (2012 CLC 569), "Muhammad Anwar and others v. Mst. Ilyas Begum and others" (PLD 2013 Supreme Court 255), "Khurram Ali Shah and 2 others v. Bahadar Khan" (2014 YLR 1025) and "Bank of Punjab through Chief Manager v. Messrs Anmol Textile Mills Limited through Chief Executive and 3 others" (2016 CLD 1566).

9. Mr. Aish Bahadur Rana, Advocate, the learned counsel for respondent No.3 after giving the factual background of the petition in a very lucid manner submits that the impugned orders have been passed in accordance with the law as laid down by the Hon'ble Supreme Court in Muhammad Anwar's case (supra). Submits that a party is not entitled to summon witnesses through process of the Court as of right. A party has to establish a sufficient cause for summoning witnesses through process of the Court. The reasons set out by the petitioner in her application do not constitute sufficient cause.

10. Contends that the statement that the evidence of the witnesses is relevant to the petitioner's case can neither be termed as a sufficient nor a good cause. Moreover, a party has to establish the relevance of the evidence of the witnesses sought to be summoned through the Court before it can be allowed to do so. The petitioner failed to establish any of the above noted grounds. Hence, the dismissal of her application and revision petition in accordance with the law.

11. Mr. Sheraz Zaka, Advocate, the learned counsel for respondents Nos.2 and 3, whilst adopting the arguments of the learned counsel for respondent No.3 further submits that the petitioner had failed to establish that the evidence of the Sub Registrar and the official of the LDA was relevant given the fact that the sale deeds in question had been admitted by the parties. Further submits that the petitioner had contended that one of the witnesses (Malik Asad) was unable to attend the Court due to his poor physical condition, however, the petitioner's application was not supported by any

medical certificate or proof in respect thereof. Further contends that the petitioner failed to establish the relevance of the evidence to be led by the witnesses sought to be summoned, therefore, the impugned order has been passed in accordance with the law. Relies on Muhammad Anwar's case (supra).

12. Heard. Record perused.

13. It is an admitted position between the parties that evidence was led in the affirmative by the petitioner and respondents Nos.5 to 7 in the suit entitled, "Shahid Hafeez Toosy and others v. Tahir Hafeez and others" (wherein the petitioner has been arrayed as plaintiff No.2), prior to framing of the consolidated Issues on 09.12.2016. It is a further admitted position that the petitioner filed her list of witnesses on 16.12.2016, that is to say, within seven days of the framing of the consolidated Issues. It is also an admitted position that after consolidation of Issues respondents Nos.2 and 3 led their evidence in affirmative in respect of the newly added/consolidated Issues and the petitioner as well as respondents Nos.5 to 7 reserved their right to lead evidence in rebuttal after the evidence of respondents Nos.2 and 3 had been completed. In other words the petitioner was yet to lead her evidence in rebuttal after framing of the consolidated Issues when she filed the application for summoning the witnesses in question.

14. As mentioned above, the petitioner sought to summon five (5) witnesses through process of the Court. Out of the five witnesses three witnesses are private witnesses whereas two witnesses are official witnesses. The three private witnesses belong to the family of the late Nawab of Kala Bagh the one time Governor of West Pakistan. The petitioner in Para-4 of her application has mentioned that one of the private witnesses, namely Malik Asad, has declined to attend Court on account of his frail physical condition. The petitioner has, therefore, requested that he may be summoned through process of the Court. In respect of the other witnesses she has maintained that they are reluctant to appear in Court or have refused to appear in Court on her behalf. Respondents Nos.1 and 8 as well as the learned counsel for respondents Nos.2 and 3 have maintained that the reasons set forth in Para-4 of the petitioner's application do not constitute sufficient grounds or a good cause for summoning of the witnesses through process of the Court. The learned counsel for respondents Nos.2 and 3 has gone further to state that no medical evidence/certificate has been filed along with the petitioner's application to establish that the witness named Malik Asad is suffering from poor physical health/condition.

15. I, however, note that the petitioner's application is supported by an affidavit whereas respondents Nos.2 and 3's reply thereto is not supported by a counter affidavit. The mere non-filing of the counter affidavit by respondents Nos.2 and 3 would, therefore, be sufficient to accept the reasons set forth by the petitioner in Para-4 of her application for summoning the witnesses through process of the Court. I am fortified in my view on the basis of the judgment of the Hon'ble Supreme Court reported as "Islamic Republic of Pakistan v. Amjad Ali Mirza" (PLD 1977 SC 182). The contention of the learned counsel for respondents Nos.2 and 3 is accordingly repelled.

16. It is settled law that for a party to a lis to be successful in leading evidence it has to firstly file its list of witnesses within seven (7) days of the framing of Issues. And in case the party seeks to summon the witnesses named in the list through process of the Court then it has to file the requisite application and to deposit the diyat money/process fee at least fourteen days prior to the date of hearing. Rules 1, 7A and 8 of Order XVI, of the C.P.C., refer. Reliance is also placed on Muhammad Anwar's case's (supra).

17. In the instant case it is an admitted position that the petitioner filed her list of witnesses within the stipulated seven (7) days. It is a further admitted position that the petitioner filed her application for summoning of witnesses before she began to lead her evidence in rebuttal after framing of the consolidated Issues. The petitioner's application would, therefore, appear to have been filed in accordance with the law.

18. It is further settled law that if a party is unable for some reason to procure the attendance of its witnesses then it can have resort to the machinery of the Court for summoning the witnesses provided it moves the application within the stipulated period. Once such an application is moved and allowed and the diet money/process fee is deposited, it is for the Court to summon the witnesses. And in case the witnesses do notappear despite service then it is for the Court to employ its coercive machinery in order to procure the attendance of the witnesses. The Court cannot require the party to procure the attendance of the witnesses on its own recognition or on its own responsibility. The judgments reported as "Mst. Bashir Bibi v. Aminuddin and 9 others" (PLD 1973 Supreme Court 45) and "Saleem-ud-Din and others v. Government of the Punjab" (2009 MLD 635), refer.

19. It may be further noted that on 06.01.2017 after respondents Nos.2 and 3 closed their evidence the said respondents raised an objection vis-à-vis the petitioner and respondents Nos.5 to 7's right to adduce evidence to the extent of the official witnesses named in their list of witnesses. Respondent No.8, however, held that since the petitioner and respondents Nos.5 to 7 had only led evidence in respect of the Issues

earlier framed, on 03.03.2016, therefore, they are legally entitled to produce their evidence in respect of the newly added/consolidated Issues, which were framed, on 09.12.2016, as per the list of witnesses submitted by them on 16.12.2016.

20. In view of the above I tend to agree with the learned counsel for the petitioner that in presence of the order, dated 06.01.2017, respondent No.1 erred by declining to allow the petitioner to summon the official witnesses through process of the Court, through the subsequent order, dated 08.03.2017.

21. When the facts of the case are examined in the light of the above then one comes to the conclusion that respondent No.1 as well as respondent No.8 erred not only in law but also in facts in refusing to allow the petitioner to summon her witnesses through process of the Court. Respondent No.1 further erred in requiring the petitioner to produce her witnesses on her own recognition or on her own responsibility.

22. Under the circumstances, the petition is allowed in the terms that the impugned orders are set aside and the prayer of the petitioner for summoning the witnesses mentioned in Para 4 of her application, dated 30.01.2017, through process of the Court, is allowed.

There is no order as to costs.

ZC/A-78/L Petition allowed.

2019 CLC 840

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD LATIF and others----Petitioners

Versus

RIAZ and others----Defendants

Civil Revision No.18 of 2016, decided on 1st August, 2018.

(a) Civil Procedure Code (V of 1908)---

----O. XXVI, R. 1---Evidence recorded by Local Commission, legalities/irregularities---Whilst recording evidence the Local Commission omitted to write the name of one of the witness whose evidence he recorded---Moreover, the evidence was unsigned by him---Evidence had thus been recorded in violation of the law.

Ghulam Mustafa v. Abdul Malik PLD 2008 Lah. 4 ref.

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

----Ss. 42 & 54---Suit for declaration and perpetual injunction---Mutations challenged on grounds of fraud, forgery and misrepresentation---Plea of plaintiff that the mutations were entered into the revenue record at a time when he was in prison in connection with a First Information Report (FIR)---Held, that plaintiff during recording of his evidence did not appear to have brought any material on the record to establish that he was actually behind bars when impugned mutations were effected and/or entered into the revenue record---Indeed, plaintiff had not tendered any documentary evidence through his statement---Certified copies of mutations were submitted by the plaintiff through the statement of his counsel, who also submitted a copy of an FIR, and some ancillary documents---However, the FIR and its supporting documents were not admitted into evidence as exhibits but were only marked as Mark-A and Mark-B---In such circumstances, the factum as to whether the plaintiff was indeed behind bars at the relevant time became questionable---Revision petition was allowed in circumstances.

(c) Limitation Act (IX of 1908)---

----S. 3---Limitation, question of---Point of limitation had to be determined by a Court, whether trial or appellate, seized of a lis, even though, the point of limitation may not have been raised by way of defence by the contesting party.

(d) Administration of justice---

----Correct law---Court, duty of---Scope---Court had the duty and obligation to apply the correct law---Judge must wear all the laws of the country on the sleeves of his robes --- Failure of counsel to properly advise the Court was not an excuse in such respect.

Muhammad Sarwar v. The State PLD 1969 SC 278 ref.

Ch. Muhammad Anwar Bhindar for Petitioner.

Rao Jabbar Khan for Respondent No.1.

Date of hearing: 26th May, 2017.

JUDGMENT

MAMOON RASHID SHEIKH, J.---The instant petition is directed against the judgment, dated 01.03.2012, passed by the learned Civil Judge 1st Class, Pasrur and the judgment and decree, dated 26.10.2015, passed by the learned Addl. District Judge, Pasrur.

2. The facts relevant for the present purposes are to the effect that, on 04.10.2005, respondent No.1 filed a suit against the petitioners and the pro forma respondents Nos.2 to 4 and one Noor Fatima, the deceased mother of petitioners Nos.2 to 5 and the pro forma respondents Nos.2 and 3, for declaration and perpetual injunction in respect of the property in dispute, which is fully described in Para-3 of the petition.

The suit was brought on the premise that respondent No.1 was the owner in possession of the property in dispute, however, in the month of May, 1993, a case bearing FIR No.127/1993, offence under section 11/7/79 was registered with P.S. Saddar, Pasrur, by one Allah Rakha, against respondent No.1. As a consequence, in the month of May, 1993, respondent No.1 and his brother were arrested. They were acquitted in the said case after 2/3 years. Subsequently, in the year, 2005, when respondent No.1 had gone to the local Courts in connection with an execution petition filed against him by one Muhammad Ismail, an associate of the afore-referred parties, respondent No.1 learned that while he was in jail, petitioner No.1 and one Muhammad Bashir (the predecessor-in-interest of petitioners Nos.2 to 5, the deceased Noor Fatima and the pro forma respondents Nos.2 and 3) and the pro forma respondent No.4 had managed to transfer the property in dispute in their names on the basis of alleged oral sales, which were given effect to in the revenue record through mutations Nos.117 and 118, dated 17.05.1993. Respondent No.1, therefore, sought setting aside of Mutations Nos.117 and 118 on the ground that they had been effected/entered into the revenue record through fraud, forgery and misrepresentation.

The petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 are stated to have not entered appearance despite service through proclamation in the daily Jurrat. As a consequence, ex parte proceedings were initiated against them on 30.03.2006.

It is further stated that, on 10.01.2007, the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 filed an application for setting aside the order, dated 30.03.2006. The application was resisted by respondent No.1, however, the learned trial Court through the order, dated 24.05.2007, accepted the application. It is further stated that thereafter the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 failed to file their written statements despite obtaining several adjournments. Finally, on 30.11.2007, they went unrepresented, hence, they were once again proceeded against ex parte. Thereafter, respondent No.1's ex parte evidence was recorded and ultimately the suit was decreed ex parte in respondent No.l's favour on 25.02.2010.

On 03.04.2010, the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 moved an application for setting aside the ex parte judgment and decree, dated 25.02.2010, passed in favour of respondent No.1. The application was resisted by respondent No.1. Issues were framed, including additional Issue No.1-A on the question of limitation vis-a-vis the application. Evidence was recorded, however, through the impugned judgment, dated 01.03.2012, the learned trial Court dismissed the application. Feeling aggrieved the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 filed an appeal; which was dismissed by the learned Addl. District Judge, Pasrur, through the impugned judgment and decree, dated 26.10.2015.

3. The learned counsel for the petitioners submits that the impugned judgments have been passed illegally and with material irregularity. Contends that the learned Courts below failed to appreciate that the suit of respondent No.1 was hopelessly time barred, therefore, the ex parte decree, dated 25.02.2010, could not have been passed in favour of respondent No.1.

4. Further submits that under Section 3 of the Limitation Act, 1908, a duty was cast upon the learned trial Court to look into the point of limitation, even if, there was no objection raised in this respect by the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4, due to their having been proceeded against ex parte. Contends that the impugned decree, dated 01.03.2012, is, therefore, a nullity in the eye of the law. The learned trial Court erred in law in passing the impugned decree. Further submits that as respondent No.1 's suit was time barred then the ex parte decree against the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 becomes irrelevant and is, therefore, liable to be set aside.

5. Relies on the judgments reported as "Assistant Controller of Imports and Exports and 2 others v. Muhammad Iqbal Bhirviya" (1989 CLC 398),"Government of N.W.F.P. and others v. Akbar Shah and others" (2010 SCMR 1408), "Muhammad Islam v. Inspector-General of Police Islamabad and others "(2011 SCMR 8) and "United Bank Limited and others v. Noor-un-Nisa and others"(2015 SCMR 380).

6. The learned counsel for respondent No.1 submits that the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 were proceeded against ex parte for the first time on 30.03.2006, on their failure to enter appearance despite publication of notice. They moved an application for setting aside the order, dated 30.03.2006, which application was accepted through the order, dated 24.05.2007, subject to costs. The petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4, however, did not file their written statements despite obtaining several adjournments. On 30.11.2007, they failed to appear before the learned trial Court and were, therefore, once again proceeded against ex parte. Thereafter respondent No.1's ex parte evidence was recorded and on the basis thereof the learned trial Court passed the ex parte decree, in respondent No.1's favour, on 25.02.2010.

7. Submits that the petitioners', Noor Fatima's and the pro forma respondents Nos.2 to 4's application for setting aside the ex parte decree was admittedly barred by time and was dismissed in accordance with the law. Further submits that similarly the petitioners', Noor Fatima's and the pro forma respondents Nos.2 to 4's appeal was also dismissed in accordance with the law.

8. Further submits that the contention of the learned counsel for the petitioners that respondent No.1 's suit was time barred, therefore, the ex parte decree could not have been passed is misconceived. Submits that respondent No. 1 's suit was based on the premise of fraud, forgery and misrepresentation. In view thereof the question of limitation becomes irrelevant. Contends that it was brought on the record that when mutations Nos.117 and 118 were effected respondent No.1 was in Jail in connection with the case bearing FIR No.127/1993, offence under section 11/7/79 registered with P.S. Saddar, Pasrur. The said mutations were, therefore, not entered into by respondent No.1. The learned trial Court, therefore, set aside the mutations in accordance with the law.

9. Relies on the judgments reported as "Hakim Khan v. Nazeer Ahmad Lughmani and 10 others" (1992 SCMR 1832), "Munazah Parveen v. Bashir Ahmad and 6 others" (2003 SCMR 1300), "Zafar and 2 others v. Ghulam Muhammad and 9 others" (2005

CLC 525) and "Government of N.-W.F.P. through Secretary C&W and others v. Rehman construction Company" (2005 CLC 1179).

10. Heard. Record perused.

11. The facts of the case have been set out in quite some detail in Para-1 above. I, therefore, do not propose to repeat them for the sake of brevity.

12. I find from the record that the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 were initially proceeded against ex parte by the learned trial Court on the basis of the proclamation appearing in the daily "Jurrat". The perusal of the orders preceding the order, dated 06.03.2006, when the order for service of the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 through proclamation was passed, reveals that there is no conscious order of the learned trial Court stating that the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 have been served in person or they have deliberately avoided service or they could not be served. The learned trial Court merely kept on repeating summonses/notices in routine without recording any of the above facts. The record further reflects that there is also a report to the effect that Noor Fatima (deceased) was not served at any time. In such circumstances, I do not feel that the learned trial Court was justified under the law to order service of the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 through substituted service/proclamation. The judgment reported as "Syed Muhammad Anwar Advocate v. Sheikh Abdul Haq" (1985 SCMR 1228) refers.

13. As to whether the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 were aware about the pendency of respondent No.1's suit and / or the ex parte decree, the evidence led by the parties in this behalf is not of much help. The reasons therefor are manifold. One of the reasons being that the evidence was recorded through a Local Commissioner who committed illegalities/irregularities whilst recording evidence. He omitted to write the name of one of the witness whose evidence he recorded, moreover, the evidence is unsigned by him. The evidence has, therefore, been recorded in violation of the law. Reliance in this regard is placed on the judgment reported as "Ghulam Mustafa v. Abdul Malik"(PLD 2008 Lahore 4). This aspect of the case has been overlooked by the learned Courts below.

14. I further note that respondent No.1 recorded his ex parte evidence on 15.01.2010. However, through the said evidence respondent No.1 does not appear to have brought any material on the record to establish that he was actually behind bars when Mutations Nos.117 and 118 were effected and / or entered into the revenue record. Indeed,

respondent No.1 has not tendered any documentary evidence through his statement. It is further observed that certified copies of mutations Nos.117 and 118 were submitted by him through the statement of his counsel, who also submitted a copy of FIR No.127/1993, and some ancillary documents. However, the FIR and its supporting documents were not admitted into evidence as exhibits but were only marked as Mark-A and Mark-B. In such circumstances, to my mind the factum as to whether the respondent No.1 was indeed behind bars at the relevant time becomes questionable.

15. I find force in the contention of the learned counsel for the petitioners that the question of limitation was pivotal in determining the maintainability of respondent No.1 's suit. It is settled law that the point of limitation has to be determined by a Court, whether trial or appellate, seized of a lis, even though, the point of limitation is not raised by way of defence. Section 3 of the Limitation Act and the judgments cited at the bar by the learned counsel for the petitioners refer.

16. As observed above, the question as to whether respondent No.1's suit was within time or not, was of great importance. In view of the provisions of Section 3 of the Limitation Act, respondent No.1's suit could not have been decreed without determining the question of limitation. Respondent No.1 chose not to lead any evidence in this respect. One may say that since the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 had been proceeded against ex parte, therefore, no objection had been raised in this respect, hence, there was no requirement for respondent No.1 to lead any evidence in this respect. However, the fact remains that under section 3 of the Limitation Act, a duty is cast upon Courts both at the trial as well as the appellate stage to examine the question of limitation, even if, it is not raised. Indeed, it is the bounden duty of every Court to take notice of the question/point of limitation, even if, it is not set up as a defence by the contesting party. It is further settled law that it is the duty and obligation of the Courts to apply the correct law on the basis of the well-known maxim that a judge must wear all the laws of the country on the sleeves of his robes. And the failure of counsel to properly advise the Court is not an excuse in this respect. "Muhammad Sarwar v. The State" (PLD 1969 SC 278), refers.

17. In view thereof, I feel that, even if, it is assumed that the petitioners, Noor Fatima and the pro forma respondents Nos.2 to 4 were initially served, they were proceeded against ex parte, the order, dated 30.03.2006, initiating ex parte proceedings against them was recalled through the order, dated 24.05.2007, subject to costs, and that thereafter they failed to file their written statements and then disappeared from the proceedings, therefore, the ex parte decree was passed against them in accordance with the law, the fact still remains that Noor Fatima does not appear to have been served in

accordance with law, moreover, and more importantly in absence of the determination of the question/point of limitation whether the decree could have been passed in respondent No.1's favour.

18. In view of the above, whilst respectfully following the judgment rendered by Ajmal Mian, J. in the "Assistant Controller of Imports and Exports case (supra), I, in exercise of my revisional jurisdiction feel that the ex parte judgment and decree, dated 01.03.2012 and the appellate decree, dated 26.10.2015, can be set aside on the above legal grounds.

19. Under the circumstances the ex parte judgment and decree, dated 01.03.2012, passed by the trial Court and the appellate judgment and decree, dated 26.10.2015, are set aside and the case is remanded to the learned trial Court for decision afresh. Respondent No.1's suit shall be deemed to be pending before the learned trial Court. The petitioners and the pro forma respondents Nos.2 to 4 shall be provided with the opportunity of filing their written statement(s) whereafter Issues shall be framed including an Issue on the point of limitation and respondent No.1's suit shall be decided in accordance with the law on the basis of the evidence led by the parties for and against the Issues so framed.

20. The petition is accordingly allowed in the above terms. There is no order as to costs.

MWA/M-54/L Revision allowed.

2019 CLC 909

[Lahore]

Before Mamoon Rashid Sheikh, J

STAR HOLDINGS----Appellant

Versus

Dr. NISHAT AFZA QURESHI----Respondent

F.A.O. No.219033 of 2018, heard on 13th September, 2018.

(a) Cantonments Rent Restriction Act (XI of 1963)---

----S. 17---Transfer of Property Act (IV of 1882), S. 107---Registration Act (XVI of 1908), S. 17(d)---Ejectment petition---Lease agreement for a period of ten years not registered---Effect---Lease of immovable property from year to year or for a term exceeding one year or reserving a yearly rent could only be made through a registered instrument, as mandated by S.107 of the Transfer of Property Act, 1882 and S.17(d) of the Registration Act, 1908---In case a lease agreement was so required to be registered but not registered with the Registrar of documents then the lease agreement was bad in law---Consequently, the relationship between such a landlord and the tenant beyond the initial period of eleven (11) months was to be regulated by the provisions of the statute in question i.e. the Cantonments Rent Restriction Act, 1963---Such a tenant became a statutory tenant and the tenancy continued on a month to month basis---In the present case, the lease agreement was for a period of ten years, however it was not registered---Admittedly, the initial eleven (11) months of the tenancy had already lapsed---Tenant was, therefore, a statutory tenant thereafter and the tenancy was to continue on a month to month basis---Plea of tenant that the lease agreement was for a period of 10-years and was not terminable prior to the lapse of the stipulated 7-years was not sustainable and was accordingly repelled---Appeal was dismissed in circumstances.

Messrs Shama Factory, Faisalabad v. Commissioner of Income Tax, Zone, Faisalabad 2006 PTD 178; Habib Bank Limited v. Dr. Munawar Ali Siddiqui 1991 SCMR 1185 and Mst. Rukhsana Bhatti v. K&N'S Foods (Pvt.) Ltd. and others PLD 2013 Lah. 119 ref.

(b) Civil Procedure Code (V of 1908)---

----O. XLI, R. 27---Cantonments Rent Restriction Act (XI of 1963), S.17---Ejectment petition---Appeal---Additional evidence, production of---Scope---In order to be able to produce additional evidence whether oral or documentary at the appeal stage a party

was required to establish that the Court against whose decree/order the appeal had been filed refused to admit evidence which ought to have been admitted---Moreover, the appellate Court while exercising its power to allow additional evidence did not normally favour a delinquent litigant---Such power was only exercised in genuine cases---In the present case, the documents that the tenant/appellant was trying to produce at the appellate stage were in its possession and power at the time of the trial of the ejectment petition and the appellant was fully aware of their existence---Explanation that the documents were not adduced in evidence during trial due to mistaken legal advice was, therefore, not tenable---Appeal was dismissed in circumstances.

Rana Abdul Aleem Khan v. Idara National Industrial Co-Operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another 2016 SCMR 2067; Muhammad Tariq and others v. Mst. Shamsa Tanveer and others PLD 2011 SC 151 and Abdul Hameed and 14 others v. Abdul Qayyum and 16 others 1998 SCMR 671 ref.

Syed Muhammad Kalim Ahmed Khurshid for Appellant.

Mian Imran Mushtaq for Respondent.

Date of hearing: 13th September, 2018.

JUDGMENT

MAMOON RASHID SHEIKH, J.----The instant appeal tiled under Section 24 of the Cantonments Rent Restriction Act, 1963, is directed against the ejectment order, dated 16.05.2018, passed by the Addl. Rent Controller, Lahore Cantt., whereby the appellant has been directed to vacate the premises in dispute (H.No.36/2, Khalid Lane, Sarwar Road, Lahore Cantt.) and hand over its vacant possession to the respondent within 30 days.

2. The appellant has also filed C.M.No.2/2018 for adducing, additional evidence. C.M.No.2/2018 shall be decided along with the main appeal.

3. The brief facts giving rise to the appeal are to the effect that, on 11.02.2015, the parties entered into a Lease Agreement (Ex.P2), in respect of the premises in dispute. The tenure of the lease was 10-years commencing 15.04.2015. The rent was fixed as Rs.120,000/- per month.

However, on 09.05.2016, the respondent filed an ejectment petition against the appellant, inter alia, on the grounds that the appellant has defaulted in payment of monthly rent to the respondent w.e.f January, 2016; the appellant has violated the terms

and conditions of the lease agreement; and the appellant has violated section 17(2) of the Act ibid., therefore, he is an illegal occupant.

The petition was resisted by the appellant by way of filing of a reply. Out of the divergent pleadings of the parties the Addl. Rent Controller, on 16.11.2016, framed the following Issues:-

"1. Whether the respondent has committed default in payment of monthly rent? OPP

2. Whether the petitioner is entitled for recovery of Rs.300000/- deducted from the rent for renovation of building? OPR

3. Whether the respondent has violated the terms and conditions of rent agreement? OPP

4. Whether the petition is maintainable in its present forum? OPR

5. Whether the instant petition is false, frivolous and filed to harass the tenant? OPR

6. Whether the respondent issued the cheque Nos. 13996234 and No.13996237 on dated 13.1.2016 to the representative of petitioner in term of payment of rent? OPR

7. Relief."

The parties led their evidence for and against the Issues. On the basis of evidence so led the Addl. Rent Controller decided Issues Nos.1 and 3 to 6 in favour of the respondent whereas Issue No.2 was decided in favour of the appellant. As a consequence, the appellant was directed to vacate the premises in dispute in the terms mentioned in Para 1 above.

4. The learned counsel for the appellant submits that the ejectment order suffers from misreading and non-reading of evidence. The impugned order is against the law and contrary to the facts of the case. The Addl. Rent Controller erred in law by not adjusting Rs.1,20,000/-, deposited by the appellant as security, against the monthly rent. Since there is no condition in the Lease Agreement for refund of the security deposit, therefore, the appellant was entitled to the said adjustment under the law. Further submits that the Lease Agreement could not have been terminated prior to the lapse of the stipulated 7-years. Refers to Clause 3 of the mutual covenants reserved in the Lease Agreement. The Addl. Rent Controller further erred in not deciding Issue

No.2 in accordance with the law, in that, the appellant spent Rs.500,000/- on renovation of the premises in dispute, however, the benefit thereof was not given to the appellant.

5. Further submits that the respondent received the rent of the property through cheques and direct deposits in her account. The respondent duly acknowledged receipt of the said amounts by putting her signatures on the requisite documents. Submits that the appellant wants to produce the said documents as additional evidence. Further submits that the petitioner also seeks permission to produce as additional evidence the other documents mentioned in C.M.No.2/2018 and also to adduce the evidence of the bank official concerned.

6. Submits that the appellant was precluded from leading the said evidence at the time of trial of the ejectment petition due to mistaken legal advice. As a consequence, C.M.No.2/2018 has been filed for adducing additional evidence. Prays that the appellant may be allowed to produce the documents appended to C.M.No.2/2018 by way of additional evidence. The said documents are essential to the proof of the appellant's case.

7. Relies on the judgments reported as "Superintending Engineer, Lower Bari Doab, Sahiwal v. Messrs Aziz Tanneries Ltd." (1979 SCMR 384), "Muhammad Ijaz Ahmad Chaudhry v. Mumtaz Ahmad Tarar and others" (2016 SCMR 1), "Commissioner Multan Division, Multan and others v. Muhammad Hussain and others" (2015 SCMR 58), "Syed Sharif ul Hassan through LRs v. Hafiz Muhammad Amin and others "(2012 SCMR 1258) and "Iqbal Ahmad and others v. Khurshid Ahmad and others" (1987 SCMR 744).

8. The learned counsel for the respondent supports the impugned order. Submits that it was established on the record that the appellant is a willful defaulter. Further submits that the documents being sought to be brought on the record as additional evidence by the appellant through C.M.No.2/2018 were in the possession as also in the knowledge of the appellant at the time of the trial of the ejectment petition. In view thereof there is no justification under the law for the appellant to submit that it may be allowed to produce the said documents by way of additional evidence. Prays that C.M.No.2/2018 may be dismissed.

9. Relies on the judgment reported as "M Abid v. Ahmed Azad and 96 others" 2017 CLC 59 [Supreme Court (AJ&K)].

10. Heard. Record perused.

11. It is an admitted position that the parties entered into the Lease Agreement, dated 11.02.2015, for a period of 10-years commencing 15.04.2015. It is an further

admitted position that the Lease Agreement is not registered. It is settled law that a lease of immovable property from year to year or for a term exceeding one year or reserving a yearly rent can only be made through a registered instrument. Section 107 of the Transfer of Property Act, 1882 and Section 17(d) of the Registration Act, 1908, so mandate. In case a lease agreement is so required to be registered and is not registered with the Registrar of Documents then the lease agreement is bad in law. As a consequence, the relationship between such a landlord and the tenant beyond the initial period of eleven (11) months is to be regulated by the provisions of the statute in question. In other words, such a tenant becomes a statutory tenant and the tenancy continues on a month to month basis.

12. In the instant case, the statue in question is the Cantonments Rent Restriction Act, 1963. Admittedly, the initial eleven (11) months of the tenancy have already lapsed. The appellant was, therefore, a statutory tenant thereafter and the tenancy was to continue on a month to month basis. In view thereof the contention of the learned counsel for the appellant that the Lease Agreement was for a period of 10-years and was not terminable prior to the lapse of the stipulated 7-years is not sustainable and is accordingly repelled.

13. Reliance for the above proposition is placed on the judgments reported as "Messrs Shama Factory, Faisalabad v. Commissioner of Income Tax, Zone, Faisalabad" (2006 PTD 178), "Habib Bank Limited v. Dr. Munawar Ali Siddiqui" (1991 SCMR 1185) and "Mst. Rukhsana Bhatti v. K&N'S Foods (Pvt.) Ltd. and others" (PLD 2013 Lahore 119).

14. I further note that the ground which has proved fatal for the appellant's case is that the respondent was able to establish that the appellant has defaulted in paying the monthly rent of the premises in dispute w.e.f. January, 2016. Having gone through the record I do not find that the Addl. Rent Controller has erred in holding that the respondent has defaulted in payment of rent since the said month. The learned counsel for the appellant has been unable to establish otherwise from the record.

15. As to the arguments of the learned counsel for the appellant that the appellant may be allowed to lead evidence in terms of the prayer made through C.M.No.2/2018, suffice it to say that I am not persuaded by the said arguments. The reasons therefor are to the effect that admittedly the documents in question were in the appellant's possession and power at the time of the trial of the ejectment petition and the appellant was fully aware of their existence. The explanation that the documents were not adduced in evidence due to mistaken legal advice is, therefore, not tenable. Even

otherwise, the appellant's witnesses RW-1 and RW-2 admitted that they have no proof that the respondent had received the amounts in question at the relevant time. In such circumstances the stand now taken by the appellant does not appear to be plausible. Moreover, it is settled law that in order to be able to produce additional evidence whether oral or documentary at the appeal stage a party is required to establish that the Court against whose decree/order the appeal has been filed refused to admit evidence which ought to have been admitted. Moreover, the appellate Court while exercising its power to allow additional evidence does not normally favour a delinquent litigant. This power is only exercised in genuine cases. In the instant case, however, the appellant has not been able to establish that he tried to produce in evidence the documents in question or to produce the bank official as a witness during the trial of the ejectment petition. The appellant on the contrary has all along maintained that he was precluded from leading the said evidence due to mistaken legal advice. The said argument in the facts and circumstances of the case is not tenable and is accordingly repelled.

16. Reliance for the above is placed on the judgments reported as "Rana Abdul Aleem Khan v. Idara National Industrial Co-operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another" (2016 SCMR 2067), "Muhammad Tariq and others v. Mst. Shamsa Tanveer and others" (PLD 2011 Supreme Court 151) and "Abdul Hameed and 14 others v. Abdul Qayyum and 16 others" (1998 SCMR 671).

17. Under the circumstances, C.M.No.2/2018 fails and is accordingly dismissed.

18. The learned counsel for the appellant has also been unable to establish that the impugned order suffers from misreading and non-reading of evidence or that it is arbitrary or perverse.

19. The appeal, therefore, fails and is accordingly dismissed.

There is no order as to costs.

MWA/S-23/L Appeal dismissed.

2019 CLC 947

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD ASLAM----Petitioner

Versus

ISHRAT BIBI and another----Respondents

Civil Revision No.3567 of 2016, heard on 29th May, 2017.

(a) Jurisdiction---

----Challenge to the jurisdiction of a Court over the subject matter of the lis---Such challenge, if based purely upon a point of law, could be raised at any stage, even before the Supreme Court. [p. 949] A

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

----S. 5 & Sched, Entry No. 9---Specific Relief Act, (I of 1877), Ss.12 &42---Civil court, jurisdiction of---Scope---Suit for declaration filed by wife against her husband in respect of property mentioned in Column No. 16 of the Nikahnama (i.e. property given to wife by way of "Atiya" at the time of marriage)---Whether such property fell within 'personal property and belongings of wife' and as such jurisdiction of civil courts was ousted in the matter---Held, that suits for specific performance, declaratory suits of any nature, or any other civil litigation between a wife and a husband, were not amenable to the jurisdiction of Family Courts---Civil Courts had jurisdiction in the present case.

Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others PLD 2011 SC 260 ref.

Mian Muhammad Nawaz for Petitioner.

Usman Azeem for Respondents.

Date of hearing: 29th May, 2017.

JUDGMENT

MAMOON RASHID SHEIKH, J.---The instant petition is directed against the judgment and decree, dated 21.04.2016, passed by the Additional District Judge, Chiniot, whereby respondent No.1's appeal, against the dismissal of her suit for declaration, in respect of the property in dispute, by the Civil Judge 1st Class, Bhowana, through the judgment and decree, dated 22.04.2014, has been accepted and respondent No.1's suit has been decreed, against the petitioner, in the terms that she has been declared to be the owner of 8-Marlas in the property in dispute.

2. The learned counsel for the petitioner submits that the sole point, which requires determination, in the instant petition, is to the effect that whether in view of the provisions of section 5 of the Family Courts Act, 1964, read with Entry No.9 in the Schedule to the Act, the jurisdiction of the Civil Courts was barred in the matter?

3. Submits that respondent No.1 filed a suit, against the petitioner, for declaration and consequential relief, in respect of the property in dispute, which measures 16-Marlas and is situated at Ghagh Chowk, Tehsil Bhowana. Further submits that respondent No.1 laid her claim in respect of the property in dispute on the basis of the entry in Column No.16 of the parties' Nikahnama, that is to say, she claimed that one half (1/2) of the property in dispute was owned by her as it was given to her by the petitioner through the said entry by way of 'Atiya' at the time of the parties' marriage, on 23.07.2008, however, respondent No.1 was denying her ownership thereof.

4. Submits that respondent No.1 brought her suit before a Civil Court. However, in view of Entry No.9, ibid., read with Section 5, ibid., the jurisdiction of Civil Courts in the matter stood ousted. Submits that at the time of passing of the impugned decree, Entry No.9, read as the "personal property and belongings of a wife". Further submits that by virtue of the said provisions of law, a suit in respect of the personal property and belongings of a wife was to be filed before a Family and not a Civil Court. Contends that in case, respondent No.1 had a claim in respect of the property in dispute, she should have approached the Family Courts and not the Civil Courts. Further submits that Entry No.9, ibid., was inserted in the Schedule, ibid., on 01.10.2002, through Family Courts (Amendment) Ordinance, 2002, whereas respondent No.1 filed her suit on 28.06.2011, therefore, her suit came under the mischief of Entry No.9. Contends that in view thereof, the impugned judgment and decree has been passed without jurisdiction and is, therefore, liable to be set aside.

5. The learned counsel for the petitioner has not urged any other ground.

6. The learned counsel for respondent No.1 supports the impugned judgment and decree. Submits that the dispute between the parties was purely of a civil nature, therefore, the Civil Courts had jurisdiction in the matter.

7. Further submits that even otherwise, the question of jurisdiction has been raised by the petitioner for the first time in the present proceedings. Contends that in absence of a challenge to the jurisdiction of the Civil Courts, at the very first instance, this ground cannot be raised at this belated stage.

8. I have considered the arguments of the learned counsel for the parties and have also gone through the record with their able assistance.

9. I find force in the contention of the learned counsel for respondent No.1 that the petitioner has raised the question of jurisdiction for the first time in the instant petition. However, this argument does not come to the aid of respondent No.1, as it is settled law that a challenge to the jurisdiction of a Court over the subject matter of the lis, if based purely upon a point of law, can be raised at any stage, even before the Hon'ble Supreme Court.

10. The challenge of the learned counsel for the petitioner to the jurisdiction of Civil Courts in the matter, however, fails for the reason that albeit by virtue of the provisions of Section 5 of the Act, ibid., Family Courts have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part I of the Schedule to the Act and Entry No.9, as quoted in Para-4 above, is included in Part I of the Schedule, yet the suit filed by respondent No.1 was a suit for declaration in respect of the property in dispute. In view thereof, as held by the Hon'ble Supreme Court in the judgment reported as Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others (PLD 2011 SC 260), suits for specific performance, declaratory suits of any nature, or any other civil litigation between a wife and a husband, are not amenable to the jurisdiction of Family Courts. In other words, the learned Courts below (the Civil Courts) had jurisdiction in the matter. The impugned judgment and decree, dated 22.04.2014, has, therefore, been passed in accordance with law.

11. Under the circumstances, the petition fails and is accordingly, dismissed.

There is no order as to costs.

MWA/M-55/L Petition dismissed.

2019 CLC 1110

[Lahore]

Before Mamoon Rashid Sheikh, J

MUHAMMAD AHMED CHATTHA----Petitioner

Versus

CH. AADIL BAKSH CHATHA and others----Respondents

Election Petition No.27 of 2018, decided on 15th April, 2019.

(a) Elections Act (XXXIII of 2017)---

----S. 144(4)---Civil Procedure Code (V of 1908), O. VI, R. 15---Election petition, verification of---Scope and object---Verification of an election petition as envisaged by S. 144(4) of the Elections Act, 2017 ('the Act') was to be done in accordance with the procedure as laid down in O. VI, R. 15, of the C.P.C.---Object of such exercise was to ensure that false and frivolous allegations were not made in election petitions, and the person making the allegations assumed responsibility in respect thereof.

Lt.-Col.(Rtd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana 2015 SCMR 1585; Sultan Mahmood Hinjra v. Malik Ghulam Mustaffa Khan and others 2016 SCMR 1312 and Feroze Ahmed Jamali v. Masroor Ahmad Khan Jatoi and others 2016 SCMR 750 ref.

(b) Elections Act (XXXIII of 2017)---

----S. 144(4)---Civil Procedure Code (V of 1908), O. VI, R. 15---Election petition, verification of---Question of law---Question as to whether the verification of an (election) petition or the affidavit in support of such petition was in accordance with the law or not, was a question which did not require recording of evidence for its determination, as the question of proper consideration of a document was a question of law and not of fact.

Gulzar Khan v. Shahzad Bibi and another PLJ 1974 SC 179; Amir Abdullah Khan through Legal Heirs and others v. Col. Muhammad Attaullah Khan PLD 1990 SC 972 and Mst. Maryam Bibi and others v. Muhammad Ali through L.Rs. 2007 SCMR 281 ref.

(c) Elections Act (XXXIII of 2017)---

----S. 144(4)---Election petition, verification of---Lack of full particulars and signatures---Interpolation---Verification of the election petition showed that the verification clause was typed/printed followed by the petitioner's signature as deponent---Signature of the

petitioner was attested by the Oath Commissioner with the date mentioned therein --- Verification clause was followed by the typed/printed words to the effect that the verification was identified by an Advocate, however, the advocate's signature and full particulars were not mentioned therein---Verification clause was followed by the typed/printed certificate of the Oath Commissioner---Underneath the Oath Commissioner's certificate a certificate had been given by the counsel for the petitioner to the effect that it was the first petition on the subject before the Tribunal---Said certificate appeared to have been signed by an Advocate but the name and / or particulars of the Advocate had not been given---Oath Commissioner had not given the full particulars of the Advocate, who was stated to have identified the petitioner to the Oath Commissioner---Moreover, there was no endorsement to the effect as to how the Oath Commissioner claimed to know the Advocate or whether he had examined the CNIC of the Advocate or his Bar Council/Association identity card---At the bottom of the (verification) page a rubber stamp had been affixed by the Oath Commissioner-Blank spaces in the rubber stamp had been filled in the handwriting of the Oath Commissioner, however in the space left out for filling the name of the identifier, the handwriting used was different---Moreover, the pen and the ink which had been used for the said purpose also appeared to be different---Verification of the petition appeared to be the result of interpolation and was not done in accordance with law--- Election petition was dismissed as being not maintainable.

(d) Interpretation of document---

----When the deed or document in question contained ungrammatical language and could not be read literally so as to give a clear meaning without adding or removing some words then the document shall be said to be suffering from a patent ambiguity and oral evidence was not admissible to cure the defect.

(e) Elections Act (XXXIII of 2017)---

----S. 144(4)---Election petition, verification of---Oath Commissioner, duty of---Scope--- Oath Commissioner at the time of verification of the election petition must take care that he recorded and endorsed the verification/attestation in the manner that he stated that the oath had been actually, physically and duly administered to the election petitioner / deponent---Additionally the full particulars of the person who had identified the election petitioner/ deponent to the Oath Commissioner were also to be mentioned in the verification.

(f) Elections Act (XXXIII of 2017)---

----S. 144(4)---High Court (Lahore) Rules and Orders, Vol. IV, Chap.12, Rr. 11, 12, 14, 15 & 16---Election petition, verification of---Affidavit filed in support of the petition in absence of verification---Pre-requisites of such an affidavit listed.

Following are the pre-requisites that an affidavit filed in support of an election petition (in absence of verification) had to fulfil in order to be accepted:

(i) Identification of deponent;

(ii) Particulars of deponent and identifier to be mentioned at the foot of the affidavit;

(iii) Time and place of the making of the affidavit to be specified;

(iv) Certification by Court/Magistrate/Other Officer at the foot of the affidavit that such affidavit was made before him;

(v) Date, signature and name of the office and designation of the Court/Magistrate/Other Officer to be subscribed underneath the certification;

(vi) Every exhibit referred to in the affidavit to be dated and initialed by the Court/Magistrate/Other Officer;

(vii) Where deponent of an affidavit did not understand the contents of an affidavit, the Court/Magistrate/Other Officer administering oath must read out the contents of an affidavit to such person so that he understood. Where such was the case, the Court/Magistrate/Other Officer shall note at the foot of the affidavit that the affidavit had been read out to the deponent and he understood its contents;

(viii) Deponent to sign/mark and verify the affidavit and the Court Magistrate or Other Officer administering the oath or affirmation to attest the affidavit; and

(ix) Oath to be administered by the Court/Magistrate/Other Officer in accordance with the Oaths Act, 1878 and affidavit to be verified by deponent and attested by Court/Magistrate/Other officer on forms appended thereto.

Lt.-Col.(Rtd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana 2015 SCMR 1585 rel.

(g) Elections Act (XXXIII of 2017)---

----S. 144(2)(c)---Election petition---Affidavit of service filed by the petitioner, legality of --- Time of making the affidavit had not been specified --- Requisite details of the Advocate who identified the petitioner/deponent to the Oath Commissioner including the advocate's CNIC and / or Bar Council/Association Identity Card had not been mentioned in the verification portion of the affidavit --- Moreover, the Oath Commissioner had not signed the typed / printed certificate to the effect that the affidavit was made before him and that the Advocate's named therein identified the petitioner/deponent to him --- Oath Commissioner had instead affixed his rubber stamp

at the bottom of the page and signed it, however he had not mentioned the name of the identifier in the rubber stamp --- Since the typed/printed certificate had not been signed by the Oath Commissioner, therefore, the rubber stamp signed by the Oath Commissioner had to be considered, which stamp lacked the name of the identifier --- Affidavit of service had not been made in accordance with the law, therefore, the election petition, could not be said to have been filed after complying with the provisions of S.144(2)(c) of the Elections Act, 2017 --- Election petition was dismissed as being not maintainable.

Bahadur Bokhari, M. Mohsin Malik and Hassan Ijaz Cheema for Petitioner.

Muhammad Shahzad Shaukat for Respondent No.1.

Date of hearing: 23rd November, 2018.

JUDGMENT

MAMOON RASHID SHEIKH, J.----Judgment was reserved in the instant petition, on 23.11.2018, whereafter the petition was dismissed through a short order, dated 18.01.2019. The said short order reads as under:

"For the reasons to be recorded later the instant petition is dismissed"

2. The Following are the reasons for the above short order.

3. The instant election petition, under Section 142 of the Elections Act, 2017 (the Act) read with all other enabling provisions of law, has been brought by the petitioner, the runner up candidate of the election held on 25.07.2018, for the constituency PP-52 (Gujranwala-II) of the Provincial Assembly of the Punjab.

4. The petitioner has called into question the election of the returned candidate (respondent No.1), inter alia, on the grounds that respondent No.1 made a false declaration on oath in his nomination paper. He, therefore, cannot be termed to be sagacious, righteous, honest, ameen, and non-profligate within the meaning of Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973, and the election suffers from ballot stuffing, grave illegalities, massive rigging and malpractice as also tampering with the polling result and delay in the announcement of result, etc., etc.

5. The petition was filed on 19.09,2018 at 2:45 p.m. The petition came up for hearing for the first time, on 24.09.2018, when, subject to the question of maintainability, notices were issued to the respondents in terms of section 145 of the Act. Only respondents Nos.1, 2 and 5 entered appearance. As a consequence, ex parte proceedings were initiated

against respondents Nos.3, 4 and 6 to 13, who failed to enter appearance, despite being served, inter alia, through publication of notice.

6. Respondents 1 and 5 filed their written statements wherein besides defending the petition on merits they took a number of preliminary objections regarding the maintainability of the petition. The said objections are, inter alia, to the effect that the petition and the affidavits attached thereto have not been duly attested by an Oath Commissioner as per the law as laid down by the Hon'ble Supreme Court in the judgments reported as "Lt.-Col.(Rtd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana" (2015 SCMR 1585) and "Sultan Mahmood Hinjra v. Malik Ghulam Mustaffa Khan and others" (2016 SCMR 1312).

7. The learned counsel for respondent No.1, in support of the above objections, has drawn the attention of the Tribunal towards pages 18 and 31 of the paper book. Submits that page 18 is the last page of the election petition, whereas page 31 is the last page of the affidavit in support of the petition. Submits that the verification of the petition has not been done by the petitioner in accordance with the law as laid down by the Hon'ble Supreme Court in the cited judgments. Further submits that clear interpolations have been made in the verification and the affidavit.

8. Submits that on page 18 the verification clause has been typed out/printed and has been signed by the petitioner. The Oath Commissioner, namely Malik Shahid Pervaiz, Advocate, has put his signature and affixed stamps bearing the date and the word "Attested" next to the petitioner's signature. Below the verification clause and the above mentioned signature/stamps the words, "Identified by me Mr. Hassan Ijaz Cheema Advocate high court," have been typed/printed. The said words are followed by the typed/printed certificate of solemn affirmation signed by the Oath Commissioner. However, at the bottom of the page the Oath Commissioner has affixed his rubber stamp to the effect that the verification of the petition was made before him on oath and that the Oath Commissioner has himself identified the petitioner. However, the name "Hassan Ijaz Cheema" has been inserted in the blank space in the rubber stamp later on so as to bring the endorsements in the blank spaces of the rubber stamp in conformity with the typed/printed solemn affirmation.

9. Submits that the name "Hassan Ijaz Cheema" has been inserted in different writing with a different pen and in different ink. The verification of the petition, therefore, suffers from interpolation. The petition has, therefore, not been verified in accordance with the provisions of section 144(4) of the Act.

10. Further submits that he concedes that the petitioner has also filed an affidavit in support of his petition. And in absence of a valid verification the affidavit can be considered as the verification, subject to the caveat that the affidavit conforms to the law on the subject. However, the said affidavit also suffers from the same illegalities as the verification, therefore, the said affidavit cannot be taken into consideration. Refers to page 31 of the paper book.

11. Further submits that the affidavit of service (pages 521 and 521-A) is false. On page 520 the courier receipts in respect of the dispatch of the copies of the petition in terms of section 144(2)(c) have been appended. The said page has been signed by the petitioner, however, the date of the petitioner's signature has been changed. It means that the said signature is defective and / or the result of interpolation.

12. The learned counsel for the petitioner submits that the petition has been filed in accordance with the provisions of Sections 142 to 144 of the Act. The verification of the petition, the affidavit in support of the petition and the affidavit of service have been sworn in accordance with the law.

13. Submits that the preliminary objections raised by respondent No.1 are false and frivolous. Respondent No.1 is guilty of failure to disclose his assets. Indeed, he has concealed the detail of his bank accounts. He has filed a false affidavit along with his nomination paper. He has, therefore, violated the law as laid down by the Hon'ble Supreme in the judgment reported as "Speaker National Assembly of Pakistan, Islamabad and others v. Habib Akram and others" (PLD 2018 Supreme Court 678), in that, he has failed to give a statement of his assets and liabilities and of his spouse and dependent children as envisaged by section 60(2) of the Act. Reiterates that respondent No.1 has given a false affidavit in support of the nomination form.

14. Further submits that Mr. Hassan Ijaz Cheema, Advocate, is one of the counsel for the petitioner. He knows the petitioner, therefore, he identified the petitioner to the Oath Commissioner. Hence, the mentioning of the learned counsel's name.

15. Further submits that respondent No.1 has admitted that he has not disclosed the assets of his spouse in his nomination paper by stating in his written statement that the omission was due to a mistaken impression and bona fide mistake. Submits that it is a simplistic answer. The concealment is apparent on the face of the record. The petitioner's declaration of assets filed along with his nomination paper was, therefore, false. The petitioner has violated the Constitution and the Act and the law as laid down by the Hon'ble Supreme Court in the "Speaker National Assembly of Pakistan's case (supra).

16. Further submits that the election of respondent No.1 suffer from corrupt practices, therefore, it is liable to be declared as void.

17. Further submits that, in any event, on the basis of the above information the Tribunal is empowered to take action against the petitioner under Section 165 of the Act.

18. Submits that, without prejudice to the above, the petitioner has filed the petition in accordance with the manner prescribed in Sections 142, 143 and 144 of the Act. Further submits that it was only after this Tribunal was satisfied that the said procedure had been complied with, that notices were issued to the respondents.

19. Further submits that the objections being raised by the learned counsel for respondent No.1 relate to the merits of the case and are not in the nature of preliminary objections. Denies that any interpolation has taken place in the process of verification of the petition and/or the verification of the affidavit in support of the petition or that the date has been changed on page 520 of the paper book.

20. Further submits that, in any event, the issues raised through the preliminary objections cannot be determined without recording of evidence. These issues may, therefore, be resolved at the time of recording of evidence in the main trial.

21. I have considered the arguments of the learned counsel for the parties and have also gone through the record with their able assistance. It is settled law that verification of an election petition as envisaged by Section 144(4) of the Act is to be done in accordance with the procedure as laid down in Order VI, Rule 15 of the C.P.C. The object of the whole exercise is to ensure that false and frivolous allegations are not made in election petitions. And the person making the allegations assumes the responsibility in respect thereof. Lt.-Col.(Rtd.) Ghazanfar Abbas Shah's case (supra) and Sultan Mahmood Hinjra's case (supra), as cited by the learned counsel for the petitioner, and the .judgments reported as "Feroze Ahmed Jamali v. Masroor Ahmad Khan Jatoi and others" (2016 SCMR 750) refer.

22. Section 145 of the Act envisages that an election petition has to conform to the provisions of Sections 142, 143 and 144 of the Act. If any of the provisions of the said sections has not been complied with the petition merits summary rejection. One of such requirements is the verification of the petition in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings. The said requirement is contained in Section 144(4) of the Act and is mandatory, as has been held in "Lt.-Col. (Rtd.) Ghazanfar Abbas Shah's case (supra).

23. The learned counsel for the petitioner has tried to maintain that since initially no questions were asked by the Tribunal in respect of the maintainability of the petition, therefore, the petition would be deemed to have been filed in accordance with the provisions of section 145 read with sections 142 to 144 of the Act. The said argument does not come to the aid of the petitioner, as through the order, dated 24.09.2018, notices were issued to the respondents, subject to the question of maintainability of the petition, moreover, in "Lt.-Col. (Rtd) Ghazanfar Abbas Shah's case (supra) in Paras 7 and 8 it has inter alia been held that:--

> "It is also relevant to note here that in an ordinary lis (suit etc.) requiring verification and support by an affidavit, if the verification or affidavit is flawed, such lapse may be considered an irregularity and be treated as a curable defect, but we are not laying down any hard and fast rule, because the matter before us is not pertaining to ordinary litigation, however in the case of an election petition the law is very stringent and imperative. Therefore, if the election petition has not been verified in accordance with law, this cannot be treated as a curable defect and the Election Tribunal particularly after the lapse of the period of limitation prescribed for filing of election petition, cannot permit the election petitioner to cure the same."

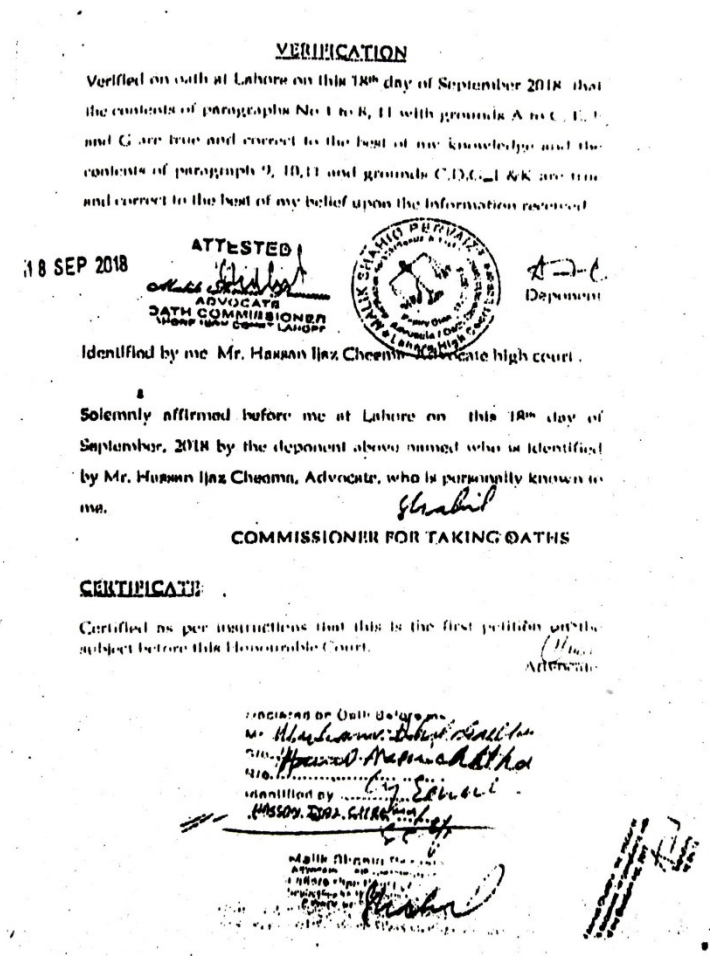
> "But for the future we hold that where the election petition or the affidavit is sought to be attested by the Oath Commissioner, the election petitioner shall insist and shall ensure that the requisite endorsement about the administration of oath is made, otherwise the election petition/affidavit shall not be considered to have been attested on oath and this the election petition shall be liable to be, inter alia, dismissed on the above score."

24. In view thereof the preliminary objections raised by the learned counsel for respondent No.1 are required to be decided before proceeding with the trial of the petition on merits, as the preliminary objections relate to the alleged flaws/defects in the verification of the petition and / or the affidavit in support of the petition.

25. Contrary to what has been argued by the learned counsel for the petitioner, the question, whether the verification of the petition or the affidavit in support of the petition is in accordance with the law or not, is a question which does not require recording of evidence for its determination, as the question of the proper consideration of a document is a question of law and not of fact. Reliance in this respect is placed on the judgments reported as "Gulzar Khan v. Shahzad Bibi and another" (PLJ 1974 SC 179), "Amir Abdullah Khan through Legal Heirs and others v. Col. Muhammad

Attaullah Khan "(PLD 1990 SC 972) and "Mst. Maryam Bibi and others v. Muhammad Ali through L.Rs. (2007 SCMR 281).

26. I first of all take up the objections of respondent No.1 raised in respect of the verification of the petition and the reply thereto by the petitioner. The verification of the petition appears at page 18 of the paper book. For ease of reference the scanned copy of page 18 is being reproduced hereunder:-



VERIFICATION

Verified on oath at Lahore on this 18th day of September 2018 that the contents of paragraphs No 1 to 8, 11 with grounds A to C, E, I and G are true and correct to the best of my knowledge and the contents of paragraph 9, 10,11 and grounds C,D,G,J &K are true and correct to the best of my belief upon the information received

18 SEP 2018 ATTESTED ADVOCATE OATH COMMISSIONER LAHORE

Deponent

Identified by me Mr. Hassan Ijaz Cheema Advocate high court .

Solemnly affirmed before me at Lahore on this 18th day of September, 2018 by the deponent above named who is identified by Mr. Hassan Ijaz Cheema, Advocate, who is personally known to me.

COMMISSIONER FOR TAKING OATHS

CERTIFICATE .

Certified as per instructions that this is the first petition on the subject before this Honourable Court.

Advocate

Declared on Oath before me

Identified by

Malik Waqas

27. As will be clear, the verification clause is typed/printed. It is followed by the petitioner's signature as deponent. The signature of the petitioner is attested by the Oath Commissioner with the date mentioned therein. The verification clause is followed by the typed/printed words, "Identified by me Mr. Hassan Ijaz Cheema Advocate High Court," However, the said words are not supported by the said learned counsel's signature nor his full particulars are mentioned therein. The verification clause is then followed by the typed/printed certificate of the Oath Commissioner. It has been signed by the Oath Commissioner. Underneath the Oath Commissioner's certificate a certificate has been given by the counsel for the petitioner to the effect that it is the first petition

on the subject before this Tribunal. The said certificate appears to have been signed by an Advocate but the name and / or particulars of the Advocate have not been given.

28. At the bottom of the page a rubber stamp has been affixed by the Oath Commissioner. The blank spaces in the rubber stamp have been filled in the writing of the Oath Commissioner. In the space left out for filling the name of the identifier the following endorsement is present:-

"Hassan Ijaz Cheema/
Self"

Underneath the said stamp the Oath Commissioner has affixed a stamp bearing his particulars and has also put his signatures.

29. It is apparent to the naked eye that the name "Hassan Ijaz Cheema" appears to have been inserted in the blank space reserved for the name of the identifier in handwriting which is different from the handwriting used for the other endorsements in the above mentioned stamp. Moreover, the pen and the ink which has been used for the said purpose also appear to be different.

30. I, therefore, tend to agree with the learned counsel for respondent No.1 that the verification of the petition appears to be the result of interpolation.

31. However, in case I accept the arguments of the learned counsel for the petitioner that there is no interpolation in the verification process, even then the case of the petitioner is not advanced. The reason being that the mere fact that the name of an Advocate ("Hassan Ijaz Cheema") has been entered in the above stamp as the identifier of the deponent/petitioner followed by a forward slash ("/") and the endorsement of "Self" by the Oath Commissioner as the identifier, makes the document ambiguous. Or in other words there is a patent ambiguity in the endorsements made. It is settled law that when the deed or document in question contains ungrammatical language and cannot be read literally so as to give a clear meaning without adding or removing some words then the document shall be said to he suffering from a patent ambiguity and oral evidence is not admissible to cure the defect. Reliance in this respect is placed on the maxim ambiguitas verborum patens nulla verificatione excluditur (that which is patently ambiguous on its face cannot be made clear by external proof).

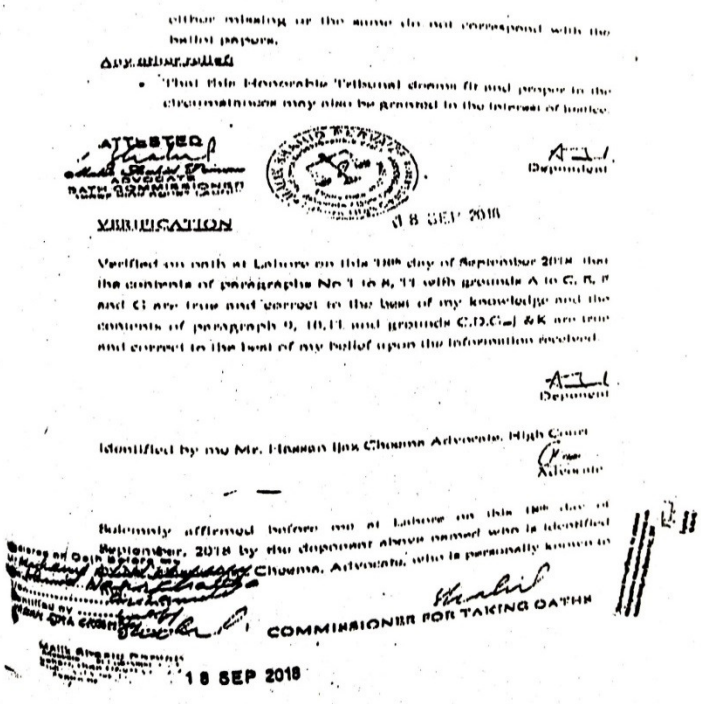
32. In view of the above, the above patent ambiguity renders the attestation/certificate of the Oath Commissioner in respect of the verification void for uncertainty.

33. It is further observed that, under the law as laid down by the Hon'ble Supreme Court, through the afore-referred 'judgments, the Oath Commissioner at the time of verification of the election petition must take care that he records and endorses the verification/attestation in the manner that he states that the oath has been actually, physically and duly administered to the election petitioner / deponent and additionally the full particulars of the person who has identified the election petitioner/ deponent to the Oath Commissioner are also to be mentioned in the verification.

34. In the instant case, as is apparent from page 18, the Oath Commissioner has not given the full particulars of Mr. Hassan Ijaz Cheema Advocate, who is stated to have identified the petitioner to the Oath Commissioner. Moreover, there is no endorsement to the effect as to how the Oath Commissioner claims to know the said learned counsel or to the effect that he has either examined the CNIC of the learned counsel or his Bar Council/Association Identity Card.

35. In view of the above I am constrained to hold that the verification of the petition was not made in accordance with the law.

36. Having held that the petition has not been verified in accordance with the law, it is now proposed to consider if the affidavit filed in support of the petition would suffice, in absence of the verification, to render the petition maintainable. For this purpose page 31 of the paper book, the scanned copy whereof is being reproduced hereunder is of relevance:-


either misuing or the same do not correspond with the ballot papers.

Any other relief

- That this Honorable Tribunal deems fit and proper in the circumstances may also be granted in the interest of justice.

ATTESTED
ADVOCATE
OATH COMMISSIONER

Deponent

VERIFICATION

18 SEP 2018

Verified on oath at Lahore on this 18th day of September 2018 that the contents of paragraphs No 1 to 8, 11 with grounds A to G, I, J and O are true and correct to the best of my knowledge and the contents of paragraphs 9, 10,11 and grounds C,D,G,e) &K are true and correct to the best of my belief upon the information received.

Deponent

Identified by me Mr. Hassan Ijaz Cheema Advocate, High Court

Advocate

Solemnly affirmed before me at Lahore on this 18th day of September, 2018 by the deponent above named who is identified by Mr. Hassan Ijaz Cheema, Advocate, who is personally known to me.

COMMISSIONER FOR TAKING OATH

18 SEP 2018

37. It has been held in "Lt.-Col.(Rtd.) Ghazanfar Abbas Shah's case (supra) that an affidavit in support of an election petition in order to be accepted to have been duly sworn in accordance with the law has to conform to the following requirements:--

"From the High Court Rules and Orders reproduced in the preceding para, it is clear to our mind that an affidavit has to meet the following requisites:

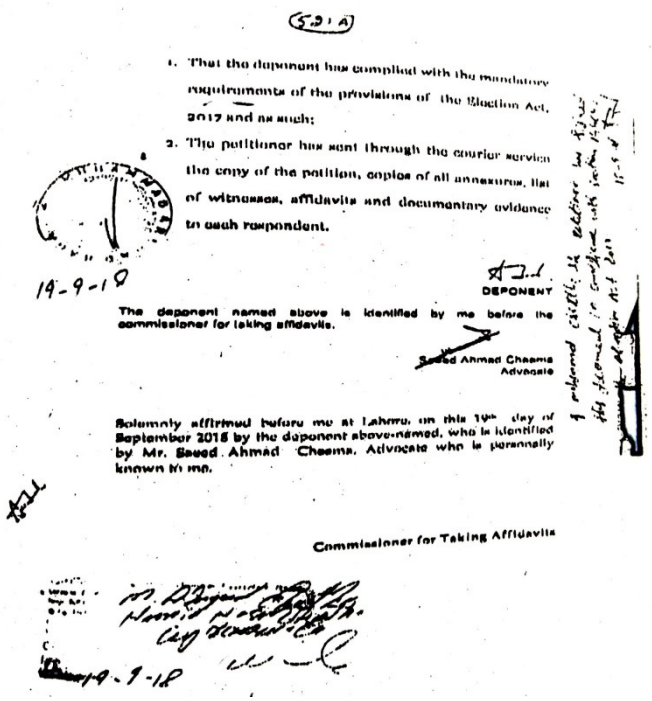
1. Identification of deponent (Rule 11)
2. Particulars of deponent and identifier to be mentioned at the foot of the affidavit (Rule 11)
3. Time and place of the making of the affidavit to be specified (Rule 11)
4. Certification by Court/Magistrate/Other Officer at the foot of the affidavit that such affidavit was made before him (Rule 12)
5. Date, signature and name of the office and designation of the Court/Magistrate/Other Officer to be subscribed underneath the Certification (Rule 12)
6. Every exhibit referred to in the affidavit to be dated and initialed by the Court/Magistrate/Other Officer (Rule 12)
7. Where deponent of an affidavit does not understand the contents of an affidavit, the Court/Magistrate/Other officer administering oath must read out the contents of an affidavit to such person so that he understands. Where such is the case, the Court/Magistrate/Other officer shall note at the foot of the affidavit that the affidavit has been read out to the deponent and he understands its contents (Rule 14)
8. Deponent to sign/mark and verify the affidavit and the Court Magistrate or other officer administering the oath or affirmation to attest the affidavit (Rule 15)
9. Oath to be administered by the Court/Magistrate/Other officer in accordance with the Oaths Act, 1878 and affidavit to be verified by deponent and attested by Court/Magistrate/Other officer on forms appended thereto (Rule 16)"

38. A perusal of the scanned copy of the affidavit in the light of the above rule of law establishes two things. Firstly, the verification of the affidavit suffers from the same defects as the verification of the election petition. Moreover, the rubber stamp of the Oath Commissioner has been superimposed/affixed upon the typed/printed certificate at the bottom of the page, therefore, the rubber stamp for all intents and purposes has superseded the typed/printed certificate. There is, however, one difference in the

verification, that is to say, the identifier, an Advocate, has signed the statement to the effect that he has identified the deponent to the Oath Commissioner. However, the requisite details of the identifier, including his CNIC and / or Bar Council/Association Identity Card are missing. And secondly, the time of making of the affidavit has not been specified in the verification/certificate portion of the affidavit. Item 3 in para 37 above refers.

39. I am, therefore, constrained to hold that the affidavit in support of the petition not only suffers from the legal flaws and defects as the verification of the election petition but also that the affidavit has not been sworn in accordance with the rules as laid down in Lt.-Col. (Rtd.) Ghazanfar Abbas Shah's case (supra).

40 There is another aspect of the case and that is the legality of the affidavit of service filed by the petitioner under Section 144(2)(c) of the Act. For ease of reference a scanned copy of the affidavit of service is being reproduced hereunder:-



5-9-A

1. That the deponent has complied with the mandatory requirements of the provisions of the Election Act, 2017 and as such;
2. The petitioner has sent through the courier service the copy of the petition, copies of all annexures, list of witnesses, affidavits and documentary evidence to each respondent.

19-9-18

DEPONENT

The deponent named above is identified by me before the commissioner for taking affidavits.

Saeed Ahmad Cheema
Advocate

Solemnly affirmed before me at Lahore, on this 19th day of September 2018 by the deponent above-named, who is identified by Mr. Saeed Ahmad Cheema, Advocate who is personally known to me.

Commissioner for Taking Affidavits

19-9-18

41. As will be evident, the affidavit of service has not been verified in accordance with the principles of law mentioned hereinabove. At the risk of repetition, it is observed that the time of making the affidavit has not been specified nor are the requisite details of the learned counsel who identified the petitioner/deponent to the Oath Commissioner including the counsel's CNIC and / or Bar Council/Association Identity Card have not been mentioned in the verification portion of the affidavit. Moreover, the Oath Commissioner has not signed the typed / printed certificate to the effect that the

affidavit was made before him and that the learned counsel's named therein identified the petitioner/deponent to him. The Oath Commissioner has instead affixed his rubber stamp at the bottom of the page and signed it. The Oath Commissioner has, however, not mentioned the name of the identifier in the rubber stamp. Since the typed/printed certificate has not been signed by the Oath Commissioner, therefore, the rubber stamp signed by the Oath Commissioner shall have to be considered but as said above the name of the identifier has not been mentioned therein.

42. In view thereof I am constrained to hold that the affidavit of service has not been made in accordance with the law. The petition, therefore, cannot be said to have been filed after complying with the provisions of section 144(2)(c) of the Act.

43. Under the circumstances, it is held that the instant election petition has not been filed in compliance with the mandatory provisions of Section 144 of the Elections Act, 2017. It is, therefore, not maintainable and is thus liable to be dismissed.

44. Before parting with the judgment, I would like to address the contention of the learned counsel for the petitioner to the effect that since respondent No.1 has conceded that he has not declared his assets/accounts required under the law, albeit due to a bona fide omission, therefore, respondent No.1 is liable to be proceeded against under Section 165 of the Act, suffice it to say that, since the petition is not maintainable the said objections cannot be entertained as they relate to the merits of the petition.

45. Dismissed.

MWA/M-90/L Petition dismissed.

2019 CLC 1651

[Lahore]

Before Mamoon Rashid Sheikh, J

INAYAT ALI----Petitioner

Versus

MUHAMMAD RAMZAN and 13 others----Respondents

Civil Revision No. 1743 of 2009, decided on 7th December, 2018.

Civil Procedure Code (V of 1908)---

----S.12(2)---Limitation Act (IX of 1908), First Sched. Art. 181---Application under S.12(2), C.P.C, filing of---Limitation---Fraud---Defendant moved his application under S.12(2) of the C.P.C. for setting aside the decree after the lapse of more than nine (9) years, inter alia on the grounds that the plaintiffs deliberately gave his incorrect address in the suit/appeal so as to non-suit him---Plaintiffs had, therefore, played a fraud upon the Court---Court below had not given a categorical finding on the issue pertaining to the point of limitation---Impugned judgment was set aside with the directions that the defendant's application under S.12(2) of the C.P.C. shall be deemed to be pending before the Court below and shall be decided afresh strictly in accordance with the law on the basis of the evidence already available on the file; and, that the Court below shall further ensure that separate and distinct findings were given on all the issues framed---Revision petition was allowed accordingly.

Tariq Masood for Petitioner.

Nazir Ahmed Chaudhary for Respondents Nos.1 to 4.

Muhammad Azeem Malik, Additional Advocate General.

ORDER

MAMOON RASHID SHAIKH, J.---The instant petition is directed against the judgment, dated 07.04.2009, passed by the Additional District Judge, Okara, whereby the petitioner's application under Section 12(2) of the C.P.C.; against the decree, in appeal, dated 02.12.1997, passed by the Additional District Judge, Okara, decreeing respondents Nos.1 to 4's suit, against the petitioner and respondents Nos.5 to 14, for declaration in respect of the property in dispute; has been dismissed.

2. The learned counsel for the petitioner submits that the impugned judgment, dated 07.04.2009, has been passed by misreading and non-reading of evidence. The impugned judgment is based on conjectures and surmises. Further submits that the findings of the learned Court below on Issue No.1 is against the law and facts of the case.

3. The learned counsel for respondents Nos.1 to 4 supports the impugned judgment. Submits that the petitioner's application under section 12(2) of the C.P.C. was hopelessly barred by time. The petitioner was unable to prove that the decree, dated 07.04.2009, was obtained by respondent No.1, through fraud and misrepresentation or that the decree has been passed without jurisdiction. As such the petitioner's application warranted outright dismissal.

4. I have considered the arguments of the learned counsel for the parties and have also gone through the record with their assistance.

5. I find that respondents Nos.1 to 4's suit, against the petitioner was decreed by the learned appellate Court below through the judgment arid decree, dated 02.12.1997. The petitioner moved his application under Section 12(2) of the C.P.C. for setting aside the said decree after the lapse of more than nine (9) years, that is to say, on 17.04.2006, inter alia on the grounds that respondents No.1 deliberately gave his wrong address in the suit/appeal so as to non-suit him. Respondents Nos.1 to 4 have, therefore, played a fraud upon the Court. Out of the divergent pleadings of the parties, the following Issues were framed:-

"1. Whether the decree and judgment dated 02.12.1997 is result of fraud, misrepresentation and want of jurisdiction ? OPA

2. Whether petitioner has no cause of action ? OPR

3. Whether the petitioner (sic) is barred by time ? OPR

4. Relief."

6. I note that even though the learned Court below has given findings on each Issue, however, the learned Court below has not given a categorical finding on Issue No.3, which pertains to the point of limitation. Under the circumstances, the impugned judgment, dated 07.04.2009, is set aside and the matter is remanded to the Court of the Additional District Judge, Okara, for decision afresh in accordance with the law.

7. The petitioner's application under Section 12(2) of the C.P.C. shall be deemed to be pending before the said Court and shall be decided afresh strictly in accordance with the law on the basis of the evidence already available on the file. The said learned Court shall further ensure that separate and distinct findings are given on all the issues in terms of Order XX, Rule 5, of the C.P.C.

There is no order as to costs.

MWA/I-10/L Case remanded.

2019 MLD 772

[Lahore]

Before Mamoon Rashid Sheikh, J

Messrs IRIS COMMUNICATIONS (PVT.) LTD.---Appellant

Versus

AHMAD KHALID---Respondent

F.A.O. No. 219035 of 2018, heard on 13th September, 2018.

(a) Cantonments Rent Restriction Act (XI of 1963)---

----S. 17---Transfer of Property Act (IV of 1882), S. 107---Registration Act (XVI of 1908), S. 17(d)---Ejectment petition---Unregistered lease agreement for a period of ten years---Where the lease agreement was beyond a period of one (1) year, under the provisions of S. 107 of the Transfer of Property Act, 1882, read with S. 17(d) of the Registration Act, 1908, such lease agreement was compulsorily registerable---Lease of immovable property from year to year or for a term exceeding one year or reserving yearly rent could only be made through a registered instrument---Since the lease agreement for ten years, in the present case , was unregistered, the tenure of the lease agreement was only binding between the parties for the initial eleven (11) months, where after the relationship between the parties was to be regulated by the terms of the statute in question, i.e. the Cantonments Rent Restriction Act, 1963---Tenancy between the parties shall, therefore, be considered to be a statutory tenancy on a month to month basis beyond the initial period of eleven (11) months.

Habib Bank Limited v. Dr. Munawar Ali Siddiqui 1991 SCMR 1185; Mst. Rukhsana Bhatti v. K & N's Foods (Pvt.) Ltd. and others PLD 2013 Lah. 119 and Messrs Shama Soap Factory, Faisalabad v. Commissioner of Income Tax, Zone, Faisalabad 2006 PTD 178 ref.

(b) Cantonments Rent Restriction Act (XI of 1963)---

----Ss. 17(2)(i) & 17(2)(ii)(b)---Ejectment petition---Grounds---Default in payment of rent---Residential property used for commercial purposes---Admittedly, the appellant was unable to bring on record any evidence, oral or documentary, regarding the payment of rent to the landlord after a specific date---In such circumstances tenant was rightly held to be a "willful defaulter"---Furthermore as per the lease agreement the tenant took the property on rent for residential purposes, but he had converted the

property to commercial use, thus he violated the terms of the lease agreement---Court below had rightly allowed the ejectment petition of the landlord and ordered the tenant to vacate the premises---Appeal was dismissed accordingly.

(c) Civil Procedure Code (V of 1908)---

----O. XLI, R. 27---Appeal---Additional evidence, production of---Scope---In order to be able to produce additional evidence, whether oral or documentary, at the appellate stage, a party had to establish that the Court against whose decree/order the appeal had been filed refused to admit evidence which ought to have been admitted or that the documents in question were not available or traceable during the trial---In absence of any of the said conditions being met additional evidence was not normally allowed to be led by an appellate Court---Appellate Court in exercise of its power to allow additional evidence normally did not favour a delinquent litigant---Such power was only exercised in genuine cases.

Muhammad Hanif and another v. Sultan 1994 SCMR 279; Syed Phul Shah v. Muhammad Hussain and 10 others PLD 1991 SC 1051; Khurshid Ali and 6 others v. Shah Nazar PLD 1992 SC 822 and Zar Wali Shah v. Yousaf Ali Shah and others 1992 SCMR 1778 ref.

Syed Muhammad Kalim Ahmad Khurshid for Appellant.

Muhammad Ahsan Bhoon and Rana Abdul Sattar Khan for Respondent.

Date of hearing: 13th September, 2018.

JUDGMENT

MAMOON RASHID SHEIKH, J.---The instant appeal has been filed under Section 24 of the Cantonments Rent Restriction Act, 1963, against the order, dated 16.05.2018, passed by the Additional Rent Controller, Lahore Cantt., whereby the appellant, upon the respondent's ejectment petition, has been directed to vacate the premises in question (House No.36, Khalid Lane, Sarwar Road, Lahore Cantt.), hereinafter referred to as "the property", and handover its vacant possession to the respondent within thirty (30) days.

2. The appellant has also filed C.M. No.2/2018 for adducing additional evidence. The said application shall be decided along with the main appeal.

3. The facts relevant for the present purposes are to the effect that the appellant is stated to have entered into the Lease Agreement, dated 18.04.2014, with the respondent in respect of the property. The monthly rent was fixed as Rs.3,30,000/- per month and

Rs.23,10,000/- is stated to have been paid as advance rent. In addition thereto a sum of Rs.6,60,000/- was paid by the appellant to the respondent by way of fixed deposit/security, which amount was refundable at the time of vacating the property minus damages/shortages and outstanding bills of utilities. It is further stated that the period of lease was ten (10) years commencing 01.06.2014.

It is the appellant's case that subsequent to the execution of the Lease Agreement, dated 18.04.2014, the parties entered into a second Lease Agreement, dated 18.08.2014, in respect of the property. The terms and conditions of the second Lease Agreement were more or less the same as in the first Lease Agreement except that the rent of the property was reduced from Rs.3,30,000/- per month to Rs.1,75,000/-.

On 07.03.2016 the respondent filed an ejectment petition, against the appellant, in respect of the property, under Section 17 of the Act, ibid., inter alia on the grounds that the appellant had defaulted in payment of the monthly rent of the property with effect from January, 2016; the property was rented out to the appellant for residential purposes but the appellant, contrary to the Lease Agreement, is using the property for commercial activities; the property is required by the respondent for his, "personal use and occupation"; and the respondent has terminated the Lease Agreement but the appellant has not vacated the property. It was also alleged that as a result of the unauthorized commercial activities being carried out by the appellant in the property the Cantonment Board has issued a notice to the respondent in respect of the illegal commercial activities.

4. The petition was resisted by the appellant by filing a reply. Out of the divergent pleadings of the parties, on 14.12.2016, the Additional Rent Controller framed the following Issues:--

"1. Whether the respondent is willful defaulter in respect of monthly rent at the rate of Rs.330000/- pm since December, 2015? OPP

2. Whether the petitioner has come to this court with unclean hands and his intention is mala fide? OPR

3. Whether the petition is maintainable in its present form? OPR

4. Whether the respondent issued the cheque No.13996231 dated 1.1.2016 amounting Two million Rupees to the representative of petitioner in term of payment of rent? OPR

5. Whether the respondent has spent two million rupees on renovation of demise property with the consent of the petitioner and on adjustable on payment of rent? OPR

6. Whether in the presence of the first agreement dated 18.4.2016 second rent agreement was executed between the parties and have any force? OP Parties.

7. Whether the respondent is liable to be ejected from the demised premises? OPP

8. Relief."

The parties adduced their oral as well as documentary evidence and on the basis thereof Issues Nos.1 to 4, 6 and 7 were decided in favour of the respondent, whereas issue No.5 was partly decided in favour of the respondent. As a consequence, the ejectment petition was decided in favour of the respondent in the terms referred to in para-1 above.

5. The learned counsel for the appellant has assailed the impugned order, dated 16.05.2018, by raising the following grounds:-

a. The impugned order has been passed by gross misreading and non-reading of evidence;

b. The impugned order suffers from gross illegalities and irregularities committed by the Additional Rent Controller during the trial of the ejectment petition;

c. The Additional Rent Controller failed to appreciate that the lease of the property was for a period of ten (10) years commencing 01.06.2014. The said period was not yet over, therefore, the respondent could not terminate the Lease Agreement;

d. The respondent was unable to establish the ground of default;

e. The Additional Rent Controller failed to appreciate that subsequent to the Lease Agreement, dated 18.04.2014, a second Lease Agreement, dated 18.08.2014, was entered into by the parties. And through the second Lease Agreement the rate of rent of the property was reduced from Rs.3,30,000/- per month to Rs.1,75,000/- per month;

f. The Additional Rent Controller also failed to appreciate that the respondent had told the appellant that the respondent owed Rs.40,00,000/- to his bank. The respondent, therefore, demanded that the said amount be paid by the appellant to the bank, to be adjusted against the appellant's liability of rent. The said amount of Rs.40,00,000/- was duly paid by the appellant to the respondent through various cheques as has been mentioned in preliminary objection No.4 of the

appellant's reply to the ejectment petition. Indeed, the complete description of the cheques has been given in the said preliminary objection. However, at the time of adducing evidence due to mistaken legal advice the photocopies of the said cheques with the respondent's receipt endorsed thereon could not be produced in evidence. The appellant, has therefore, filed C.M. No.2/2018 along with the appeal for bringing on record the said copies and other documents by way of additional evidence;

g. The appellant has paid several other amounts to the respondent, which have been duly received and acknowledged by the respondent. The appellant seeks permission to also bring those documents on the record as additional evidence. C.M. No.2/2018 may, therefore, be allowed and the appellant may be allowed to lead additional evidence in his defence;

h. During the trial of the petition the appellant moved several applications. The first on 31.05.2017, for a direction to the respondent to produce the original Lease Agreement, dated 18.08.2014, for comparison of thumb impressions of the parties; The second application was filed, on 19.10.2017, under Articles 59, 61, 84 of the Qanun-e-Shahadat Order, 1984, for comparison of thumb impressions;

The third application was filed on 31.01.2018, for production of the Lease Agreement dated 18.08.2014;

The fourth application, dated 07.02.2018, was filed under Articles 80 and 82 of the Order, ibid., for adducing the evidence of additional witnesses;

Submits that the Additional Rent Controller did not decide the afore-referred applications before deciding the ejectment petition. Contends that by not deciding the applications before deciding the main petition the Additional Rent Controller has erred in law and has thus prejudiced the appellant's case; and

j. The Additional Rent Controller also failed to appreciate that it is settled law that in an ejectment petition where default of rent is alleged any amount paid by a tenant to the landlord by way of security is to be treated as advance rent. In the instant case admittedly the appellant had paid an amount of Rs.6,60,000/- as security. The said amount was not adjusted by the Additional Rent Controller at the time of holding that the appellant had defaulted in paying the rent. The Additional Rent Controller has, therefore, erred in law.

6. Relies on the judgments reported as Muhammad Umer v. Muhammad Qasim and another (1991 SCMR 1232), Muhammad Yousuf and 12 others v. Abdul Khaliq and

others (1991 SCMR 1981), Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639), Mrs. Batool v. Shahzad (2002 MLD 1087), Muhammad Ali v. Syed Asghar Ali Imam (1982 CLC 1030), Haji Abdul Ghani v. Makhan Bano (1981 CLC 1060), Mahmud and 6 others v. Haji Tajdin and 8 others (1984 CLC 97) and Masjid-e-Humra v. Zamir Ahmad (PLD 1981 Karachi 473).

7. The learned counsel for the respondent supports the impugned ejectment order. The learned counsel has set up the following defence in response to the grounds raised by the learned counsel for the appellant:-

(i) The agreement, dated 18.04.2014, was terminable in case the appellant defaulted in paying the monthly rent. Admittedly, the appellant did not pay the monthly rent of the property w.e.f. January, 2016, therefore, he committed default. Thus the respondent was within his rights to terminate the Lease Agreement;

(ii) The second Lease Agreement, dated 18.08.2014, was not entered into by the parties, as alleged by the appellant. Submits that the entering into of a second Lease Agreement defies logic as in the first Lease Agreement the rate of rent was fixed as Rs.3,30,000/- per month and through the alleged second Lease Agreement the rate of rent was reduced to Rs.1,75,000/- per month. The appellant has been unable to establish as to why the respondent would agree to a reduction in the rate of rent in such a short span of time and in unchanged circumstances, given the fact that property prices and rent normally increase with the efflux of time.

(iii) All the applications moved by the appellant in respect of the alleged second Lease Agreement were decided by the Additional Rent Controller before passing of the ejectment order, dated 16.05.2018. Contends that the argument of the learned counsel for the appellant that the said applications were not decided before passing of the ejectment order is not supported by the record;

(iv) Even otherwise, the prayer of the appellant for a direction to the respondent to produce the original alleged second Lease Agreement, dated 18.08.2014, was not tenable in the eye of law for the simple reason that the "Note" appearing at the end of the alleged second Lease Agreement after Clause 7 states that:-

"Note: This lease agreement is being made in two originals, one for the LESSEE and one for the LESSOR."

Submits that if indeed the alleged second Lease Agreement had been entered into by the parties then, as per the above quoted "Note", a presumption arises that the

second original copy of the said Lease Agreement was with the appellant. No justification has, however, been shown by the appellant as to why he did not produce that second original copy at the time of leading evidence;

(v) It was established on the record that the appellant is a willful defaulter of rent;

(vi) Admittedly, the property was leased out to the appellant for residential purposes but in violation of the Lease Agreement it started using the property for commercial purposes. As a consequence, a notice was issued to the respondent by the Cantonment Board in respect of the said violation. The respondent brought this fact to the notice of the appellant but it failed to take any step to rectify the position. Indeed, if the appellant does not vacate the premises the Cantonment Board is likely to take penal action against the respondent; and

(vii) Admittedly, the documents being sought to be produced by the appellant, in support of its case, by way of additional evidence were within the knowledge of the appellant and more importantly were in its possession at the time of recording of evidence. The appellant cannot now claim that the said documents were not adduced in evidence, at the relevant time, due to mistaken legal advice. Prays for dismissal of C.M. No.2/ 2018.

8. I have considered the above arguments in the light of the record and have come to the following conclusions:-

I. The Lease Agreement between the parties (dated 18.04.2014), or for that matter if for one minute it is assumed that there was a second Lease Agreement (dated 18.08.2014), was admittedly executed for a period of ten (10) years starting with effect from 01.06.2014. As the Lease Agreement was beyond a period of one (1) year, therefore, under the provisions of Section 107 of the Transfer of Property Act, 1882, read with Section 17(d) of the Registration Act, 1908, the Lease Agreement was compulsorily registerable. However, admittedly the Lease Agreement is unregistered.

It is settled law that a lease of immovable property from year to year or for a term exceeding one year or reserving yearly rent can only be made through a registered instrument. In view thereof, the Lease Agreement for the period beyond one year would, therefore, be bad in law.

As observed above, the Lease Agreement is unregistered. As a consequence, the tenure of the Lease Agreement was only binding between the parties for the initial eleven (11) months, whereafter the relationship between the parties is to

be regulated by the terms of the statute in question, that is to say, the Cantonments Rent Restriction Act, 1963. The tenancy between the parties shall, therefore, be considered to be a statutory tenancy on a month to month basis beyond the initial period of eleven (11) months.

Reliance is placed on the judgments reported as Habib Bank Limited v. Dr. Munawar Ali Siddiqui (1991 SCMR 1185), Mst. Rukhsana Bhatti v. K & N's Foods (Pvt.) Ltd. and others (PLD 2013 Lahore 119) and Messrs Shama Soap Factory, Faisalabad v. Commissioner of Income Tax, Zone, Faisalabad (2006 PTD 178).

In view of the above legal position the contention of the learned counsel for the appellant that the Lease Agreement had not expired, therefore, the respondent could not terminate the Lease Agreement or that the ground of personal need was not available to the respondent loses force and is accordingly repelled;

II. The learned counsel for the appellant has laid great stress on the argument that the impugned ejectment order is bad in law as before its pronouncement the Additional Rent Controller did not decide the appellant's pending applications vis-à-vis the production of the purported second Lease Agreement, comparison of signatures/thumb impressions and production of additional evidence/witnesses. The contention of the learned counsel is, however, not supported by the record. The appellant's applications, referred to in Para 4(h) above, were decided by the Additional Rent Controller through orders dated 25.10.2017, 31.01.2018, 07.02.2018 and 14.03.2018, that is to say, much prior to the pronouncement of the ejectment/ impugned order, dated 16.05.2018;

III. Admittedly, the appellant was unable to bring on record any evidence, oral or documentary, regarding the payment of rent to the respondent subsequent to the month of December, 2015. There is nothing on the record to show that the appellant either tendered or paid the monthly rent to the respondent with effect from January, 2016. I, therefore, do not consider that the Additional Rent Controller has erred in deciding Issues No. 1 and 4 against the appellant and thus hold that the appellant is a willful defaulter;

IV. The appellant admittedly took the property on rent for residential purposes, as established from the Lease Agreement. It is also an admitted fact that the appellant converted the property to commercial use. The appellant thus violated the terms of the Lease Agreement;

V. As to the refusal and/or failure of the respondent to produce the original of the purported second Lease Agreement (dated 18.08.2014) and thus prejudicing the

appellant's case, suffice it to say that the "Note" quoted in Para 7(iv) above is admittedly part and parcel of the purported second Lease Agreement and if indeed the alleged second Lease Agreement had been executed the "second" original copy thereof should presumably have been in possession of the appellant, however, no justification has been shown nor any explanation given as to why the appellant failed to adduce the said second original copy in his evidence;

VI. The learned counsel for the appellant has similarly been unable to establish as to why the appellant did not adduce in evidence the documents appended to C.M. No.2/2018, except to submit that the said documents were not produced at the time of trial due to mistaken legal advice. The said argument I am afraid does not advance the appellant's case. It is settled law that in order to be able to produce additional evidence, whether oral or documentary, at the appellate stage, a party has to establish that the Court against whose decree/order the appeal has been filed refused to admit evidence which ought to have been admitted or that the documents in question were not available or traceable during the trial.

In absence of any of the above conditions being met additional evidence is not normally allowed to be led by an appellate Court. In the instant case neither of the above grounds has either been pleaded or established. On the contrary, it has been maintained that the documents were available but were not produced in evidence due to mistaken legal advice.

It is further settled law that an appellate Court in exercise of its power to allow additional evidence normally does not favour a delinquent litigant. This power is only exercised in genuine cases. In the instant case, to my mind the reason put forth by the learned counsel does not meet the above criteria.

I am fortified in my view on the basis of the judgments reported as Muhammad Hanif and another v. Sultan (1994 SCMR 279), Syed Phul Shah v. Muhammad Hussain and 10 others (PLD 1991 SC 1051), Khurshid Ali and 6 others v. Shah Nazar (PLD 1992 SC 822) and Zar Wali Shah v. Yousaf Ali Shah and others (1992 SCMR 1778).

In view thereof, C.M. No.2/2018 fails and is accordingly dismissed.

VII. As to the argument of the learned counsel for the appellant in respect of non-adjustment of the security and/or determination of arrears, I find that the impugned order has sufficiently addressed those arguments, therefore, they do not require any further consideration;

VIII. The learned counsel for the appellant has even otherwise been unable to establish that the impugned order is the result of misreading or non-reading of evidence;

IX. I also do not find that the impugned order is either arbitrary or perverse.

9. Under the circumstances, the appeal fails and is accordingly dismissed.

There is no order as to costs.

MWA/I-6/L Appeal dismissed.

2019 MLD 1013

[Lahore]

Before Mamoon Rashid Sheikh, J

Syed ATTA UL HASSAN---Petitioner

Versus

AHMAD NAWAZ and others---Respondents

Election Petition No.4 of 2018, decided on 15th April, 2019.

(a) Elections Act (XXXIII of 2017)---

----S. 144(4)---Civil Procedure Code (V of 1908), O. VI, R. 15---Election petition, verification of---Mandatory for the petitioner to verify the petition in terms of S. 144(4) of the Elections Act, 2017---Said verification had to be done in accordance with the procedure laid down in O. VI, R. 15, of the C.P.C., before an Oath Commissioner---In case the petition was not so verified it was deemed to be not maintainable and merited outright dismissal.

Lt.-Col. (Rtd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana 2015 SCMR 1585 rel.

(b) Elections Act (XXXIII of 2017)---

----S. 144(4)---Civil Procedure Code (V of 1908), O. VI, R. 15---Election petition, verification of---Affidavit appended to the petition---Place and date of swearing of the affidavit on oath was not mentioned on the stamp endorsed thereon by the Oath Commissioner---Moreover, there was no statement as to who identified the petitioner to the Oath Commissioner---In absence of the said particulars, especially those of the

identifier, the. verification of the affidavit could not be deemed to have been made in accordance with the law---Election petition was liable to be dismissed in circumstances.

Lt.-Col. (Rtd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana 2015 SCMR 1585 rel.

(c) Elections Act (XXXIII of 2017)---

----Ss. 142, 143 & 144(2)(c)---Contents of election petition---Affidavit of service---Plea of petitioner that in absence of the affidavit of service, the postal receipts were sufficient to serve the purposes of S. 144(2)(c) of the Elections Act, 2017 ('the Act')---Held, that under S. 145 of the Act if any of the provisions of Ss. 142 to 144 of the Act had not been complied with by a petitioner, the petition was not maintainable---Filing of the affidavit of service was one of the mandatory (requirements) under S.144(2)(c) of the Act---Petitioner has not filed the said affidavit, therefore, his petition was bad in law and liable to be dismissed.

Shahzad Sarwar for Petitioner.

Nemo for Respondents.

Date of hearing: 3rd December, 2018.

JUDGMENT

MAMOON RASHID SHEIKH, J.---Judgment was reserved in the instant election petition, on 03.12.2018, whereafter the petition was dismissed through a short order, dated 31.12.2018. The said short order reads as under:-

"For the reasons to be recorded later the instant petition is dismissed."

2. The petitioner, the runner up candidate, has filed the instant election petition under Section 139 of the Elections Act, 2017 (the Act), challenging the election of respondent No.2, who is the returned candidate, of the constituency PP 41 (Sialkot-VII) of the Provincial Assembly or the Punjab. The petitioner has brought the petition on a number of grounds including but not limited to the allegation that the election process of the constituency in question was not conducted in accordance with the Act and the Elections Rules, 2017.

3. The petition was filed on 29.08.2018. It came up for initial hearing on 30.08.2018. On the said date, the attention of the learned counsel for the petitioner was drawn to the provisions of Sections 142 to 144 of the Act was required to establish if the petition conformed to the said provisions of the said Act. The learned counsel was further

informed that in case this Tribunal finds that if any of the provisions of the said Sections have not been complied with, the petition merits summary dismissal under Section 145 of the Act. Since the limitation for filing the petition was still available to the petitioner, the learned counsel for the petitioner sought permission to amend the petition and to remove the defects therein. The petitioner, therefore, filed C.M.No.2/2018 and thereafter C.M.No.3/2018 for amendment to the petition. C.M.No.3/ 2018 was allowed and on 18.09.2018 the petitioner filed an amended petition. The question of the maintainability of the amended petition kept on pending as the learned counsel for the petitioner sought repeated adjournments due to various reasons including the serious illness of his father. Notices were finally issued to the respondents on 05.10.2018, subject to the question of maintainability of the petition. Respondents Nos.2 to 23 failed to enter appearance despite service inter alia through publication of notice. As a consequence, they were proceeded against ex parte through the order, dated 29.10.2018, moreover, respondent No.1 (the Returning Officer PP 41 Sialkot-VII) was deleted from the array of the respondents as he had been erroneously impleaded by the petitioner.

4. The attention of the learned counsel for the petitioner has been drawn to the following:--

1. The amended petition has not been verified in terms of Section 144(4) of the Act, in that, it has not been verified before an Oath Commissioner and only before the learned counsel for the petitioner; and

2. The amended petition is not supported by an affidavit of service as envisaged by Section 144(2)(c) of the Act.

5. The learned counsel for the petitioner submits that the amended petition is supported by an affidavit. The said affidavit may, therefore, be considered to be the verification of the petition. In respect of the lack of affidavit of service submits that the petitioner has appended the postal receipts in proof of sending the copies of the petition and the documents appended to it to the respondents in terms of Section 144(2)(c) of the Act.

6. I am afraid I am not convinced by the arguments of the learned counsel for the petitioner for the reason that it is mandatory for the petitioner to verify the petition in terms of Section 144(4) of the Act. The said verification has to be done in accordance with the procedure laid down in Order VI, Rule 15, or the C.P.C., before an Oath Commissioner. In case the petition is not so verified it is deemed to be not maintainable and merits outright dismissal. Reliance in this regard is placed on the judgment

reported as "Lt.-Col. (Rtd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana" (2015 SCMR 1585). In the instant: case as observed above no such verification exists.

7. The reliance of the learned counsel for the petitioner on the affidavit appended to the petition and his request for consideration thereof as the affidavit in support of the petition also does not come to the aid of the petitioner as the said affidavit also does not conform to the law as laid down in Lt.-Cot. (Rtd.) Ghazanfar Abbas Shah's case (supra), in that, the place and date of the swearing of the affidavit on oath is not mentioned in the stamp endorsed thereon by the Oath Commissioner, moreover, there is no statement as to who identified the petitioner to the Oath Commissioner. In absence of the above particulars, especially those of the identifier, the verification of the affidavit cannot be deemed to have been made in accordance with the law.

8. I am similarly not convinced by the arguments of the learned counsel for the petitioner that in absence of the affidavit of service, the postal receipts are sufficient to serve the purposes of Section 144(2)(c), for the reason that under Section 145 of the Act if any of the provisions of Sections 142 to 144 of the Act have not been complied with by a petitioner, the petition is not maintainable. The filing of the affidavit of service is one of the mandatory under Section 144(2)(c) of the Act. The petitioner has not filed the said affidavit, therefore, his petition is bad in law for that reason too.

9. Under the circumstances the petition is held to be not maintainable and is accordingly dismissed.

MWA/A-44/L Petition dismissed.

PLD 2019 Lahore 285

Before Mamoon Rashid Sheikh, J

Ms. SADAF MUNIR KHAN---Petitioner

versus

CHAIRMAN, RECONCILIATION COMMITTEE and 2 others---Respondents

Writ Petition No.21162 of 2015, decided on 8th January, 2018.

(a) Muslim Family Laws Ordinance (VIII of 1961)--

----S. 7---Rules under the Muslim Family Laws Ordinance, 1961, R.3(b)---Notification/S.R.O. No.1086(K)/61, dated 09.11.1961---Divorce certificate, issuance of---Territorial jurisdiction of Chairman, Reconciliation Committee---Scope---Wife not residing in Pakistan at the time of pronouncement of 'talaq'---Under R.3(b) of the Rules under the Muslim Family Laws Ordinance, 1961 ('the Rules') the basic factor which determined the jurisdiction of the Union Council and/or the Chairman for entertaining and proceeding on a notice of divorce (talaq) under subsection (1) of S.7 of the Muslim Family Laws Ordinance, 1961 (`the Ordinance') was the place where the wife was residing at the time of pronouncement of divorce (talaq)---Union Council and/or the Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction the wife was residing at the time of pronouncement of divorce (talaq)---At the time the husband, in the present case, was alleged to have pronounced divorce (talaq) upon the wife, both of them were permanently residing in a foreign country (United States of America), however, the husband was stationed in another foreign country (Germany) due to his job---In such circumstances the Chairman, Reconciliation Committee (based in Pakistan) did not have jurisdiction in the matter and erred in issuing the impugned Divorce Certificate---Since the husband and the wife were nationals of Pakistan and a foreign country (USA) and were permanently residing in said foreign country at the relevant time, therefore, the husband should have approached the authorized officer of the concerned Pakistan mission in the foreign country under S.7 of the Ordinance---Divorce certificate issued by the Chairman, Reconciliation Committee (based in Pakistan) was held to be of no legal effect and was accordingly set-aside---Constitutional petition was allowed in circumstances.

Syeda Wajiha Haris v. Chairman, Union Council No.7, Lahore 2010 MLD 989 and Mst. Sharifan v. Abdul Khaliq and another 1983 CLC 1296 ref.

(b) Constitution of Pakistan---

----Art. 199---Averment of facts made in constitutional petition---In absence of a counter affidavit or other material in rebuttal, the averment of facts made in a petition, which were supported by an affidavit, were to be normally accepted as correct.

Islamic Republic of Pakistan through Secretary, Ministry of Defence, Government of Pakistan Rawalpindi and another v. Amjad Ali Mirza PLD 1977 SC 182 ref.

Anwar Kamal for Petitioner.

Muhammad Azeem Malik, Addl. Advocate-General Punjab.

Arsalan Akhtar for Respondents Nos. 1 and 2.

Nemo for Respondent No.3.

Date of hearing: 9th June, 2017.

JUDGMENT

MAMOON RASHID SHEIKH, J.---Through the instant petition the petitioner has challenged the order, dated 30.04.2015, and the Divorce Certificate, dated 30.04.2015, issued by the Chairman, Reconciliation Committee, Ward No.7, Cantonment Board, Walton Cantt., Lahore (respondent No.1), on the ground that the Divorce Certificate has been issued without jurisdiction and is, therefore, void and of no legal effect. As a consequential relief it has been prayed that the Divorce Certificate be ordered to be cancelled.

2. Notices were issued to respondent No.3 through various modes. However, despite service respondent No.3 failed to enter appearance, therefore, ex parte proceedings were initiated against him through the order dated 06.08.2015.

3. The brief facts giving rise to this petition are to the effect that the petitioner and respondent No.3 are Muslims and were married at Lahore, their Nikah was performed on 04.08.2007. It is stated that at the time of their marriage the parties were dual nationals of Pakistan and the United States of America (USA) and continue to be so.

In the parties Nikah Nama the petitioner has been shown to be a resident of DHA Lahore whereas respondent No.3 has been shown to be a resident of House No.37-A, Jail Road Lahore. The parties are stated to have moved to Prattville, Alabama, USA, immediately after their marriage. The parties have one son, namely Noah Mehboob Khan, who was born in the USA on 25.07.2008. Respondent No.3 is a member of the Unites States Military and at the time of filing of the petition he was said to be stationed at Honolulu; Hawaii, USA.

The marital relationship between the parties is stated to have deteriorated, at some point in time, resulting in separation on 19.09.2013.

On 28.10.2013, respondent No.3 is stated to have "purportedly" divorced the petitioner by way of triple "talaq" whilst he was in Garmisch, Germany with the U.S. Armed Forces. It is further stated that at that time the petitioner and respondent No.3 were permanently residing in Alabama State, USA. Thereafter, on 13.03.2014, respondent No.3 sent a notice, under section 7(1) of the Muslim family Laws Ordinance, 1961 (the Ordinance), through his mother and special attorney, namely Naheed Khan, to respondent No.1 for initiation of proceedings under Section 7 of the Ordinance and issuance of a divorce certificate on the basis of the Divorce Deed. In the said proceedings the petitioner initially went unserved, however, after publication of notice she entered appearance before respondent No.1, in May, 2014. The petitioner joined the proceedings and called into question the validity of the Divorce Deed, the Special Power of Attorney of respondent No.3's mother and more importantly the jurisdiction of respondent No.1 to entertain the matter of divorce between the parties. The matter kept on pending and through the order, dated 28.08.2014, respondent No.1 whilst requiring respondent No.3 to produce the original Power of Attorney and an authenticated copy of the Divorce Deed, adjourned the proceedings sine die. The proceedings were re-initiated on 20.02.2015, upon filing of an application by the special attorney and mother of respondent No.3 for revival of the proceedings. Ultimately through the impugned order, dated 30.04.2015, the impugned Divorce Certificate was issued on 30.04.2015.

4. The learned counsel for the petitioner submits that the sole point which requires determination is the lack of territorial jurisdiction of respondent No.1 to entertain respondent No.3's request for issuance of a divorce certificate on the basis of the purported undated divorce deed wherein the date of the alleged pronouncement of divorce (talaq) is given as 28.10.2013.

5. Further submits that admittedly the parties were married at Lahore. It is also an admitted position that the petitioner and respondent No.3 are dual nationals of Pakistan and the USA. It is further admitted position that the parties have been permanently residing in the USA since their marriage. It is also admitted that respondent No.3 is a member of the US Armed Forces. Separation, between the parties, took place on 19.09.2013. On 28.10.2013 respondent No.3 is alleged to have pronounced divorce (talaq) upon the petitioner, whilst he was in Garmisch, Germany, with the U.S. Armed Forces. At that time, however, the parties were permanently residing in the USA.

6. Further submits that on 13.03.2014 respondent No.3 through his mother, purportedly acting as his special attorney, filed an application before respondent No.1,

through mail, for issuance of a divorce certificate under Section 7 of the Ordinance on the basis of the Divorce Deed purportedly executed by respondent No. 1. In the said application the petitioner's address was deliberately wrongly given by respondent No.3 and/or his mother. As a consequence, the petitioner remained unserved. The petitioner became aware of the proceedings before respondent No.1 and the purported pronouncement of talaq after publication of notice in the daily "Dawn", on 13.05.2014. On 15.05.2014 the petitioner moved an application before respondent No.1 for obtaining copies of the proceedings initiated by respondent No.1. The petitioner immediately challenged the territorial jurisdiction of respondent No.1 to entertain respondent No.3's application. The petitioner informed respondent No.1 about the divorce proceedings pending between the parties before the Circuit Court of Jefferson County, Alabama. The petitioner also challenged the veracity of the Divorce Deed as well as the Special Power of Attorney executed in favour of respondent No.3's mother. Respondent No.1 instead of deciding the question of jurisdiction adjourned the proceedings sine die, on 28.08.2014, for production of the original Divorce Deed and the Special Power of Attorney.

7. On 20.02.2015 respondent No.3's mother moved an

application for revival of the proceedings. And even though, the original Divorce Deed was not presented, respondent No.1 resumed the proceedings. Similarly, from the copy of the Special Power of Attorney filed by respondent No.3's mother it is evident that the Special Power of Attorney only pertains to the guardianship petition filed by respondent No.3 before the Guardians Courts at Lahore. The Special Power of Attorney did not confer any power upon respondent No.3's mother to either file any proceedings before respondent No.1 or to pursue them. Respondent No.1, however, assumed jurisdiction and proceeded with the matter.

8. Further submits that the petitioner also questioned the jurisdiction of respondent No.1 on the ground that through the Notification/S.R.O.No.1086(K)/61, dated 09.11.1961, the Federal Government under Section 2(b) of the Ordinance had authorized the Director General (Administration), Ministry of External Affairs, to appoint officers of Pakistan missions abroad to discharge the functions of Chairman under the Ordinance. Submits that it was, therefore, contended before respondent No.1 that jurisdiction in the matter lay before the relevant Pakistan mission in the USA as the petitioner as well as respondent No.3 were not only nationals of the USA but were also permanent residents thereof.

9. Submits that respondent No.1, however, turned down the objection on the ground that since the parties' Nikah was registered within his jurisdiction and the parties' marriage was also solemnized in DHA, Lahore and that the petitioner was resident at DHA,

therefore, he had jurisdiction in the matter and proceeded to pass the impugned order, dated 30.04.2015, and issue the Divorce Certificate of the same date.

10. Contends that under the provisions of Section 2(b) of the Ordinance the Federal Government had issued the above Notification, therefore, the jurisdiction in the matter lay with the foreign mission concerned and not respondent No. 1. This fact was totally ignored by respondent No.1. Relies on the judgment reported as "Syeda Wajiha Haris v. Chairman, Union Council No.7 Lahore" (2010 MLD 989).

11. Further submits that this is a classic case of postal divorce. The divorce (talaq) was allegedly pronounced upon the petitioner by respondent No.3 whilst he was in Germany. The pronouncement of divorce (talaq) is purportedly recorded in the undated Divorce Deed. However, the original Divorce Deed was never filed before respondent No.1, therefore, the veracity thereof remains questionable.

12. Further submits that the Divorce Deed has been purportedly notarised but the Notary has not written the date on which the Divorce Deed was notarised. The original Divorce Deed was not presented before respondent No.1 by respondent No.3's attorney. In fact a copy of the Divorce Deed was received by respondent No.1, by mail, purportedly sent by respondent No.3. Contends that in such circumstances no authenticity can be attached to the Divorce Deed.

13. Further submits that the Special Power of Attorney does not confer any power on respondent No.3's mother to pursue the divorce proceedings before respondent No.1 . As such it could not have been acted upon.

14. Further submits that respondent No.1 further erred in not actually constituting an Arbitraion Council as cnvisaged by Section 7 of the Ordinance.

15. Further contends that Section 7 of the Ordinance does not admit of proceedings being adjourned sine die by the Chairman. Respondent No.1, therefore, erred in having done so.

16. The learned counsel for respondents No.1 and 2 relies on the report and parawise comments and submits that the impugned order, dated 30.04.2015, and the Divorce Certificate of even date, were issued in accordance with the law.

17. Submits that the marriage ceremony/Nikah of the parties was performed at DHA, Lahore. The petitioner was residing within the jurisdiction of respondent No.1, therefore, respondent No.1 had jurisdiction in the matter and the Divorce Certificate has been issued in accordance with the law.

18. Further submits that the Notification, dated 09.11.1961, referred to by the learned counsel for the petitioner has no relevance in view of Rule 3(b) of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 (the Rules). The Notification has been made only to facilitate Pakistan nationals living abroad. It does not oust the jurisdiction of respondent No. 1. Contends that Rule 3(b) of the Rules determines jurisdiction in such like matters. Respondent No.1, assumed jurisdiction in the matter in accordance with rule 3(b). Reiterates that the Divorce Certificate has been issued in accordance with the Ordinance and the Rules framed thereunder.

19. Heard. Record perused.

20. The facts of the case have been set out in quite some detail in the preceding paras. The sole point in issue, as argued by the learned counsel for the petitioner, is the assumption of jurisdiction by respondent No.1 in order to pass the impugned order, dated 30.04.2015, and to issue the impugned Divorce Certificate, dated 30.04.2015.

21. In support of their respective arguments the learned counsel for the parties have referred to Sections 2(b) and 7 of the Ordinance, the Notification/S.R.O. No.1086(K)/61, dated 09.11.1961, which has been issued under Section 2(b), ibid. and Rule 3(b) of the Rules. in order to better appreciate the arguments of the learned counsel it would be advantageous to reproduce the afore-referred provisions hereunder:-

Section 2(b) of the Ordinance.

> "Section 2(b):-"Chairman" means the Chairman of the Union Council or a person appointed by the Federal Government in the Cantonment areas or by the Provincial Government in other areas or by any officer authorized in that behalf by any such Government to discharge the functions of Chairman under this Ordinance." (Emphasis supplied)

Section 7 of the Ordinance.

> 7. "Talaq. (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
>
> (2) Whoever, contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in subsection (5) a Talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Sub-section (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever be later, ends.

(6) _____

Notification/S.R.O. No.1086(K)61 dated 09.11.1961:-

"In exercise of the powers conferred by clause (b) of section 2 of the Muslim Family Laws Ordinance 1961 (VIII of 1961), the Central Government is pleased to authorize the Director General (Administration) Ministry of External Affairs to appoint officers of Pakistan missions abroad to discharge the functions of Chairman under the aforesaid Ordinance."

Rule 3(b) of the Rules

"Rule 3. The Union Council which shall have jurisdiction in the matter for the purpose of clause (d) of section 2 shall be as follows, namely:---

(a) _____

(b) in the case of notice of talaq under subsection (1) of section 7, it shall be the Union Council of the Union or Town where the wife in relation to whom talaq has been pronounced was residing, at the time of the pronouncement of talaq:

Provided that if at the time of pronouncement of talaq such wife was not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be--

(i) in case such wife was at any time residing with the person pronouncing the Talaq in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with such person; and

(ii) in any other case, the Union Council of the Union or Town where the person pronouncing the talaq is permanently residing in West Pakistan;" (Emphasis supplied)

22. Section 2(b) of the Ordinance defines the word "Chairman" to mean the Chairman of the Union Council concerned. And the Union Council as defined in the Ordinance means the basic Local Government Unit. Section 2(b) also provides that the relevant Government may authorize any of its officers to discharge the functions of the Chairman under this Ordinance.

23. Under the provisions of subsection (1) of Section 7, when a man (the husband) wishes to divorce his wife then as soon as he pronounces divorce (talaq) upon his wife he is required to give the Chairman a notice in writing of his having divorced his wife. The husband is further required to supply a copy of the notice to the wife.

24. Under subsection (3) of the Section 7, the Chairman in turn is required to constitute an Arbitration Council within 30 days of the receipt of the notice under subsection (1), so as to bring about a reconciliation between the parties/spouses. The Arbitration Council normally consists of the Chairman and a representative of each of the spouses [Section 2(a) of the Ordinance refers]. The Arbitration Council so formed is required to take all steps necessary to bring about such a reconciliation. However, if the spouses do not reconcile within the stipulated period the Chairman issues the divorce certificate.

25. As will be clear, the Chairman plays a pivotal role in terms of Section 7 of the Ordinance. And in view of the large number of Pakistanis living abroad the Federal (Central) Government in exercise of its powers under Section 2(b) of the Ordinance, has issued the Notification, dated 09.11.1961. The Notification authorizes the Director General (Adminstration) Ministry of External Affairs, to appoint officers of Pakistan missions abroad to discharge the functions of the Chairman under the Ordinance.

26. Rule 3(b) envisages that the Union Council or in other words the Chairman, which shall have jurisdiction in the case of a notice of divorce (talaq) under subsection (1) of Section 7, shall be the Union Council/Chairman within whose territorial jurisdiction the wife in relation to whom divorce (talaq) has been pronounced was residing at the time of pronouncement of divorce (talaq). The proviso to Rule 3(b) goes on to state that, if, at the time of pronouncement of divorce (talaq) the wife was not residing in any part of Pakistan then the Union Council/Chairman, which shall have jurisdiction in the matter shall be: (a) in case the spouses had resided together in any part of Pakistan at any time then the Union Council/Chairman within whose

jurisdiction the wife so last resided with the husband; and (b) in any other case the Union Council/Chairman within whose jurisdiction the husband is permanently residing in Pakistan.

27. I have considered the arguments of the learned counsel for the parties in the light of the above provisions and tend to agree with the learned counsel for respondents Nos.1 and 2 that jurisdiction in the matter is to be determined under the provisions of Rule 3(b). However, the Notification, dated 09.11.1961, also has relevance in the facts and circumstances of the case, as will be elaborated in the later part of the judgment.

28. As will be evident, under rule 3(b), the basic factor which determines the jurisdiction of the Union Council and/or the Chairman for entertaining and proceeding on a notice of divorce (talaq) under subsection (1) of Section 7, of the Ordinance, is the place where the wife was residing at the time of pronouncement of divorce (talaq). In other words the Union Council and/or the Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction the wife was residing at the time of pronouncement of divorce (talaq). Reference in this regard is made to the judgment reported as "Mt. Sharifan v. Abdul Khaliq and another" (1983 CLC 1296).

29. I have examined the facts of the case on the touchstone of Rule 3(b) and find that it has been asserted in the petition, which is duly supported by an affidavit, that at the time respondent No.3 is alleged to have pronounced divorce (talaq) upon the petitioner she and respondent No.3 were permanently residing in Alabama State, in the USA, however, respondent No.3 was stationed in Garmisch, Germany with the U.S. Armed Forces. There is no rebuttal of this assertion nor any counter affidavit has been filed to the petition, as respondent No.3 despite service has failed to enter appearance. In view thereof, on the strength of the judgment reported as "Islamic Republic of Pakistan through Secretary, Ministry of Defence, Government of Pakistan, Rawalpindi and another v. Amjad Ali Mirza" (PLD 1977 Supreme Court 182), wherein it has been inter alia held that in absence of a counter affidavit or other material in rebuttal, the averment of facts made in a petition, which is supported by an affidavit, is to be normally accepted as correct, I hold that the petitioner was not residing within the jurisdiction of respondent No.1 at the relevant time. Indeed, she was not residing in any part of Pakistan at the relevant time.

30. In view thereof and on the strength of "Mst. Sharifan's case (supra) I hold that respondent No.1 did not have jurisdiction in the matter. Respondent No.1 has, therefore, erred whilst passing the impugned order, dated 30.04.2015, and issuing the impugned Divorce Certificate, dated 30.04.2015.

31. However, at this stage, on account of the petitioner being not resident in Pakistan at the relevant time the proviso to Rule 3(b) assumes relevance. When the facts of the case are examined in the light of the proviso to Rule 3(b), even then, respondent No.1 does not have jurisdiction in the matter. The reason for the above conclusion is that the marital home of the parties as well as the permanent residence of respondent No.3 in Pakistan is respondent No.3's house/residence at 37-A Jail Road, Lahore. The said house/address does not fall within the jurisdiction of respondent No.1.

32. As to the contention of the learned Counsel for respondents Nos.1 and 2 that the Notification, dated 09.11.1961, has been made to only facilitate Pakistan nationals living abroad and it does not oust the jurisdiction of respondent No.1, suffice it to say that the Notification has been promulgated to precisely deal with such like cases. The Notification is an enabling provision and creates a convenient forum for Pakistanis who are resident abroad, especially permanently resident abroad, for dealing with their matrimonial affairs under the Ordinance in the Pakistan mission in the country of their residence.

33. As has been held hereinabove respondent No.1 does not have jurisdiction in the matter, therefore, I tend to agree with the argument of the learned counsel for the petitioner that in the first instance, since the petitioner as well as respondent No.3 are dual nationals of Pakistan and the USA and were permanently residing in the USA at the relevant time, therefore, respondent No.3 should have approached the authorized officer of the concerned Pakistan mission under Section 7, of the Ordinance. Moreover, when this objection was raised before respondent No.1, he should have stayed his hands and required respondent No.3 to first have recourse to the authorized officer of the concerned Pakistan mission abroad.

34. In this respect reference is made to "Syeda Wajiha Haris's case (supra), cited at the bar by the learned counsel for the petitioner, wherein it has been, inter alia, held that for Pakistanis resident abroad the law has created a remedy and forum for reconciliation between the spouses under the Ordinance in the Pakistan mission in the country of their residence. In view thereof, the husband (therein) was directed to first avail of that remedy in respect of his divorce proceedings.

35. The argument of the learned counsel for respondents Nos.1 and 2 is accordingly repelled.

36. Under the circumstances, I hold that the impugned, order dated 30.04.2015, and the Divorce Certificate, dated 30.04.2015, to be of no legal value and effect and are accordingly set aside.

37. The petition is accordingly allowed with the observation that respondent No.3 may approach the appropriate forum, if so advised.

38. The record of the case be remitted to respondent No.1 forthwith.

39. In view of the issues involved, there is no order as to costs.

MWA/S-24/L Petition accepted.

PLD 2019 Lahore 295

Before Mamoon Rashid Sheikh, J

MUHAMMAD SAFDAR and another---Petitioner

versus

MUHAMMAD NASEER HAIDER and others---Respondents

Civil Revision No.377 of 2015, decided on 27th January, 2017.

Civil Procedure Code (V of 1908)--

----O. XXXIX, R. 2-B [as amended by the Lahore High Court]---Interim injunction---Expiry---Temporary injunction ceased to have effect upon expiration of the period of one year as envisaged by O.XXXIX, R. 2-B, C.P.C.---In the present case, a period of more than one year had lapsed between the passing of the temporary injunction, in favour of plaintiffs by the Trial Court and the passing of the impugned decision by the appellate Court, whereby the temporary injunction was confirmed---As such, at the time of the decision by the appellate Court there was no temporary injunction in the field in favour of the plaintiffs---Nothing was available on the record to show that the defendants had moved application in terms of R.2-B of O.XXXIX, C.P.C. for extension of the order of temporary injunction granted in their favour nor for that matter the order was extended nor was there any report to that effect before the High Court---Similarly there was nothing on the record to show that the said order was suspended by the appellate Court in the plaintiffs' appeal since by operation of law there was no temporary injunction in the field---Plaintiffs' appeal before the appellate Court in fact had become infructuous---Revision petition was dismissed being incompetent with the observation that defendants, if advised, may move an application under the provisions of R.2-B of O.XXXIX, C.P.C. before the trial Court for extension and/or re-issuance of a temporary injunction in their favour.

Raja Talat Mahmood v. Ismat Ehtishamul Haq 1999 SCMR 2215; District Collector, Bannu and 4 others v. Muhammad Subhan and 3 others 2008 CLC 1568 and Xen PESCO (WAPDA) Mansehra through Chairman, PESCO and 4 others v. Gas Masters CNG Filling Station, Mansehra through Khalid Latif and others PLD 2005 Pesh. 132 ref.

Ms. Elysee Nazir Khan for Petitioners.

Arshad Mehmood Janjua for Respondents.

ORDER

Main Case
C.M.No.1-C/2015

C.M.No.88-C/2017

MAMOON RASHID SHEIKH, J.---The petitioners being defendants Nos.1 and 2, in the suit for declaration and perpetual injunction, filed by respondents Nos.1 to 7, against the petitioners and respondents Nos.8 and 9, have brought the instant petition challenging the order in appeal, dated 03.03.2015, passed by the learned Addl. District Judge, Jhelum, confirming the temporary injunction granted to respondents Nos.1 to 7, by the learned trial Court, through the order, dated 12.02.2014.

2. At the outset, the attention of the learned counsel for the parties has been drawn to the provisions of Rule (2B) of Order XXXIX of the C.P.C. (as amended by the Lahore High Court), which read as under:-

> "(2B) The order of injunction made under rules 1 or 2 after hearing the parties or after notice to the defendant shall cease to have effect on the expiration of one year unless extended by the Court after hearing the parties again and for reasons to be recorded for such extension. Provided that report of such extension shall be submitted to the High Court:
>
> Provided also that the case shall be disposed expeditiously."

3. Admittedly upon respondents Nos.1 to 7's application, under Order XXXIX, rules 1 and 2 of the C.P.C., a temporary injunction was granted to them, after hearing the parties, on 12.02.2014. The petitioners filed their appeal against the said order on 18.02.2014. The petitioners' appeal kept on pending for more than a year and was finally decided through the order dated 03.03.2015, which is under challenge in the instant petition.

4. As will be clear, a period of more than one year had lapsed between the passing of the temporary injunction, in favour of respondents Nos.1 to 7, by the learned trial Court and the passing of the impugned decision by the learned appellate Court. In other words, the temporary injunction ceased to have effect upon expiration of the period of one year envisaged by Rule 2B, ibid. As such, at the time of the decision by the appellate Court there was no temporary injunction in the field in favour of respondents Nos.1 to 7. The petitioners' appeal in fact had become infructuous. However, this point appears to have escaped the notice of the appellate Court as well as the parties.

5. There is nothing on the record to show that respondents No.1 to 7 had moved an application in terms of Rule 2B, ibid., for extension of the order of temporary injunction granted in their favour nor for that matter the order was extended nor is there any report to that effect before this Court. Similarly there is nothing on the record to show that the said order was suspended by the learned appellate Court in the petitioners' appeal.

6. It may be further noted that the instant petition was filed after the lapse of the said period of one year, that is to say, when there was no temporary injunction existing in favour of respondents Nos.1 to 7.

7. The learned counsel for the parties despite opportunity being provided have been unable to establish otherwise.

8. Under the circumstances, on the basis of the above facts and the provisions of Rule 2B, ibid., without going into the merits of the case it is observed that since by operation of law there is no temporary injunction in the field the instant petition was infructuous nay incompetent at the time of filing. I am fortified in my view on the basis of the judgments reported as "Raja Talat Mahmood v. Ismat Ehtishamul Haq" (1999 SCMR 2215), "District Collector, Bannu and 4 others v. Muhammad Subhan and 3 others" (2008 CLC 1568) and "Xen PESCO (WAPDA) Mansehra through Chairman, PESCO and 4 others v. Gas Masters CNG Filling Station, Mansehra through Khalid Latif and others" (PLD 2005 Peshawar 132).

9. In Raja Talat Mahmood's case, supra, it has been held that upon confirmation an interim injunction stands expired after, "six months" (in this case one year). In Xen PESCO (WAPDA) Mansehra's case, supra, it has been observed that the law maker has introduced rule 2B, ibid., so as to suppress the mischief of delay in disposal of those cases in which the plaintiff seeks and is granted interim relief. The outer limit of one year has been fixed to obviate such practice. The amendment was introduced to deny the

opportunity to the beneficiary of the temporary injunction to misuse it by deliberately delaying the adjudication of the suit.

10. It may, however, be observed that trial Courts as well as appellate Courts below normally do not take this provision of law into consideration whilst passing orders on applications for grant of temporary injunction and/or hearing appeals in respect thereof, whereas under the law they are required to do so, which is regrettable.

11. Under the circumstances, the petition is dismissed being incompetent with the observation that respondents Nos.1 to 7, if so advised, may move an application under the provisions of Rule 2B, ibid., before the learned trial Court for extension and/or re-issuance of a temporary injunction in their favour.

12. It is further observed that as and when such an application is moved the learned trial Court shall decide it expeditiously, strictly in accordance with the law and after hearing the parties.

13. Needless to add that the report of any such extention shall be submitted to the High Court and respondents Nos.1 to 7's suit shall be decided expeditiously.

There is no order as to costs.

MWA/M-56/L: Revision dismissed.

PLJ 2020 Lahore (Note) 13

Present: MAMOON RASHID SHEIKH, J.

MUHAMMAD MAZHAR-UL-QAYYUM--Appellant

versus

SUI NORTHERN GAS LTD.--Respondent

R.F.A. No. 173448 of 2018, decided on 17.4.2018.

Gas (Theft Control and Recovery) Act, 2016--

---Ss. 7(2) & 13--Suit for recovery--Decreed--Non-payment of bills--Late payment charges--Filling of application for leave to defend--Dismissed--Filling of application for rejection of plaint--Transfer of suit to Gas Utility Court--Withdrawal of application for rejection of plaint--Barred by time--Challenge to--Once appellant entered appearance, on 20.12.2016, before Gas Utility Court, then under law, it would be deemed that he was served on 20.12.2016--He was, therefore, required under Section 7 of Act to file an application for leave to defend suit within twenty-one (21) days of said date--But he failed to do so. As a consequence, his belatedly filed application for leave to defend suit was dismissed, being barred by time, in accordance with law--Counsel for respondent has argued that respondent's suit was validly filed by Regional Manager, Sargodha, of respondent, who was duly authorized in this behalf--However, there is nothing on record to support learned counsel's contentions--Moreover, no evidence was led by respondent in this behalf--Indeed, Gas Utility Court neither adverted to nor decided this aspect of case--Appeals allowed. [Para 10 & 12] A & B

Malik Talal Hussain, Advocate for Appellant.

Mr. Umer Sharif, Advocate for Respondent.

Date of hearing: 17.4.2018

JUDGMENT

The instant appeal, filed under Section 13 of the Gas (Theft Control and Recovery) Act, 2016 (the Act), is directed against the judgment and decree, dated 02.02.2018, passed by the learned Addl. District Judge/Gas Utility Court, Mianwali, in the respondent's suit for recovery, against the appellant, whereby the respondent has been entitled to recover Rs. 267,080/- plus late payment surcharge on account of non-payment of bills for gas consumed.

2. The appellant has challenged the impugned judgment and decree on a number of grounds. The learned counsel for the appellant has vehemently urged that the Gas Utility Court dismissed the appellant's application for leave to defend the suit, by mis-appreciation of facts and mis-application of the law, on the ground that the appellant had failed to file the application within the stipulated period.

3. Further submits that the appellant appeared before the Gas Utility Court, on 20.12.2016, in response to a summons, received by the appellant, which had been issued to him by the Civil Court. Hence, the filing of the application by the appellant under Order VII, rule 11, of the CPC for rejection of the plaint on the said date. Further submits that the appellant did not receive a summons in terms of Section 6(4) of the Act nor did he receive a copy of the plaint along with the summons received by him. Contends that in view thereof, the service of the appellant cannot be deemed to have been made in accordance with the law. The learned Gas Utility Court has, therefore, erred in law in dismissing the appellant's application for leave to defend the suit.

4. Further submits that the Gas Utility Court failed to appreciate that the respondent is a public limited company, however, the suit had not been filed by a person duly authorized. The suit was, therefore, liable to be dismissed.

5. The learned counsel for the respondent submits that the mere fact that the appellant appeared before the Gas Utility Court on 20.12.2016 and filed an application for rejection of the plaint establishes that the appellant was served in accordance with the law and he was aware about the contents of the plaint.

6. Further submits that the respondent is indeed a public limited company. The suit was filed through its Regional Manager, Sargodha, who was duly authorized in this behalf. Contends that the impugned judgment and decree has been passed in accordance with the law. Prays for dismissal of the appeal.

7. The record reveals that the respondent initially filed its suit, on 13.10.2016, before the Civil Courts at Mianwali, however, thereafter, the Gas Utility Courts were established, under the provisions of the Act. As a consequence, the Gas Utility Court for Mianwali was established through Notification No. 279 JOB(I)/VI.F.6, dated 17.10.2016, read with letter bearing Endst:No. 2231/S-13, dated 20.10.2016. As a result, the suit was transferred to the Gas Utility Court, Mianwali, on 28.11.2016. There is nothing on the record to show that the appellant had been served till that date. However, in the order of the said date, whereby the Civil Court transmitted the fire of the suit to the Gas Utility Court, the presence of the counsel for "the parties" has been marked.

8. Upon entrustment of the suit, on 28.11.2016, the Gas Utility Court directed that the appellant be summoned for 20.12.2016 in terms of Section 6(4) of the Act through special summons in Form No. 4, Appendix-B of the CPC, along with a copy of the plaint. The appellant entered appearance on 20.12.2016 and filed the application for rejection of the plaint. The appellant thereafter, on 02.02.2017, withdrew the application for rejection of the plaint and at the same time filed an application under Section 7(2) of the Act for leave to defend the suit. The latter application, was dismissed through the order, dated 02.11.2017, and the respondent's suit was eventually decreed, on 02.02.2018, through the judgment of even date.

9. The record further reveals that the summonses sent to the appellant either by the Civil Court or the Gas Utility Court have not been appended thereto. In absence, therefore, of the original summonses the question cannot be conclusively determined as to when the appellant was served and through ordinary summons or summons issued in terms of Section 6(4) of the Act. In view thereof, whilst giving the benefit of doubt to the appellant, I am persuaded to observe that the appellant was not served in accordance with the provisions of Section 6(4) of the Act.

10. However, once the appellant entered appearance, on 20.12.2016, before the Gas Utility Court, then under the law, it would be deemed that he was served on 20.12.2016. He was, therefore, required under Section 7 of the Act to file an application for leave to defend the suit within twenty-one (21) days of the said date. But he failed to do so. As a consequence, his belatedly filed application for leave to defend the suit was dismissed, being barred by time, in accordance with the law.

11. Be that as it may, I find that admittedly the respondent is a public limited company. It is settled law that a company limited by shares (a corporation) has an identity separate and distinct from its shareholders/members/officials/officers. In order for a company to establish that a suit filed on its behalf has been validly filed it has to firstly show that the plaint was signed and verified by a person duly authorized in terms of order XXIX, rule 1 of the CPC and secondly it was instituted and filed by a person duly authorized by the Board of Directors of the company in accordance with the memorandum and articles of an association of the company. Reference in this regard is made to the judgments reported as *"Messrs Muhammad Siddiq Muhammad Umar and another v. The Australasia Bank Ltd."* (PLD 1966 Supreme Court 684), *"Khan Iftikhar Hussain Khan of Mamdot (represented by 6 heirs) v. Messrs Ghulam Nabi Corporation Ltd., Lahore"* (PLD 1971 Supreme Court 550) and *"Abdul Rahim and 2 others v. Messrs United Bank Ltd. of Pakistan"* (PLD 1997 Karachi 62).

12. The learned counsel for the respondent has argued that the respondent's suit was validly filed by the Regional Manager, Sargodha, of the respondent, who was duly authorized in this behalf. However, there is nothing on the record to support the learned counsel's contentions. Moreover, no evidence was led by the respondent in this behalf. Indeed, the Gas Utility Court neither adverted to nor decided this aspect of the case.

13. Under the circumstances, the impugned judgment and decree, dated 02.02.2018, are set aside and the matter is remanded to the Gas Utility Court, Mianwali, for decision afresh.

14. The respondent's suit shall be deemed to be pending before the Gas Utility Court, Mianwali. The parties are directed to appear before the said Court on 21.06.2018.

15. The appellant shall file a fresh application for grant of leave to defend the suit, in accordance with the provisions of Section 7 of the Act, within twenty one (21) days of the said date.

16. The Gas Utility Court shall then proceed to decide the application and the suit expeditiously and strictly in accordance with the law.

17. The record of these case be remitted forthwith. There is no order as to costs.

(Y.A.) Appeal Allowed.

REPORTED JUDGMENTS

OF

HON'BLE MR. JUSTICE MAMOON RASHID SHEIKH

AS AN ADVOCATE

P L D 2001 Lahore 256

Before Syed Jamshed Ali, J

IFTIKHAR HUSSAIN ---Petitioner

versus

PAKISTAN TELEVISION CORPORATION through General Manager and 5 others---Respondents

Writ Petition No. 16682 of 1998, heard on 25th January, 2001.

Television Receiving Apparatus (Possession and Licensing) Rules, 1970---

----R. 3(3)---Constitution of Pakistan (1973), Art. 199---Constitutional petition--Levy of fee for T.V. licence and introduction of a pay card system---Contention was that charging of T.V. Licence fee was illegal and unjustified because a T.V. set was also used as a monitor for a computer and only those persons who wanted to use T.V. for viewing programmes were liable to pay said fee---Contention was repelled because law would not compel a person to possess a T. V. and if it was intended to be used as computer monitor, then one could conveniently go for monitor instead of a T.V.---Such fee was livable on possession simpliciter even if a T.V. was not in actual use---Contention that a pay card system should be directed to be introduced, was also repelled because no direction- could be issued to the Television Corporation for installing a particular system as it was a matter of policy beyond the reach of High Court---Contention that contract to collect fees for T.V. awarded to the respondent was for inadequate consideration and was not given in a transparent manner was also repelled as resolution of such question involved a detailed inquiry which was beyond the scope of Constitutional jurisdiction of High Court.

Muhammad Aslam Saleemi, Advocate v. The Pakistan Television Corporation and another PLD 1977 Lah. 852 ref.

Muhammad Javed -Iqbal Jafree for Petitioner.

M. R. Sheikh for Respondents Nos. 1 and 2

Respondents Nos.3 to 6: Ex parte.

Dates of hearing: 23rd and 25th January, 2001

JUDGMENT

This petition was filed in person by the petitioner with the following prayers:

2. The learned counsel for the petitioner has contended that a fee can only be charged by respondents Nos., l and 2 for rendering services and in case of the VCR and the Dish-Antina since no services were being provided by the Pakistan Television Corporation (hereinafter referred to as the PTV) charging of the fees for the Dish-Antina and the VCR is without lawful authority.

3. That even the fee for a T.V. licence was illegal and unjustified. Elaborating his submission his contention was that a T .V. set is also used as a monitor for a computer, therefore, only those persons who want to view the programmes of the PTV should be charged the fee and a pay card system should be directed to be introduced. It was further contended that the PTV Corporation generates enormous resources by displaying commercials which are adequate to meet the expenses being incurred by the PTV.

4. It was next contended that contract to collect fees for T.V., Dish Antina and VCR was awarded to respondent No.6 Messrs Research and Collection (Pvt.) Ltd. for a sum of Rs.44 crores against an expected income of 900 crores and that it was not-given, in a transparent manner. It was also contended that despite instructions of the Ministry of Interior prohibiting letting out of collection of Government dues to the security agencies, the contract was awarded to respondent No.6.

5. The learned counsel for respondents Nos. 1 and 2 placed reliance on Muhammad Aslam Saleemi, Advocate v. The Pakistan Television Corporation and another (PLD 1977 Lahore 852) to contend that PTV was not a person within the contemplation of Article 199(5) of the Constitution of Islamic Republic of Pakistan, 1973 and, therefore, the writ petition was not maintainable. About the Dish-Antina and VCR licence fees, he placed on record fax message dated 24-1-2001 from the PTV according to which the fee on Dish-Antina and VCR has been proposed to be abolished and the matter was under consideration for the issuance of SROs and that license fees on Dish-Antina and VCR are not being recovered from the public since the year 1999-2000. He, however, contended that under the Telegraph Act, 1885 and Wireless Telegraphy Act, 1933 read with Television Receiving Apparatus (Possession and Licencing) Rules, 1970, even the fee on VCR and Dish-Antina was legally justified. About fee for possessing a T.V. he relied on the Rule -3(3) of the aforesaid Rules. Reliance was also placed on a judgment of the Hon'ble Supreme Court in C.A. No.36-K of 1987, decided on 30-9-1991 (Messrs Hotel Plaza International v. Pakistan Television Corporation) according to which fee was leviable on possession of a T.V. set even if it was not in use. Regarding introduction of the pay card system his contention' was that shifting over to the proposed system will require altogether a new apparatus and system rendering the T.V. sets in use incapable of receiving the transmission. Further, it was a matter of policy which is beyond the - reach of this Court in exercise of Constitutional jurisdiction.

Regarding contract in question his contention was that it was let out in open auction in a fair and transparent manner in any case it was for the year 1998-99 and the contract period was already over.

6. Controverting the submissions of the learned counsel for the respondents, the learned counsel for the petitioner contends that the PTV is the wholly Government-owned company and was, therefore, a person within the contemplation of Article 199 of the Constitution. He attacked the T.V. Receiving Apparatus (Possession and Licensing) Rules, 1970 on the ground that these violated the principle of due process of law and the equality clause of the Constitution and were, therefore, ultra vires of Articles 2A, 4, 24 and 25 of the Constitution. Regarding contract in question, the period of which has already expired, his contention was that future contracts are also being let out in the same manner.

7. Before proceeding to examine the contentions of. The learned counsel for the parties it may also be noted that a rival contender, namely Mir Afzal Brothers had also assailed the contract in question in W.P. 17466 of 1998 awarded to respondent No.6 which was, however, withdrawn on 24-1-2000. Another Writ Petition bearing No. 15321 of 1998 was filed by one Hizbullah Khan who claimed that he was prepared to take the contract for 64 crores of rupees: This writ petition was also withdrawn on 24-1-2000.

8. As far as fees for VCR and Dish-Antina are concerned, its recovery has been discontinued since 1999. The first grievance of the petitioner stands removed. As far as fee for possessing a T.V. set is concerned, the judgment of the Hon'ble Supreme Court in the case of Hotel Plaza International (supra) fully support the contention of the learned counsel for respondents Nos. 1 and 2. According to the said judgment, fee was' leviable on possession simpliciter even if a T.V. set was not in actual use. The contention of the learned counsel that a T.V. set could be used as a monitor for a computer and therefore, only those who wanted to use a T.V. set for viewing the programmes of the PTV are liable to pay the fee has no merit. No law compels a person to possess a T.V. and if it is intended to be used as computer monitor, then one can conveniently go for monitor instead of a T.V. Therefore, the contention that a pay card system should be introduced by the PTV has no merit either. No direction can be issued to the PTV for installing a particular system, as it is a matter of policy beyond, the reach of this Court.

9. As far as the contract in question is concerned, the period thereof has already expired. Resolution of the question that it was let out for inadequate consideration involves a detail inquiry which is beyond the scope of Constitutional jurisdiction.

10. As far as the contention that the contract was let out contrary to the instructions of Ministry of the Interior it has no merit either because respondent No.6 is not a security

agency and as explained by the learned counsel for respondents No. 1 and 2, it was a consortiums of which Messrs Habib Bank Limited and SMS Couriers were the members.

11. For what has been stated above, this writ petition has no merit and is, accordingly, dismissed. No order as to costs.

H.B.T./1-43/L Petition dismissed.;

P L D 2005 Lahore 596

Before Syed Zahid Hussain, J

JDW SUGAR MILLS LTD. through G.M. Finance---Petitioner

Versus

PROVINCE OF PUNJAB through Secretary Department of irrigation and Power, Lahore and another---Respondent

Writ Petitions Nos.3761 of 2002, decided on 10th June, 2005.

(a) Interpretation of statutes---

----Fiscal statute---Salutary principles to be kept in view while deciding the controversy enumerated.

Following are the salutary principles to be kept in view while deciding fiscal controversy:

(i) That in view of wide variety of diverse economic criteria, which are to be considered for the formulation of a fiscal policy, Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc. for taxation. But with all this latitude certain irreducible desiderata of equality shall govern classification for differential treatment in taxation law as well.

(ii) That Courts while interpreting laws relating to economic activities view the same with greater latitude than the laws relating to civil rights such as freedom of speech, religion etc., keeping in view the complexity of economic problems which do not admit of solution through any doctrinaire or strait-jacket formula.

(iii) That in the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to the legislative judgment.

(iv) That the Legislature is competent to classify persons or properties into different categories subject to different rates of tax. But if the same class of property similarly

situated is subject to an incidence of taxation, which results in inequality amongst holders of the same kind of property, it is liable to be struck down on account of infringement of the fundamental right relating to equality.

(v) That `a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably'.

(vi) That while interpreting Constitutional provisions Court should keep in mind, social setting of the country, growing requirements of the society/nation burning problems of the day and the complex issues facing the people, which the Legislature in its wisdom through legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid.

(vii) That the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of a legislation keeping in view that the rule of Constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless, ex facie, it is violative of a Constitutional provision.

(viii) That generally the effect of deeming provision in a taxing statute is that it brings within the tax net an amount which ordinarily would not have been treated as an income. In other words, it brings within the net of chargeability income not actually accrued but which supposedly to have accrued notionally.

(ix) That where a person is deemed to be something the only meaning possible is that whereas he is not in reality that something, the Act required him to be treated as he were with all inevitable corollaries of that state of affairs.

Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/O Finance, Islamabad and 6 others PLD 1997 SC 582 fol.

(b) Punjab Finance Act (XXXIV of 1964)-----

----S.13, Explanation (c) [as added by Punjab Finance Ordinance (VI of 2001), S.4]---Constitution of Pakistan (1973), Arts.157 & 199---Punjab Government Notification dated 25-8-2001---Constitutional petition---Levy of electricity duty---Punjab Government Notification issued under S.13, Punjab Finance Act, 1964, dated 25-8-2001 whereby it was provided that any person generating the electric power from a Generator having the capacity of more than 500 K.W. shall pay the Electricity duty with effect from 1-7-2001, was assailed in the Constitutional petition with a further contention that notification in question was not . retrospective in effect---Validity---Held, issuance of notification in question was consistent with the legislative field of power of Provincial Government and its

will---Notification in question which was issued in supersession of all previous notifications on the subject thus had the backing of the Statutory provisions, validity whereof was beyond any doubt---Levy of. duty, therefore, could not be disputed or assailed on any sustainable ground---Application of notification with effect from a date prior to its issuance could not be regarded as legal in view of the law that such subordinate legislative measures could not operate retrospectively from the date of its issuance---Principles.

Amanullah Khan v. Chief Secretary, Government of N.-W.F.P. and 2 others 1995 SCMR 1856 and B.P. Biscuit Factory Ltd., Karachi v. Wealth Tax Officer and another 1996 SCMR 1470; Messrs Gadoon Textile Mills and 814 others. v. WAPDA and others 1997 SCMR 641 and Messrs Fecto Cement Ltd. v. Federation of Pakistan and others PLD 2003 Lah. 531 ref.

(c) West Pakistan Electricity Duty Rules, 1964-----

----R. 11---Settlement of peripheral issues about the energy lost in the process of generation etc.---Resort could be had to the provisions of R.11, West Pakistan Electricity Duty Rules, 1964 to settle such issues and Electric Inspector could well enquire into such issues and decide the matter according to law.

(d) Interpretation of statutes---

----Provision of law cannot be interpreted in isolation, ignoring the progressive trends of time---While discovering the true meanings one must have regard to the enactment as a whole, to its object and to the scope and effect of the provisions.

(e) Interpretation of statutes-----

----Notification---Subordinate legislation like a notification cannot operate retrospectively but from the date of its issuance.

Ijaz Ahmed Awan, Salman Akram Raja, Noman Akram Raja and Mamoon Rasheed for Petitioners.

Ch. Aamer Rehman, Addl. A.-G., Punjab, M.A. Aziz and Abdul Rehman Madni for Respondents.

Dates of hearing: 11th, 13th, 15th April, 10th, 17th, 19th and 20th May, 2005.

JUDGMENT

Notification dated 25-8-2001 issued under section 4 of the Punjab Finance Ordinance, 2001 (Ordinance VI of 2001) whereby it was provided that "any person generating the Electric Power from a Generator having the capacity of more than 500 KW shall pay the electricity duty with effect from 1-7-2001" has been assailed through this and the other petitions on the subject mentioned in the attached list "A".

2. Messrs Salman Akram Raja, Noman Akram Raja and Ijaz Ahmed Awan, Advocates have mainly argued the cases on behalf of the petitioners whereas rest of the learned counsel for the petitioners have adopted their arguments.

3. The main thrust of the contentions of the learned counsel for the petitioners is that electricity duty which was levied through section 13 of the West Pakistan Finance Act, 1964 is payable only with respect to consumption by a consumer when supplied by a licensee. It is contended that mere generation of electricity and its self-use is not subject to levy of duty. According to them it is the licensee who is to pay the electricity duty on behalf of the consumer out of the revenue that comes into its hands and that since self-use by the licensee generates no revenue there can be no question of payment of electricity duty. In order to supplement and fortify their contentions, amendment made through Punjab Finance Ordinance, 1980 (Ordinance VIII of 1980) in the Punjab Finance Act, 1964 is pressed into service, that the duty was payable on energy charges worked out according to the tariff and that since self-consumption by a producer of electricity is not subject to a tariff determination, self-consumption cannot be subjected to electricity duty; It is added that supplier of electricity and consumer are two separate entitles and both are to be treated distinctly. It is contended that even with the amendment made through section 4 of The Punjab Finance Ordinance, 2001 (Ordinance VI of 2001) creating a category of deemed licensee, the scope of word supply has not been altered. It is further contended that even if it be assumed that self-consumption by the producer of electric power by means of private power generators is dutiable even then by virtue of notification dated 13-12-1985 they are exempt from its payment which exemption notification has not been withdrawn or rescinded. It is contended that notification dated 25-8-2001 which purports to impose electricity duty on all persons, generating electric power from generator having capacity more than 500 KW is ultra vires as it has no legal backing i.e. section 13 of West Pakistan Finance Act, 1964. With reference to the provisions of clause (2)(b) of Article 157 of the Constitution of Islamic Republic of Pakistan, 1973 it is contended that tax can be levied only on consumption of electricity within the Province. It is further contended that the line losses and losses of energy in the course of generation has also not been kept in view as the energy lost cannot be capable of consumption and the notification, is bad for such reason also. Legality of the notification has also been assailed on the ground of retrospectivity that whereas the notification was issued on 25-8-2001 it purports to levy electricity duty with effect from 1-7-2001, the same cannot operate retrospectivity. Reference has been made to Amanullah Khan v. Chief Secretary, Government of N.-W.F.P. and 2 others 1995 SCMR 1856 and B.P. Biscuit Factory Ltd., Karachi v. Wealth Tax Officer and another 1996 SCMR 1470 to highlight the principles, applicable for interpreting fiscal laws.

4. The learned Additional Advocate-General Punjab while contesting the petitions and controverting the contentions of the learned counsel for the petitioners has contended with reference to the provisions of Article 157 of the Constitution of Islamic Republic of Pakistan, 1973, that levy of electricity duty is within the competence of Provincial Government and section 13 was validly enacted as also the amendment made through Punjab Finance Ordinance 2001. Reference in this context has been made by him to Messrs Gadoon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641 and Messrs Facto Cement Ltd. v. Federation of Pakistan and others PLD 2003 Lahore 531. It is contended that not only the petitioners had been paying electricity duty in the past but in all other Provinces also such duty has been levied and is being paid. It is pointed out that even WAPDA is paying the duty as everybody generating or consuming energy is liable to pay duty and self-consumption is not excluded., According to him under the West Pakistan Finance Act, 1964, West Pakistan Electricity Duty Rules, 1964 had been framed, the petitioners had the alternate remedy under rule 11 thereof before the Electric Inspector, therefore, the petitions are liable to be dismissed for that reason.

The learned counsel for .the petitioners, responded to the alternate remedy aspect that the issues of vires and legality of the leviability cannot be adequately decided by the Electric Inspector, therefore, the petitioner's availing of the said remedy could not serve any real purpose.

5. In order to comprehend and resolve the controversy reference may be made to the relevant Constitutional and statutory provisions. It is Article 157 of the Constitution of Islamic Republic of Pakistan, 1973 which reads as follows:-

> "157. (1) The Federal Government may in any Province construct or cause to be constructed hydro-electric or thermal power installations or grid stations for the generation of electricity and lay or cause to be laid inter-Provincial transmission lines.
>
> (2) The Government of a Province may-
>
> (a) to the extent electricity is supplied to the Province from the national grid, require supply to be made in bulk of transmission and distribution within the Province;
>
> (b) levy tax on consumption of electricity within the Province.
>
> (c) construct power houses and grid stations and lay transmission lines for use within the Province; and
>
> (d) determine the tariff for distribution of electricity within the Province.

This provision of the Constitution came to be considered by their Lordships of the Supreme Court of Pakistan in Messrs Gadoon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641 and it was observed that sub-clause (b) of clause (2) empowers the Government of a Province to levy tax on consumption of electricity within the Province. This provision and provisions of section 13 of West Pakistan Finance Act, 1964 were also considered by a learned Bench of this Court in Messrs Facto Cement Ltd. v. Federation of Pakistan and others PLD 2003 Lahore 531, though in some different context yet on consideration of the matter the validity of section 13 of West Pakistan Finance Act, 1964 was upheld.

6. Through the Punjab Finance Act, 1964 (Act XXXIV of 1964) by enacting section 13, electricity duty was imposed with effect from 1st of July,. 1964. Due to its relevance and significance it is reproduced hereunder:-

> "13. (1) From the first day of July, 1964, there shall be levied and paid to Government, on the units of energy consumed for the purposes specified in the first column of the Fifth Schedule, excluding losses of energy in transmission and transformation, a duty (hereinafter referred to as `Electricity Duty') at the rates specified in the second column of that Schedule:'
>
> Provided that Electricity Duty shall not be leviable on the energy consumed by or in respect of the consumers enumerated in the Sixth Schedule, except to the extent specified therein:
>
> Provided further that for reasons to be recorded, Government may, by notification in the official Gazette, exempt any other consumer or class of consumers from the operation of this section.
>
> Explanation.--In this section, unless there is anything repugnant in the subject to context---

(a) "consumer" means any person other than a distributing licensee, who is supplied with energy by licensee,;

(b) "energy" means electrical energy when generated, transmitted, supplied or used for any purpose except the transmission of a message;

(c) "licensee" means any person licensed under Part II of the Electricity Act, 1910 (Act IX of 1910), to supply energy and includes any person who has obtained the sanction of the Government under section ' 28 of the Act. (This clause was amended in 2001 which finds mention in the subsequent paragraphs).

(2) Every licensee shall collect and pay to the Government the Electricity Duty payable under this section in such manner as may be prescribed. The duty so payable shall be a first

charge on amount recoverable by the licensee for the energy supplied by him and shall be a debt due by him to the Government:

Provided that-

(i) the licensee shall not be liable to pay the duty in respect of any energy supplied by him for which he has been unable to recovery his dues;

(ii) the licensee shall be entitled, for his cost of collection of the duty, to a rebate of such percentage, as may be determined by the Government, on the amount of the duty collected and paid by him under this subsection.

(3) Where any person tails or neglects to pay the amount of electricity Duty due from him, the licensee may, without prejudice to the right of Government to recover the amount under section 3 of the (Punjab) Government Dues Recovery Ordinance, 1962 (West Pakistan Ordinance (XXII of 1962), discontinue to supply energy to him and for this purpose, exercise the power conferred on a licensee, by subsection (1) of section 24 of the' Electricity Act, 1910 for recovery of any charge or sum due in respect of energy supplied by the licensee.

(4) In case of energy other than that supplied by a licensee, the person generating the energy shall pay to the Government the electricity Duty payable under this section in respect of the energy consumed, in such manner as may be prescribed.

Section 17 thereof empowered the Government to make rules for that purpose. Accordingly West Pakistan Electricity Duty, Rules, 1964 were framed. Section 13(1) of Punjab Finance Act, 1964 (Act, XXXIV of 1964) was sought to be substituted through Punjab Finance Ordinance, 1978. However, the said Ordinance was repealed on 9-7-1978 with effect from the date of its promulgation, which lost its legal efficacy. Through the Punjab Finance Ordinance, 1980 some amendments were carried out in the Fifth and Sixth Schedule. Thereafter the relevant legislation came I through section 4 of the Punjab Finance Ordinance, 2001 (No.VI of 2001) substituting explanation "c" to subsection (1) of section 13 of the Punjab Finance Act, 1964 (Act XXXIV of 1964). This because of its significance is reproduced:--

> "(c) 'licensee' means a person licensed under section 15 or 20 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997) to engage in the generation and sale of energy to a consumer and includes any person generating the electric power from a generator having the capacity of more than five hundred kilowatt for self-use."

Notification dated 25-8-2001 was then issued, which has been assailed by the petitioners. It reads as follows:--

'in exercise of the powers conferred upon him under section 4 of the Punjab Finance Ordinance, 2001 and in supersession of all previous notifications, the Governor of the Punjab is pleased to direct that any person generating the Electric Power from a Generator having the capacity of more than 500 KW shall pay the Electricity Duty with effect from 1-7-2001.'

Thus, the prime question to be considered is as to whether notification dated 25-8-2001 has been issued within the parameters of law and has got the backing of contemporaneous law.

7. There are some settled principles with regard to the Interpretation of fiscal statutes as were enumerated , in Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through. Secretary M/o Finance, Islamabad and 6 others PLD 1997 SC 582. Few of them are as under:--

"(i) That in view of wide variety of diverse economic criteria, which are to be considered for the formulation of a fiscal policy, Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc. for taxation. But with all this latitude certain irreducible desiderata of equality shall govern classification for differential treatment in taxation law as well.

(ii) That Courts while interpreting laws relating to economic activities view the same with greater latitude than the laws relating to civil rights such as freedom of speech, religion etc., keeping in view the complexity of economic problems which do not admit of solution through any doctrinaire or strait-jacket formula as noted out by Holmes, J. in one of his judgments.

(iii) That Frankfurter J., in Morey v. Doud (1957) US.457 has remarked that `in the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to the legislative judgment',

(iv) That the Legislature is competent to classify persons or properties into different categories subject to different rates of tax. But if the same class of property similarly situated is subject to an incidence of taxation, which results in inequality amongst holders of the same kind of property, it is liable to be struck down on account of infringement of the fundamental right relating to equality.

(v) That `a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably' (Willi's Constitutional Law).

(vi) .

(vii) .

(vii) That while interpreting Constitutional provisions Court should keep in mind, social setting of the country, growing requirements of the society/nation burning problems of the day and the complex issues facing the people, which the Legislature in its wisdom through legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid.

(ix) That the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of a legislation keeping in view that the rule of Constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a Constitutional provision.

(x)

(xi)

(xii)

(xiii)

(xiv)

(xv)

(xvi)

(xvii) That generally the effect of deeming provision in a taxing statute is that it brings within the tax net an amount which ordinarily would not have been treated as an income. In other words, it brings within the' net of chargeability income not actually accrued but which supposedly to have accrued notionally.

(xix) That where a person is deemed to be something the only meaning possible is that whereas he is not in reality that something, the Act required him to be treated as he were with all inevitable corollaries of that state of affairs.

These are the salutary principles to be kept .in view while deciding the controversy.

8. The contentions of the petitioners if considered with reference to section 13(1) of Act XXXIV of 1964 alone, it appears to be attractive, however, on a closer examination when considered in the context of all the legislative measures including provisions of section 4 of Punjab Finance Ordinance, 2001, the tenability of the claim of the petitioners becomes questionable and is found to be not worthy of countenance. Section 13(1) provides the levy of electricity duty on the units of energy consumed Explanation thereto defines "consumer", "energy" and the "licensee". Subsection (2) thereof burdened the licensee with the duty to collect and pay the electricity duty to the Government. Subsection (4) thereof is, however,

of some significance according to which in the case of energy other than that supplied by a licensee, the person generating the energy shall pay to the Government the electricity duty payable under this section in respect of the energy consumed. It brought within its ambit the person generating the energy. If there was some obscurity the same was set at rest with the promulgation of Ordinance VI of 2001 i.e. the Punjab Finance Ordinance, 2001. Section 4 whereof substituted the term "licensee" and enlarged its meaning to "include any person generating the electric power from a generator having the capacity of more than five hundred kilowatt for self-use".

9. Too much stress and emphasis has been laid upon the expression "consumer" and "consumption" as used in section 13(1) of The Punjab Finance Act, 1964 (W.P. Act XXXIV of 1964) and sub-clause (b) of clause (2) of article 157 of the Constitution of Islamic Republic of Pakistan, 1973. It need to be kept in view that these terms are not to be construed in a pedantic, restrictive and limited manner. With the changing trends and passage of time, dependency upon the supply of energy from the national grid system has lessened and self-generation for self-consumption is being encouraged and taking place. The provisions of law cannot, therefore, be interpreted in isolation, ignoring the progressive trends of time. It may be observed that while discovering the true meanings one must have regard to the enactment as a whole, to its objects and to the scope and effect of the provisions.

The issuance of notification dated 25-8-2001 that "any person generating the electric power from a Generator having the capacity of more than 500 KW shall pay the electricity duty with effect from 1-7-2001" was consistent with the legislative field of power of Provincial Government and its will. The notification thus sought to be assailed had the backing of the statutory provisions, validity whereof is beyond any doubt. The levy of the duty, therefore, cannot be disputed or assailed on any sustainable grounds.

10. The reliance of the petitioners on exemption notification of 1985 whereby "consumers using private generators" were exempt from the payment of electricity duty is also not apt inasmuch as notification dated 25-8-2001 was issued "in supersession of all previous notifications", thus the notification relied upon by the petitioners (regarding exemption) had lost its legal efficacy having been superseded and cannot be pressed into service.

11. There is some substance, however, in the contention of the learned counsel as to the retrospective operation of notification dated 25-8-2001. Whereas the notification dated 25-8-2001 is and has been found to be valid and intra vires having the backing of law, its application with effect from a date prior to its issuance cannot be regarded as legal. From the tenor of notification it appears that the same has been given effect with effect from 1-7-2001 whereas it was issued on 25-8-2001. In view of the settled law that such subordinate

legislative measures cannot operate retrospectively it is clarified that the notification will be effective from the date of its issuance i.e. 25-8-2001 and not from 1st July, 2001.

12. There are few peripheral issues about the energy lost in the process of generation etc. For the settlement of such disputes resort can be had .to the provisions of rule 11 of West Pakistan Electricity Duty Rules, 1964 which statedly are still in force and the Electric Inspector can well enquire into such issues and decide the matter according to law.

In view of the above the petition is dismissed with the clarification made in paragraph Neel 1 and observations contained in paragraph No.12 above.

The parties to bear their own costs.

LIST `A'

(1) W.P. No.21602/2001, (2) W.P. No.3762/2002, (3) W.P. No.3763/2002 (4) W.P. No.3764/2002 (5) W.P. No.3765/2002, (6) W.P. No.3766/2002,,(7) W.P. No.3767/2002 (8) W.P. No.4514/2002, (9) W.P. No.4692/2002, (10) W.P. No.4946/2002, (11) W.P. No.6147/2002 (12) W.P. No.7287/2002, (13) W.P. No.17540/2002, (14) W.P. No.3425/2003, (15) W.P. No.14672/2003(16) W.P. No.15043/2003, (17) W.P. No.381/2004,. (18) W.P. No.382/2004, (19) W.P. No.383/2004 (20) W.P. No.2286/2004 (21) W.P. No.2287/2004, (22) W.P. No.2356/2004, ,(23) W.P. No.2357/2004 (24) W.P. No.2558/2004, (25) W.P. No.3377/2004, (26) W.P. No.3604/2004, (27) W.P. No.15175/2004 (28) W.P. No.15541/2004 (29) W.P. No.17039/2004, (30) W.P. No.17763/2004, (31) W.P. No.986/2005 (32) W.P. No.4110/2005, (33) . W.P. No.4583!2005, (34) W.P. No.5293/2005, (35) W.P. No.5518/2005 (36) W.P. No.6475;2005 (37) W.P. No.8191/2005, (38) W.P No.8192/2005, (39) W.P: No.8841/2005 (40) W.P. No.8842/2005, (41) W.P. No.8843/2005, (42) W.P. No.8844/2005, (43) W.P. No.8845/2005 (44) W.P. No.8846/2005 (45) W.P. No.9054/2005, (46) W.P. No.9056/2005, (47) W.P. No.9057/2005.

M.B.A./J-74/L Order accordingly.

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2010 C L C 4

[Lahore]

Before Umar Ata Bandial, J

MUHAMMAD ALI KHAN and another----Petitioners

Versus

PROVINCE OF THE PUNJAB through Secretary to Government of Punjab Home Department and 4 others----Respondents

Writ Petition No.16056 of 2009, decided on 20th October, 2009.

Constitution of Pakistan (1973)---

----Art. 199---Constitutional petition---Licence and licensee---Provincial/Home Secretary cancelled Arms dealership licences issued in the name of a company, which was being operated by the petitioners under other names---Licences were cancelled on two grounds; firstly that several F. I. Rs. were registered against the petitioners alleging the issuance of false licences; secondly that petitioner had acquired the dealership licence of a private company under a different name---Out of seven F.I.Rs. petitioners had been able to obtain acquittal and/or discharge of five F.I.Rs. and remaining two F.I.Rs. were pending---High Court ordered that if the petitioners were able to exculpate themselves from all criminal cases registered against them, they could approach Home Secretary for considering in accordance with law the revival/restoration of the licences which stood cancelled under impugned order---Second ground would have to be decided afresh by the Home Secretary---Cancellation of the licences would be held in abeyance until a decision by the Home Secretary on the said point was made in that matter---Petitioners were granted six months time to clear themselves of the criminal cases registered against them in order to approach Home Secretary---Beyond that they would lose the right to claim revival of their cancelled dealership licences.

Muhammad Shahzad Shaukat for Petitioner.

Mamoon Rashid Sheikh, A.A.-G. for Respondents.

ORDER

UMAR ATA BANDIAL, J.--- By the order dated 13-10-2009 the Home Secretary, respondent No.2 has on two grounds cancelled Dealership Licences Nos.126/87 and 127/87 issued in the name of Ijaz Fareed and Company but which were being operated by the petitioners under other names. Firstly, that there are several F.I.Rs registered against the petitioner, inter alia, alleging the issuance of fake licences in order to support illegal sale

and trafficking of arms. Learned counsel for the petitioner has explained that the seven F.I.Rs. registered through a short span of time in the year 2004 and 2005 were motivated by the animus of a police officer serving in the local area at the time. Out of those seven F.I.Rs. the petitioner has been able to obtain acquittal and or/discharge in five F.I.Rs. and the remaining two F.I.Rs. are still pending. The second ground of cancellation of the petitioner's licences is that he acquired the dealership licence of Ijaz Fareed and Company under a private agreement of partnership but operated the same under a different name i.e. Mohmand & Company without obtaining the approval of the competent authority. The application for transfer of the licence to the new name was made for the first time in 2007, seven years after the petitioner commenced the business purportedly under the said dealership licences.

2. Learned counsel for the petitioner has assailed the impugned order on technical grounds relating to the incompetence of a designated hearing officer to decide the matter on behalf of the respondent No.2. That objection however, does not answer the afore-noted two principal grounds upon which the cancellation is based. Clearly with criminal cases pending against the petitioner there should be no question of the dealership licences being resorted. Learned counsel for the petitioner concedes that the so long as any criminal cases are pending against the petitioner, he does- not have any entitlement to claim the restoration of the licences. However, if the petitioner successfully obtains discharge/ acquittal in such cases, he seeks a right to approach the competent authority for the revival/restoration of such licences.

3. On that question learned Assistant Advocate General raises objection that the petitioner has run business for seven years without even applying for permission to operate the dealership licences issued in the name of another person. He submits that the petitioner is disqualified from claiming restoration. Learned counsel for the petitioner submits that there are several precedents available with the petitioners in which the respondent government authorities have allowed post facto transfer of dealerships where the antecedents of the new operator are satisfactory. On that score the impugned order has not given a finding nor has discussed the past precedents as well as the relevant rules on the subject.

4. Accordingly, it is ordered that if the petitioner is able to exculpate himself from all criminal cases - registered against him he may approach the respondent No.2 for considering in accordance with law the revival/restoration of the licences which stand cancelled under the impugned order. Since on the precedents claimed by the petitioner and for the relevant law to be disclosed the second ground would have to be decided-afresh by the respondent No.2, therefore, the cancellation of the licences shall be held in

abeyance until a decision by the respondent No.2 on the said point is made in this matter. The petitioner is granted six months from the date of this order to clear himself of the criminal cases in order to approach the respondent No.2. Beyond that he shall lose the right to claim revival of his cancelled dealership licence. In any event the petitioner shall not at all indulge in the dealership business under the cancelled licences unless the same are restored by the Home Secretary.

5. Disposed of with the foregoing direction.

H.B.T./M-802/L Order accordingly.;