REPORTED JUDGMENTS

OF

HON'BLE MR. JUSTICE SHAHID MUBEEN

JUDGE, LAHORE HIGH COURT, LAHORE

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MR. JUSTICE SHAHID MUBEEN

Judge, Lahore High Court, Lahore

(June 08, 2015 to December 31, 2019)

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2015 PLC 322

[Lahore High Court]

Before Shahid Mubeen, J

HABIB BANK LIMITED through President and another

Versus

EJAZ HUSSAIN and 2 others

W.P.No.1845 of 2011, decided on 29th June, 2015.

Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---

----S. 13---Constitution of Pakistan, Art. 199---Constitutional petition---Power of competent authority to impose penalty---Scope---Enhanced penalty imposed without assigning any reason---Permissibility-- Disagreement with report of Inquiry Officer---Principles---Competent authority dismissed petitioner, a Bank employee from service while disagreeing with report of Inquiry Officer, who had recommended penalty of compulsory retirement---Petitioner filed grievance petition before Labour Court challenging his termination and his termination was converted into compulsory retirement---Labour Appellate Tribunal converted termination into stoppage of three annual increments and fifty per cent back-benefits were allowed during period petitioner had remained out of job---Validity---Contention of respondent that findings of Inquiry Officer were not binding on competent authority, had no force---Authority while enhancing penalty from compulsory retirement into termination must have given reasons in letter of termination---Authority though was not bound by recommendations of Inquiry Officer regarding award of penalty, but while disagreeing with report of Inquiry Officer and awarding higher penalty than the one recommended by Inquiry Officer firstly, he had to provide opportunity of hearing to accused officer, and secondly, he had to pass reasoned order with conscious application of mind, that was also with reference to evidence available on record---Findings of facts by courts below did not suffer from any misreading or non-reading of evidence---Constitutional petition was dismissed in circumstances.

Secretary, Government of Punjab (C & W) and others v. Ikramullah 2013 PLC (C.S.) 801 and Asif Yousaf v. Secretary Revenue Division, CBR, Islamabad and another 2014 SCMR 147 rel.

Tariq Mahmood for Petitioners.

Mirza Muhammad Afzal for Respondent No.l.
Qasim Ali Chohan, A.A.-G.

ORDER

SHAHID MUBEEN, J.--- Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have challenged the vires of order dated 9-3-2011 passed by learned Punjab Labour Appellate Tribunal, Lahore and judgment dated 31-8-2009 passed by the learned Labour Court No.6 Rawalpindi.

2. Brief facts of the case are that respondent No.1 was appointed as Naib Qasid on 1-1-1984 in the petitioners bank, subsequently, promoted as Cashier in the year 1988 and, thereafter, his services were terminated vide order dated 29-8-2002. The respondent No.1 after receiving termination order filed departmental appeal on 12-9-2002, however, same was rejected vide order dated 5-10-2002. Feeling aggrieved with the said order, he filed an appeal before learned Federal Services Tribunal which was dismissed on the point of jurisdiction vide order dated 30-4-2004. The respondent No.1 filed an appeal before august Supreme Court of Pakistan against the order dated 30-4-2004 passed by learned Federal Services Tribunal which was accepted and matter was remanded to learned Federal Services Tribunal for its decision afresh, in accordance with law. During the pendency of appeal before learned Federal Services Tribunal, on the basis of judgment dated 27-6-2006 of the august Supreme Court of Pakistan, the appeal of respondent No.1 was abated. The abatement was communicated to respondent No.1 vide notice dated 14-7-2006. The respondent No.1 after availing the period of 90-days granted by the august Supreme Court of Pakistan vide above judgment, filed the grievance petition before the learned Presiding Officer Punjab Labour Court, Rawalpindi on 25-9-2006.

3. The grievance petition was vehemently contested by the petitioners by maintaining that the petition is incompetent as well as barred by time on merits and asserted that respondent No.1 was charge sheeted lawfully. In an inquiry conducted by the bank he was found guilty and his services were rightly terminated in accordance with law.

4. The parties led their evidence pro and contra to prove their respective contentions. The grievance petition of respondent No.1 was partly accepted vide order dated 31-8-2009 passed by Presiding Officer, Punjab Labour Court, Rawalpindi and the order of termination was converted into the compulsory retirement from the date of order passed by the respondent No.3. However, it was held that the respondent shall not be given wages from date of termination till 31-8-2009. Feeling aggrieved from the impugned order dated 31-8-2009 both the parties preferred appeals. Learned Punjab Labour Appellate Tribunal vide judgment dated 9-3-2011 accepted the appeal of respondent No.1 and compulsory retirement of respondent No.1 was converted into the stoppage of his three annual increments. Further relief given to respondent No.1 was that 50% back benefits were also allowed during the period he remained out of job. The appeal filed by the petitioners' bank was dismissed. Feeling aggrieved from the impugned judgments, the petitioners have instituted the present writ petition.

5. It is contended by the learned counsel for the petitioners that competent authority is fully competent to .convert the penalty of compulsory retirement into the termination. It is further contended that the findings of the inquiry officer is not binding on the authority.

6. On the other hand, it is contented by the learned counsel for respondent No.1 that the allegations leveled against the respondent No.1 are false and baseless and the impugned termination order was passed in violation of mandatory provision of law. It is further contended that despite the fact that the inquiry officer after completion of inquiry had recommended for compulsory retirement of respondent No.1 from service but the competent authority while disagreeing with the findings of the inquiry officer imposed major penalty of termination upon the respondent No. 1. Lastly the learned Assistant Advocate-General and the learned counsel for respondent No.1 have supported the impugned judgments.

7. Heard. Record perused.

8. The contention of the learned counsel for the petitioners that the findings of the inquiry officer are not binding on the authority has no force. The authority while

enhancing penalty from compulsory retirement into termination must have given reasons in letter dated 29-8-2002 but it is lacking in the instant case. It is established law that if the competent authority wants to enhance penalty then reasons must be given. Reliance is placed on Secretary, Government of Punjab (C& W) and others v. Ikramullah" (2013 PLC (C.S.) 801). The relevant portion is reproduced as under:---

> "Having heard learned Law Officer and learned counsel for the respondents, we find that a two member committee comprising of senior officials of the C&W Department was constituted to inquire into the allegations levelled against the respondents and the said committee in the detailed report has discussed the role attributed to the respondents in the light of the evidence recorded during inquiry and came to the conclusion in case of respondent in Civil Petition No.733-L of 2012 (Ikram Ullah) that none of the charges stood proved; in case of respondent in Civil Petition No.737- L of 2012 (Iftikhar Ahmed) that some charges were proved and it recommended minor penalty of withholding of two increments for two years; in case of respondent in Civil Petition No. 755-L of 2012 (Syed Atta Hussain) that some of the charges were proved and minor penalty of withholding of one increment for one year was recommended; in case of respondent in Civil Petition No.1988-L of 2012 (Ameen Ahsan Shah) that some of the charges were proved, some were partially proved and one charge was not proved and it recommended reduction of three stages in his pay scale and withholding of promotion for three years when due; in Civil Petition No.1989-L of 2012 (Qazi Altaf Hussain Shah) that some of the charges were proved, some were partially proved and one charge was not proved and it recommended penalty of reduction by two stages in pay scale and withholding of promotion for three years when due. Similarly in Civil Petition No.1990-L of 2012 (Asif Shaheen Khan) one charge was proved and four other charges were not proved and it recommended minor penalty of withholding of two increments for one year. The Competent Authority without assigning any reason to disagree with the findings of the', Committee with reference to the evidence collected enhanced the penalty and converted the same into major penalties as indicated in column No.4 of the chart referred to in Para 3 above. There is no

cavil to the proposition that the competent authority on .receipt of the report from inquiry officer of the inquiry committee can proceed in any of the options available to him in terms of subsections (2) to (8) to section 13 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006. However, while doing so, it has to follow the procedure laid down therein and if it proposes to enhance the penalty it has to give reasons germane to the charges levelled and the evidence collected during inquiry and that too with reference to the liability of each of the officers who were inquired into. Unfortunately the Competent Authority did not give any reason whatsoever except that he gone through the record and the defence pleas of the respondents and had also personally inspected the road, defective construction of which was a moot point during inquiry. Mere deplorable condition of the road at site was not enough to hold each respondent guilty unless the Competent Authority specifically had referred to the role and liability of each one of the respondents in the light of material/evidence collected during inquiry. Learned Law Officer on court query, could not dispute the fact that the competent authority neither gave any reason for enhancing the penalty nor apportioned the liability of each of the respondents specifically. Even the site inspection of the road was carried out, it is not denied by the learned Law Officer, after four years of the completion of the said project and that too in absence of the respondents."

9. Reliance is also placed on "Asif Yousaf v. Secretary Revenue Division, CBR, Islamabad and another" (2014 SCMR 147). The relevant portion is reproduced as under:--

"There is no cavil to the proposition that the Competent Authority is not bound by the recommendation of Inquiry Officer qua the award of penalty to the accused officer. However, while disagreeing and awarding higher penalty than recommended by the Inquiry Officer, he has to firstly provide opportunity of hearing to the accused officer and secondly, he has to pass a reasoned order with conscious application of mind. The tenor of the order passed to which reference has been made above indicates that although the Inquiry Officer had found the appellant to be negligent in his conduct and the charge of 'mal administration' was

not proved yet the Competent Authority while awarding him major penalty of dismissal from service found that "there was substantial evidence on record to prove the charges". There is no reference to the evidence or material which found favour with the Competent Authority to award major penalty of dismissal from service. Admittedly there was no allegation that the accused officer was guilty of corruption or of financial gain."

10. The concurrent findings of fact recorded by the two courts below do not suffer from any misreading and non-reading of evidence available on the record.

11. Sequel to the above, this petition having no force is dismissed leaving the parties to bear their own costs.

SL/H-18/L Petition dismissed.

2016 CLC 180
[Lahore]
Before Shahid Mubeen, J
Mst. NAVEEDA KAUSAR and others----Petitioners
Versus
MAUZZAM KHAN and others----Respondents

Writ Petition No.3045 of 2014, decided on 5th August, 2015.

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

----S. 5 & Sched.---Muslim Family Laws Ordinance (VIII of 1961), S.7---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance, dowry articles, delivery expenses and cash amount---Talaq, pronouncement of---Determination---Oral Talaq, proof of---Principles as to when oral Talaq becomes effective---Notice of Talaq to Chairman, Union Council, absence of---Effect---Talaq pronounced in anger---Recovery of amount mentioned in column 16 of Nikahnama and claimable in case of divorce---Jurisdiction of Family Court---Decree for restitution of conjugal rights---Enforceability---Non-framing of issue regarding Talaq---Effect---Plaintiff's wife and minor filed suit for recovery of maintenance, dowry articles and delivery expenses along with recovery of amount resulting from divorce---Trial Court partially accepted the suit and dismissed the same to the extent of amount claimed as result of divorce---Appellate court enhanced quantum of maintenance of minor and dismissed appeal regarding remaining prayer---Husband took plea that marriage between parties was still intact as he divorced plaintiff in anger---Validity---Wife produced affidavit in evidence in support of her contention that defendant had orally divorced her---Defendant had sought Fatwa which had established that he had divorced plaintiff for three times in irritated and annoyed mood---When fact of oral divorce had been admitted by defendant, then it was valid divorce---Oral Talaq, given thrice, had become irrevocable and effective the moment same had been pronounced---High Court observed that oral Talaq would become effective and binding in spite of absence of notice under requirement of S.7 of Muslim Family Laws Ordinance, 1961---Oral Talaq was as good as Talaq in writing---Husband was bound to send notice to Chairman of concerned Union Council---No issue regarding alleged oral divorce had been framed by Trial Court---Both parties had asserted said issue in their pleadings and also produced evidence regarding same---Non-framing of issue regarding factum of divorce was, therefore, not fatal---Finding of courts below regarding divorce were contrary to record---Court could grant relief flowing from pleadings and evidence of parties---Present suit had also been treated as suit for dissolution of marriage---Plaintiff's claim on basis of column No.16 of Nikahnama regarding recovery of amount in case of divorce could not be granted to her by Family Court, for which she could file appropriate remedy before court of competent jurisdiction---Decree of

restitution of conjugal rights had become redundant and ineffective as defendant had divorced plaintiff---Said decree was good answer to suit for maintenance filed by wife---Impugned judgment and decrees were in accordance with evidence on record regarding remaining issues---Constitutional petition was partially accepted in circumstances.

Ghulam Shabir Shah v. The State 1983 SCMR 942; Muhammad Sarwar and another v. The State PLD 1988 FSC 42; Allah Dad v. Mukhtar and another 1992 SCMR 1273; Fida Hussain v. Mst. Najma and another PLD 2000 Quetta 46; Mirza Qamar Raza v. Mst. Tahira Begum and others PLD 1988 Kar. 169; Mst. Batool Bibi v. Muhammad Hayat and another 1995 CLC 724; Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others PLD 2011 SC 260; Muhammad Akram v. Mst. Hajra Bibi and 2 others PLD 2007 Lah. 515; Ghulam Muhammad v. Parveen Akhtar and others 2012 CLC 321: Shahida Parveen v. Nijabat Ali and 2 others 2009 MLD 671; Mushtaq Ahmad v. District Judge, Vehari and 2 others 2013 CLC 928; Shamshoo v. Mst. Tahira and another 1983 CLC 133 and Rukhsana Tabassm v. Judge, Family Court and 2 others 1999 CLC 878 rel.

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

----S. 5 & Sched.---Suit for recovery of amount mentioned in Column 16 of Nikahnama---Maintainability---Claimable in case of divorce---Jurisdiction of Family Court---Plaintiff's claim on basis of column No.16 of Nikahnama regarding recovery of amount in case of divorce could not be granted to her by Family Court, for which she could file appropriate remedy before court of competent jurisdiction.

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

----S. 5 & Sched.----Decree for restitution of conjugal rights---Enforceability---Decree of restitution of conjugal rights became redundant and ineffective as defendant had already divorced the plaintiff.

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

----S. 5 & Sched.---Non-framing of issue regarding divorce---Effect---Both parties had asserted said issue in their pleadings and also produced evidence regarding the same---Non-framing of issue regarding factum of divorce was, therefore, not fatal---Court could grant relief flowing from pleadings and evidence of parties.

Muhammad Umar Awan for Petitioners.
Syed Atif Hussain Naqvi for Respondent No.1.

ORDER

SHAHID MUBEEN, J.--- Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have challenged the vires of judgment and decree dated 01.07.2014 passed by the learned Additional District Judge, Rawalpindi and judgment and decree dated 22.03.2014 passed by the learned Judge Family Court, Kahuta and prayed that the said impugned judgments and decrees be set aside.

2. Briefly stated the facts of the case are that petitioner No.1, Mst. Naveeda Kausar (wife) instituted a suit for the recovery of maintenance, dowry articles of Rs.23,000/- as well as Rs.100,000/-. In her suit, she asserted that on 12.03.2013, respondent No.1, Muazzam Khan, orally pronounced divorce thrice at the spot, which has become effective. Petitioner No.2, Abdul Hadi, instituted a suit through his real mother/petitioner No.1 for recovery of maintenance as well as delivery expenses. On the other hand, defendant filed written statement with the contention that on 25.9.2013 he in angry mood pronounced divorce orally but revoked later on and the marriage is still intact. Out of the divergent pleadings of the parties following issues were framed:-

ISSUES

1. Whether the plaintiffs are entitled for recovery of maintenance, if so, at what rate and for what period? OPP

2. Whether the plaintiff is entitled for recovery of dowry articles as per list annexed with the plaint? OPP

3. Whether the plaintiff is entitled for recovery of Rs.23,000/- which were barrowed by the defendant? OPP

4. Whether the plaintiff is entitled for recovery of Rs.100,000/- as per column No.16 of Nikah Nama? OPP

5. Relief.

3. The learned Judge Family Court, Kahuta vide judgment and decree dated 22.03.2014 partially accepted the suit of petitioner No.1 whereas suit to the extent of recovery of Rs.23,000/- as well as Rs.100,000/- was dismissed. Feeling aggrieved, the petitioners have assailed the judgment and decree dated 22.03.2014 passed by the learned Judge Family

Court, Kahuta by filing appeal before learned Additional District Judge, Rawalpindi/respondent No.2. Learned Additional District Judge Rawalpindi/Respondent No.2 vide its judgment and decree dated 01.07.2014 enhanced the quantum of maintenance to the extent of petitioner No.2 from Rs.2000/- to Rs.2500/- per month and claim of petitioner No.1 for the recovery of Rs.23,000/- and Rs.100,000/- was not accepted. Feeling aggrieved from the said judgments and decrees passed by the learned courts below, the petitioners have instituted the instant writ petition.

4. The petitioner No.1 asserted in her plaint that she was verbally divorced by respondent No.1 on 12.03.2013. In the written statement, the respondent No.1 asserted that on 12.07.2013 he divorced the petitioner No.1 when he was ailing and in a condition of an irritated/ annoyed mood and in this regard he executed an affidavit. The petitioner No.1 asserted the fact of oral divorce dated 12.03.2013 by the respondent No.1 in her affidavit which is produced as Ex-P-1. The respondent No.1 also admitted the factum of oral divorce to the petitioner. He has produced a document dated 20.04.2013 whereby he sought a Fatwa from Quran Academy. From bare perusal of said document, it is established that he divorced the petitioner No.1 in an irritated/annoyed mood for three times. When the fact of oral divorce has been admitted by the respondent No.1 as stated above then under the law, it is a valid divorce. In para No.310 of "Principles of Mohamedan Law" by D.F. Mullas which is reproduced as under:-

> "A talak may be effected (1) orally (by spoken words) or (2) by written document called a Talaknama".

In sub-para (3) of para 311 of said book which is reproduced as under:-

> "Talak-ul-bidaat or talak-i-badai --- This consist of:
>
> (i) three pronouncements made during a single tuhr either in one sentence, e.g., "I divorce thee thrice --- or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce three" (x) or,
>
> (ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage (y), e.g., "I divorce thee irrevocably."

5. In sub-para No.3 of para No.312, of said book which is as under:-

> "A talak in the badai mode becomes irrevocable immediately it is pronounced, irrespective of the iddat. As the talak becomes irrevocable at once, it is called talak-i-bain, that is, irrevocable talak.

6. From the bare perusal of above referred paras, it is crystal clear that oral divorce given thrice becomes irrevocable and become effective the moment same was pronounced.

7. It is argued by the learned counsel for respondent No.1 that oral Talak is not effective as no notice was given by him and the concerned Union Council has not issued a certificate of effectiveness of Talak. This argument is fully answered by august Supreme Court of Pakistan in a case reported as "Ghulam Shabir Shah v. The State" (1983 SCMR 942) held as under:-

> "We notice that the learned counsel for the petitioner has taken it as a ground for the first time that the divorce pronounced orally in October 1979 or in writing in January, 1980 was such as to fall outside the provisions of sections 7 and 8 of the Family Laws Ordinance. Not even the divorce document has been placed on record to make out this ground. What we find is that the two courts dealing with the question have recorded a finding that the divorce was pronounced by the petitioner on 17th of January, 1980, that it was a divorce as envisaged under section 7 of the Muslim Family Laws Ordinance and it required notice and did not become effective till 90 days expired after such notice. Reading sections 7 and 8 together we find no such distinction as is sought to be made out by the learned counsel for the petitioner."

8. In case reported as 'Muhammad Sarwar and another v. The State" (PLD 1988 Federal Shariat Court 42) it was held as under:

> "We have gone through the judgment in Mirza Qamar Raza and appreciate that the effectiveness of the 'Talaq' cannot be subjected to the service of notice on the Chairman. The observations of the learned Judge that the reconciliation efforts ordained in Quran pertain to a period before the pronouncement of 'Talaq' or that an official or other person cannot be designated in a man-made law to enforce and oversee the reconciliation proceedings in obedience to the dictates of Allah, are mere abiter dicta as these questions never fell to be decided."

9. In a case reported as "Allah Dad v. Mukhtar and another" (1992 SCMR 1273) it was held as under:-

> "The question of the notice of Talaq to the Chairman under section 7 of the Family Laws Ordinance was also decided by all these Courts in favour of the respondents and it was held that even in the absence of such a notice, the Talaq has become effective. Reliance, in this respect, was placed on Article 2-A of the Constitution, as interpreted in the case of Mirza Qamar Raza v. Mst. Tahira Begum and others PLD 1988 Kar. 169."

10. In a case reported as "Fida Hussain v. Mst. Najma and another" (PLD 2000 Quetta 46) relying upon "Mirza Qamar Raza v. Mst. Tahira Begum and others", (PLD 1988 Kar. 169) and (PLD 1988 FSC 42), it was held that:-

> "In view of above position oral Talaq would be effective and binding in spite of its non-compliance with mandatory requirement of section 7 of the Muslim Family Laws Ordinance, 1961."

11. In another case reported as "Mst. Batool Bibi v. Muhammad Hayat and another" (1995 CLC 724) it is held that:-

> "The objection of learned counsel for respondent No.1 that oral Talaq even if proved is invalid since no notice under section 7 of Muslim Family Laws Ordinance, 1961 was given by respondent No.1 to Chairman, Union Council or to the petitioner is not sustainable. It has been held in case titled Allah Dad v. Mukhtar and another (1992, SCMR 1273) that failure to send notice to Chairman, Union Council does not render the divorce ineffective in Shariah. The same has been held in another case titled Mst. Zahida Shaheen and another v. The State and another (1994 SCMR 2098). Respondent No.1 had assailed the genuineness of the Nikahnama, however, he has not been able to lead any evidence to the effect that the Nikahnama is forged. There is a rebuttable presumption regarding the validity of public documents. Since this presumption has gone unrebutted, the Nikahnama stands as a genuine document and it is stated in the Nikahnama that the petitioner has entered into Nikah after being divorced. Respondent No.2 has not properly appraised the evidence regarding pronouncement of oral Talaq nor has he taken into consideration the fact that the genuineness of Nikahnama of the petitioner with Lal has gone unchallenged. Respondent No.2 has also not taken into consideration the fact that the petitioner was pregnant during the proceedings for jactitation of marriage. He passed the impugned order setting aside the judgment of the learned Judge, Family Court and consequence of his order would be that child born to the petitioner would be considered illegitimate. In such a situation, the law leans in favour of validity of marriage and legitimacy of a child who is innocent. This consideration was totally disregarded by respondent No.2. He also failed to take into consideration the fact that in pursuance of his judgment, the petitioner and Lal would be convicted and sentenced in the case pending against them under the Zina Ordinance."

Reliance is also placed upon the cases reported as "Ms. Roheela Yasmin v. Ms. Neelofar Hassan and 6 others" (2014 YLR 2315), "Mst. Zarina Begum v. Major Aziz ul Haq and 3

others. "(2006 CLC 1525) and "Hamid Hameed Waris v. Mst. Tehseen" (PLD 2002 Karachi 518).

12. Relying upon above judgments, it can safely be concluded that oral talak is as good as Talaq in writing and it was duty of the husband to send notice to Chairman, Union Council concerned relating to divorce.

13. Although no issue was framed in this regard by the learned Judge Family Court, Kahuta whether the petitioner No.1 was orally divorced by the respondent No.1, however, the parties were conscious about the issue which was asserted by the petitioner No.1 in her plaint and admitted in written statement by respondent No.1. The parties adduced evidence, therefore, the non framing of issue on said point is not fatal. Consequently, it is held that the petitioner No.1 was divorced by respondent No.1. The findings qua the divorce by the learned courts below are contrary to the record. It is established law that this Court can grant relief flowing from pleadings and evidence of parties, therefore, this suit is also treated a suit for dissolution of marriage.

14. As far as the claim of petitioner No.1 with regard to recovery of Rs.100,000/- on the basis of condition No.16 in the nikahnama is concerned. Reliance is placed on a celebrated judgment of Hon'ble Supreme Court of Pakistan reported as "Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others" (PLD 2011 Supreme Court 260), the relevant portion is reproduced as under:-

> "The definition of "actionable claim" in the TPA is strictly and exclusively relatable to the operative provisions of Chapter VIII of that Act, which by virtue of Sections 130 to 137 thereof inter alia, prescribes the requirements and the broad mechanism for the transfer and the assignment of the "actionable claims" so defined in section 3. It has no application beyond the Act even if any general concept emerges on account of the expression, it is restricted to the law it forms part and cannot be stretched to apply to any other law of the land, including the Family Courts Act, 1964, thus the interpretation of entry No.9 ibid as provided by Muhammad Akram v. Mst. Hajra Bibi and 2 others (supra) is the correct explication of law, which is hereby approved. However, adding thereto, it may be held that if the ratio of Nasrullah dictum (supra) which is entirely and solely founded on the noted concept/definition is taken to be correct, than a suit for Specific Performance, declaratory suits of any nature, or any other civil legislation between a wife and husband shall be amenable to the special jurisdiction of the family Court, which is not intent of the law. Because according to the literal approach of reading a statute, the statue has to be read literally by giving the words used therein, ordinary,

natural and grammatical meaning. Besides, the addition and subtraction of a word in a statute is reading in and reading down may be pressed into service in certain cases; thus when in Entry No.9 'actionable claim' has not been provided by the legislature intent and the rules of interpretation to add this express to the clause/entry."

15. The judgment of Apex Court approves the judgment of High Court in case title "Muhammad Akram v. Mst. Hajra Bibi and 2 others" (PLD 2007 Lahore 515), relevant portion of which is reproduced as under:-

"Heard. As regards the question, whether the suit is competent before the Family Court, it is the case of respondent No.1, and also held by the learned Additional District Judge that the matter falls within the Entry No.9 of the Schedule to section 5, i.e. "personal property and belonging of the wife". I feel amazed to note as to how the amount of Rs.100,000/- allegedly payable by the petitioner on account of the divorce or bad relations between the parties, is the personal property or belonging of respondent No.1, so as to bring the case within the jurisdiction of the Family Court. Such personal property or belonging referred to it Entry No.9, in my considered view, is a residuary provision, which enables the wife to recover through the process of the Family Courts Act, 1964, whatever property she has acquired during the subsistence of the marriage, which is not the part of her dowry, through her own independent means or even through the means provided by the husband, such as her clothes, ornaments and items of personal use and nature, this may also include anything which has been gifted to the wife by the husband or any of his or her relatives or the friends; such property and belonging may be the one acquired by the wife out of the money given to her by the husband, her saving from household allowance, or pocket money, from the money provided by her parents and relatives. But definitely the aforesaid entry does not cover any amount which is not yet the property of the wife and she only has a claim to recover from the husband on the basis of any special condition incorporated in the Nikahnama. I am not convinced by the argument that the amount in question is covered under the rules of actionable claims as envisaged by section 130 of the Transfer of Property Act, 1882. The term "actionable claim" in general means, a claim for which an action will lie, furnishing a legal ground for an action and according to section 3 of the Transfer of Property Act, a claim towards a debt. On account of both the means such claim cannot be equated as a "personal property and belonging of the wife." Resultantly, in my considered view, the family Court has no jurisdiction in the matter and the suit in this behalf before the said Court was not competent."

16. The other judgments on the point includes "Ghulam Muhammad v. Parveen Akhtar and others" (2012 CLC 321), "Shahida Parveen v. Nijabat Ali and 2 others" (2009 MLD 671) and Mushtaq Ahmad v. District Judge, Vehari and 2 others" (2013 CLC 928).

17. The claim of the petitioner No.1 on the basis of column No.16 qua recovery of Rs.100,000/- in case of divorce cannot be granted to her by a learned Judge Family Court on the strength of the above noted judgment, however, she may file appropriate remedy before court of competent jurisdiction.

18. As far as decree of restitution of conjugal rights is concerned, it has become redundant as this Court has already held that petitioner No.1 has been divorced by the respondent No.1 on 12.03.2013. Even otherwise, it has been held in "Shamshoo v. Mst. Tahira and another" (1983 CLC 133) that "a wife cannot be compelled to live with her husband even if he obtains decree for restitution of conjugal rights". It has also been held in a case reported as "Rukhsana Tabassm v. Judge, Family Court and 2 others" (1999 CLC 878) that "a decree for restitution of conjugal rights is not absolute decree and cannot be enforced by Courts of justice." The said decree is a good answer to a suit for maintenance filed by wife.

19. In the above facts and circumstances of case, the decree of restitution of conjugal rights of respondent No.1 has become ineffective. However, the impugned judgments and decrees are in accordance with the evidence available on the record with regard to rest of the issues decided by the courts below.

20. For what has been discussed above, this writ petition is partially accepted leaving the parties to bear their own cost.

SL/N-43/L Order accordingly.

2016 CLC 915

[Lahore]

Before Shahid Mubeen, J

MUHAMMAD NAWAZ----Petitioner

Versus

SENIOR MEMBER BOARD OF REVENUE, PUNJAB, LAHORE and 4 others----Respondents

Writ Petition No.1322 of 2012, decided on 13th November, 2015.

(a) Punjab Land Revenue Rules, 1968---

----Rr. 17 & 19---Lambardar---Appointment of---Procedure---Vested right---Petitioner filed application for appointment of Lamberdar on the death of earlier Lamberdar which was accepted by the District Officer (Revenue)---Respondent filed appeal against the said appointment which was accepted and he was appointed as Lamberdar---Validity---Concurrent findings of fact had been recorded by the revenue authorities---Respondent had land measuring 61-kanals and 7-marlas which was sufficient for Zar-e-Bharat---Respondent had already rendered services as Sarbrah Lamberdar for a long time and he was well versed with the duties of the post---Petitioner had higher education qualification as compared to respondent---To be appointed as Lamberdar was not the vested right---Concurrent findings recorded by the revenue authorities were in accordance with law---Constitutional petition was dismissed in circumstances.

2006 CLC 755 distinguished.

Bashir Ahmad v. Member (Judicial-III), Board of Revenue Punjab and others 2002 SCMR 1371; M. Nazir Ahmad v. Muhammad Aslam and others 2013 SCMR 363 and Abdul Ghafoor v. Member (Revenue) Board of Revenue and another 1982 SCMR 2002 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---High Court could not upset concurrent findings of fact while exercising constitutional jurisdiction.

Sheikh Naveed Shehryar for Petitioner.

Muhammad Nasir Chowhan, Addl. A.-G. for the State.

Mian Tariq Hussain for Respondent.

ORDER

SHAHID MUBEEN, J.--- Through the instant writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called into question the validity and legality of orders dated 26.09.2011 and, 25.01.2011 passed by respondent No.1/Senior Member Board of Revenue, Punjab, Lahore and respondent No.2/Executive District Officer (Revenue), Toba Tek Singh, respectively.

2. Briefly facts of the case are that the petitioner filed an application before Tehsildar Tehsil Kamalia, District Toba Tek Singh/respondent No.4 for the appointment of Lambardar of Chak No.754-G.B. Tehsil Kamalia, District Toba Tek Singh as the earlier Lambardar Anayat Ali had passed away and the seat became vacant due to his death. Respondent No.3/District Officer (Revenue), Toba Tek Singh appointed the petitioner as Lambardar of the said Chak vide order dated 23.11.2010. Respondent No.5/Bashir Ahmad son of Anayat Ali filed an appeal before respondent No.2 against the order dated 23.11.2010, which was accepted by respondent No.2 by appointing him as Lambardar of the said Chak. The petitioner filed revision petition before respondent No.1 which met with the same fate and was dismissed vide order dated 26.09.2011, hence this writ petition.

3. It is contended by the learned counsel for the petitioner that order dated 23.11.2010 passed by respondent No.3 appointing the petitioner as Lambardar should not have been ignored as it has been passed in accordance with the reports submitted by the field staff. He relies on 2006 CLC 755. On the other hand learned counsel for respondent No.5 has supported the impugned orders passed by respondents Nos.1 and 2 appointing him as Lambardar of the said Chak.

4. Arguments heard. Record perused.

5. There is concurrent findings of fact recorded by respondent No.1/Senior Member Board of Revenue, Punjab, Lahore vide order dated 26.09.2011 and respondent No.2/Executive District Officer (Revenue), Toba Tek Singh, Lahore vide order dated 25.01.2011. Respondent No.5 owns land measuring 61-kanals 7-marlas in Chak No.754-G.B. which is sufficient land for Zar-e-Bharat. It is also proved from the record that respondent No.5 has rendered services as Sarbrah Lambardar for a long time and he is well versed with the duties of the post of Lambardar. Learned counsel for respondent No.5 has provided copy of the challan wherein respondent No.5 has been declared innocent. Respondent No.5 has also placed on record certificate of his passing matric from the Board of Intermediate and

Secondary Education, Sargodha. He has also placed on record order dated 19.04.2011 wherein it has been stated that nothing is outstanding against respondent No.5. So far as the petitioner is concerned, he has not placed on record any proof that he is matriculate, therefore, finding of respondent No.2 is correct that the petitioner is not matriculate whereas he is middle. The most important thing in appointing respondent No.5 as Lambardar is that he had been performing the duties as Sarbrah Lambardar for a long time and has experience to perform such duties. Reference may be made to case titled Bashir Ahmad v. Member (Judicial-III), Board of Revenue Punjab and others (2002 SCMR 1371). To be appointed as Lambardar is not the vested right of anybody. Reliance is placed on case titled M. Nazir Ahmad v. Muhammad Aslam and others (2013 SCMR 363). The relevant portion of the said judgment is reproduced herein below:--

> "As per the settled law, lambardari is an administrative post of its own kind, which has the colour and tinge of any honorary post and assignment, in any case it is neither in the nature of government service nor a profession or an avocation having any nexus to an office of profit such a drawing salary etc. from the government exchequer (Note: may be some monetary benefits etc. can be said to be attained by the Lambardar directly or indirectly by virtue of his office), it is also not a vested right of a person to be appointed as Lambardar, rather the revenue authorities, for the purposes of assigning certain responsibilities to a person in the Chak, make a selection as per the criteria set out in rule 17 of the Land Revenue Rules and to find the most suitable candidate for the job who could capably discharge the duties inter alia in terms of rule 22 of the rules ibid. As the entire effort of the revenue authorities in this behalf should be to find out and locate the most suitable person for the job, because no one, as mentioned above, has a vested right to the appointment, rather a Lambardar is saddled with certain responsibilities in connection with the collection of the land revenue, Abiana and other government dues, etc. therefore, for choosing the best available person, on whom trust can be reposed, the condition and requirement of qualifications in strict terms, which may otherwise be adhered to in some other kinds of recruitments in the government service etc. especially in relation to and by a given and a specific date meant for applying for such posts/appointments, should not be strictly followed in the lambardari matter."
>
> Reliance is also placed on case titled Abdul Ghafoor v. Member (Revenue) Board of Revenue and another (1982 SCMR 2002).

6. The concurrent findings of fact recorded by respondents Nos.1 and 2 are in accordance with law which cannot be upset by this Court while exercising constitutional jurisdiction

under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. The case law relied upon by the learned counsel for the petitioner i.e. 2006 CLC 755 is distinguishable from the facts of the present case.

7. Sequel to the above, this writ petition is devoid of any merit, hence dismissed with no order as to cost.

ZC/M-362/L Petition dismissed.

2016 CLC 1095

[Lahore]

Before Atir Mahmood and Shahid Mubeen, JJ

Messrs MEGA STEEL MILLS PRIVATE LIMITED----Appellant

Versus

GOVERNMENT OF PUNJAB through Secretary, Environmental Protection Department, Punjab, Lahore and 6 others----Respondents

W.P. No.17300 converted in F.A.O. No.145 of 2015, decided on 22nd December, 2015.

(a) Pakistan Environmental Protection Act (XXXIV of 1997)---

----Ss. 16 & 23---Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, Rgln.20(3)---Environment protection---Sealing of property---Audi Alteram Partem, principle of---Applicability---Appellant company was aggrieved of sealing its factory by authorities under Pakistan Environmental Protection Act, 1997---Plea raised by appellant was that no opportunity of hearing was provided to appellant, before sealing its factory---Validity---Authorities were not empowered under S.16 of Pakistan Environmental Protection Act, 1997, and Regln.20(3) of Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, to seal property---Sealing of property / premises of appellant by authorities was beyond the scope of Pakistan Environmental Protection Act, 1997, and Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000---Action of sealing property of appellant by authorities was violative of principle of audi alteram partem as no notice was given by authorities to appellant---Principles of natural justice had to be observed in all proceedings whether judicial or administrative, if proceedings were to result in consequences affecting person or property or other right of parties concerned---Such rule was applied even though

there was no positive words in statute or legal document whereby power was vested to take such proceedings and in such cases such requirement was to be implied into it as the minimum requirement of fairness---High Court set aside the order of sealing of factory of appellant by authorities---Appeal was allowed in circumstances.

Amanullah Khan v. Chief Secretary, Government of NWFP and others 1995 SCMR 1856; The Registrar of University of Dacca v. Zakir Ahmad PLD 1965 SC 90; Mrs. Anisa Rehman v. P.I.A.C. and another 1994 SCMR 2232 and Abdul Hafeez Abbasi and others v. Managing Director, Pakistan International Airlines Corporation, Karachi and others 2002 SCMR 1034 rel.

(b) Maxim---

-----Audi Alteram Partem---Applicability---Scope.

Syed Riaz-ul-Hassan Gillani for Appellant.
Mubashar Latif Gill, A.A.G.
Syed Ahsan Raza Hashmi for respondent No.7.
Hafiz Muhammad Tahir and Khalid Iqbal Cheema for Respondents

ORDER

Through this First Appeal under section 23 of the Pakistan Environmental Protection Act, 1997, the appellant has prayed that the action of sealing of factory of the appellant by officials of respondent No.3 and order bearing No.297, dated 09.10.2015 passed by respondent No.3 (on the face of letter No.157/AD/R&I/EPA/MN/1090, 1st October, 2015) be declared illegal, without lawful authority and ineffective upon the rights of the appellant.

2. Briefly the facts of the case as discernable from the contents of this appeal are that the appellant purchased land measuring 16 kanals and 11 Marlas situated at Khewat No.91/91, Khatoni No.195, 14-km Lahore-Khanewal Road, Mouza Karplapur, Multan, from respondent No.7 and after obtaining NOCs from all the concerned departments and fulfilling all the codal formalities, constructed a factory thereupon known as Mega Steel Mills (Pvt.) Limited. Respondent No.7 filed an application to the Chief Minister Punjab alleging therein that two furnaces have been installed in the said factory for the production of iron rods and TRs which are polluting the environment and causing diseases of eyes and lungs in the vicinity. This application was converted into complaint before the Environmental Tribunal Lahore by respondent No.3/Director General Environmental

Protection Agency Punjab, Lahore, which is pending adjudication. The appellant also filed an appeal before the Environmental Protection Agency for the dismissal of complaint bearing No.44/2014. Said appeal was dismissed in default vide order dated 17.09.2015. However, the same has been restored vide order dated 01.12.2015. During the pendency of said application for restoration of the appeal, the officials of respondent No.3 came to the spot and sealed the factory of the appellant in pursuance of order dated 09.10.2015 passed by respondent No.3. Hence this FAO.

3. It is contended by the learned counsel for the appellant that the respondent/department has no jurisdiction to seal the premises, of the appellant. He further contends that the sealing of premises of the appellant is violation of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973. He further submits that the respondent/ department has no power to seal, the premises of the appellant under sub-Regulation (3) of Regulation 20 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000 as well as under the Punjab Environmental Protection Act, 1997. On the other hand learned Assistant Advocate General assisted by learned counsel for respondent has supported the impugned action of sealing the factory of the appellant by the official of respondent No.3 as well as impugned order dated 09.10.2015.

4. Arguments heard. Record perused.

5. For the following reasons, this appeal is liable to be accepted:--

(a) As regards the contention of the learned counsel for the appellant that the respondent/department has no power and jurisdiction under the Punjab Environmental Protection Act, 1997 as well as Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, for facility of reference, the relevant, provisions of law are reproduced herein below:-

"16. Environmental protection order.--- (1) Where the Provincial Agency is satisfied that the discharge or emission of any effluent, waste, air pollutant or noise, or the disposal of waste, or handling of hazardous substance, or any other act or omission is likely to occur, or is occurring, or has occurred, in violation of any provision of this Act, rules or regulations or of the conditions of a license, or is likely to cause, or is causing, or has caused an adverse environmental effect, the Provincial Agency may, after giving the person responsible for such discharge, emission, disposal, handling; act or omission an opportunity of being heard, by

order, direct such person to take such measures as the Provincial Agency may consider necessary within such period as may specified in the order.

(2) In particular and without prejudice to the generality of the foregoing power, such measures may include--
(a) immediate stoppage, preventing, lessening or controlling the discharge, emission, disposal, handling, act or omission, or to minimize or remedy the adverse environmental effect;

(b) installation, replacement or alteration of any equipment or thing to eliminate or control or abate on a permanent or temporary basis, such discharge permission, disposal, handling, act or omission,.

(c) action to remove or otherwise dispose of the effluent, waste, air pollutant, noise or hazardous substances; and

(d) action to restore the environment to the condition existing prior to such discharge, disposal, handling, act or omission or as close to such condition as may be reasonable in the circumstances; to the satisfaction of the Provincial Agency.

(3) Where the person, to whom directions under subsection (1) are given, does not comply therewith, the Provincial Agency may, in addition to the proceeding initiated against him under this Act or the rules and regulations, itself take or cause to be taken such measures specified in the order as it may deem necessary, and may recover the costs of taking such measures such person as arrears of land revenue."

The other relevant provision relied upon by the learned counsel for the respondent/department and the learned Assistant Advocate. General contains in sub-Regulation (3) of Regulation 20 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, which is reproduced herein below:-

"20. Cancellation of approval

(1)
(2)

(3) On cancellation of the approval, the proponent shall cease construction or operation of the project forthwith."

As is evident from the above quoted provisions of section 16 of the Act ibid as well as sub-Regulation (3) of Regulation 20 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, it does not empower the respondent/department to seal the property, therefore, the sealing of property/premises of the appellant by the officials of respondent No.3 is beyond the scope of Environmental Laws and Regulations relied upon by the respondent/department.

(b) The sealing of property/premises of the appellant by the officials of respondent No.3 is also violative of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973. This would not only deprive the appellant but also the labourers working there from this livelihood, which is not the intention of law.

(c) The word sealing is nowhere mentioned either in the Punjab Environmental Protection Act, 1997 or the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, therefore, if the Legislature has not used the word sealing, this omission cannot be supplied by the Court under the principle of casus omissus. Reference may be made to case law titled Amanullah Khan v. Chief Secretary, Government of NWFP and others (1995 SCMR 1856). The relevant portion of the judgment is reproduced herein below:--

"4. The learned counsel for the petitioner perhaps attempted to press into service in his arguments the concept of 'casus omissus'. Casus omissus is a point or case unprovided for. When a given state of affairs does not come within the obvious meaning of the words of the statute, that is, when certain contingencies are not provided for or when the words do not embrace the particular question in hand, it is a case of 'casus omissus' (see Bhadramma v. Kotam Raj (AIR 1955 Hyderabad 140). By the recognized principles of construction of statutes we are not entitled to read words into a statute unless clear reason for it is to be found within the four corners of the statute itself. In Dr. L. Raymond v. Flourence B. Yakehee (AIR 1957 Allahabad 212) the process of casus omissus was depreciated in the following words:--

"A court can construe or interpret existing words but cannot supply missing word in a statute."

In Kamalaranjan v. Secretary of State (AIR 1938 PC 281) this rule of construction was disapproved in the following paragraph at page 383 of the report:--

"The court cannot put into the Act words which are not expressed and which cannot reasonably be implied on an recognized principles of construction. That would be a work of legislation, not of construction, and outside the province of the Court."

Again it is a well-established principle of construction of statutes that the Court cannot supply omissions by implication and analogy, unless existing provisions of a statute by necessary intendment to compel the court. (See Rajammal v. The Chief Justice (AIR 1950 Madras 185). That is only possible that it effectuates the legislative intention."

(d) The act of sealing the property of the appellant by the officials of respondent No.3 is also violative of principle of Audi Alteram Partem as no notice was given by the respondent department to the appellant. It is well settled principle of law that in all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting "the person or property or other right of the parties concerned". This rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceedings, for, in such cases this requirement is to be implied into it as the minimum requirement of fairness. Reference may be made to cases titled (1) The University of Dacca through its Vice-Chancellor and (2) The Registrar of University of Dacca v. Zakir Ahmad (PLD 1965 SC 90); Mrs. Anisa Rehman v. P.I.A.C. and another (1994 SCMR 2232) and Abdul Hafeez Abbasi and others v. Managing Director, Pakistan International Airlines Corporation, Karachi and others (2002 SCMR 1034).

6. Sequel to the above, this appeal is accepted and the action of sealing the premises of the appellant by officials of respondent No.3 and impugned order dated 09.10.2015 are hereby set aside with no order as to cost.

MH/M-21/L Appeal allowed.

2016 MLD 1018

[Lahore]

Before Shahid Mubeen, J

Malik MUHAMMAD AKHTAR---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and others---Respondents

W.P. No.1384 of 2008, decided on 11th August, 2015.

(a) Illegal Dispossession Act (XI of 2005)---

----Ss. 3, 7 & 8---Illegal dispossession of property---Interim relief under S.7 of Illegal Dispossession Act, 2005---Petitioner impugned order of Trial Court whereby respondent was put in possession of suit property---Validity---Complainant (respondent) never mentioned anything about being involved with any land mafia or qabza group in his complaint as well as in his cursory statements, therefore, complaint under S.3 of the Illegal Dispossession Act, 2005 was not competent and since the main complaint was not competent so the impugned order, whereby interim possession was granted to complainant, by the Trial Court, was illegal having been passed without deciding the application under S.265-K of Criminal Procedure Code, 1898, which was illegality---Impugned order did not discuss the cursory statements but only relied on the report produced by the SHO---Constitutional petition was allowed and the impugned orders were set aside.

PLD 2007 Lah. 231 ref.

Zahoor Ahmad and 5 others v. The State and 3 others PLD 2007 Lah. 231; Bashir Ahmad v. Additional Sessions Judge, Faisalabad and 4 others PLD 2010 SC 661; Habibullah and others v. Abdul Mannan and others 2012 SCMR 1533 and Muhammad Ihsan and others v. Muhammad Yousaf and others 2007 MLD 1034 rel.

(b) Illegal Dispossession Act (XI of 2005)---

----Ss. 7 & 8---Interpretation of S.7 of Illegal Dispossession Act, 2005---Nature, object and scope of interim relief contemplated under S.7 of Illegal Dispossession Act, 2005.

Ch. Sadaqat Ali for Petitioner.

Mirza Shahid Baig-I for Respondent.

Muhammad Ejaz, AAG with Muhammad Nazir, ASI.

ORDER

SHAHID MUBEEN, J.---Brief facts giving rise to the institution of present writ petition are that respondent No.2 instituted a criminal complaint under Section 3 of the Illegal Dispossession Act, 2005 on 05.12.2006 against the petitioner and respondents Nos.3 to 5. Cursory statements of Malik Jamil Iqbal/complainant as PW-1, Ch. Khalid Bashir as PW-2 and Ijaz Hussain as PW-3 were recorded by the learned trial Court, Sialkot. Copies under Section 265-K, Cr.P.C. were delivered to the petitioner as well as respondents Nos.3 to 5 on 18.10.2007. Vide order dated 2.11.2007 the petitioner and respondents Nos.3 to 5 were summoned through bailable warrants by the orders of learned trial Court, Sialkot. Vide order dated 25.1.2008 respondents Nos.3 to 4 were formally charged. Respondent No.2 filed application under Section 7 of the Illegal Dispossession Act, 2005 for an interim relief that he be put into possession qua the disputed property. After hearing arguments vide order dated 25.1.2008 it was ordered that the possession be delivered to the complainant as an interim measure. SHO was also directed that respondent No.2 be put into the possession of the disputed property. The petitioner has also assailed the impugned orders dated 2.11.2007, 25.1.2008 and order dated 2.2.2008 passed by learned trial Court, Sialkot by filing the present writ petition.

2. It is contended by learned counsel for the petitioner that the petitioner has purchased land measuring 12 marlas for a consideration of Rs.6,60,000/- from one Naveed Iqbal from Khata in which Khata land of respondent No.2 also falls through a registered sale deed in the year 2003. Later on the petitioner sold 4 marlas of land to one Mst. Rehana Ghafoor and 4 marlas to one Qadeer Ahmad in the year 2005. Mst. Rehana Ghafoor has further sold the land to one Shahid Mahmood through registered sale deed No.620 Bhai No.1, Jild No.2001 dated 23.2.2007. It is further contended that the possession of the petitioner is based on a valid titled document and his possession over the disputed property is in no way illegal and unlawful. It is further contended by learned counsel for the petitioner that while passing the impugned orders dated 02.11.2007, 25.01.2008 and 02.02.2008 learned trial Court, Sialkot has ignored the judgment reported as PLD 2007 Lahore 231. It is further alleged that the petitioner neither belongs to Land Mafia nor property grabber. It is further contended by learned counsel for the petitioner that impugned order has been passed without deciding his application under Section 265-K, Cr.P.C.

3. On the other hand, learned counsel for contested respondent No.2 supported the impugned order.

4. Heard. Record perused.

5. Respondent No.2 nowhere in his complaint as well as in his cursory evidence stated that the petitioner and respondents Nos.3 to 5 belongs to Qabza Group or property grabbers. As there is no material produced by respondent No.2 in this regard that the petitioner belongs to land mafia or property grabbers, complaint under Section 3 of the Illegal Dispossession Act, 2005 was not competent as held in a celebrated judgment of Full Bench of Lahore High Court, Lahore reported as "Zahoor Ahmad and 5 others v. The State and 3 others" (PLD 2007 Lahore 231). The relevant portion is reproduced herein below:—

> "7. For the purpose of providing guidance to all the Courts of Session in the Province of Punjab we declare as follows:-
>
> (i) The Illegal Dispossession Act, 2005 applied to dispossession from immovable property only by property grabbers/Qabza Group / land mafia. A complaint under the Illegal Dispossession Act, 2005 can be entertained by a Court of Session only if some material exists showing involvement of the persons complained against in some previous activity connected with illegal dispossession from immovable property or the complaint demonstrates an organized or calculated effort by some persons operating individually or in groups to grab by force or deceit property to which they have no lawful, ostensible or justifiable claim. In the case of an individual it must be the manner of execution of his design which may expose him as a property grabber.
>
> (ii) The Illegal Dispossession Act, 2005 does not apply to run of the mill cases of alleged dispossession from immoveable properties by ordinary persons having no credentials or antecedents of being property grabbers/Qabza Group/land mafia, i.e. cases of disputes over possession of immovable properties between co-owners or co-sharers, between landlords and tenants, between persons claiming possession on the basis of inheritance, between persons vying for possession on the basis of competing title documents, contractual agreements or revenue record or cases with a background of an on-going private dispute over the relevant property.
>
> (iii) A complaint under the Illegal Dispossession Act, 2005 cannot be entertained where the matter of possession of the relevant property is being regulated by a civil or revenue Court.

All the Courts of Session in the Province of Punjab are directed to examine all the complaints under the Illegal Dispossession Act, 2005 pending before them and to dismiss all those complaints forthwith which are found to be not maintainable in terms of the interpretation of the said law rendered by us through the present judgment."

This judgment of Full Bench of Lahore High Court, Lahore has been upheld by the Hon'ble Supreme Court of Pakistan in case law reported as "Bashir Ahmad v. Additional Sessions Judge, Faisalabad and 4 others" (PLD 2010 Supreme Court 661). The relevant portion is reproduced herein below:--

"It has been conceded before us by the learned counsel for the petitioner that no material is available with the petitioner to establish that respondents Nos.2 to 4 belonged to any Qabza Group or land mafia or that they had the credentials or antecedents of being property grabbers. In view of the discussion made above the impugned acquittal of respondents Nos.2 to 4 recorded by the learned Additional Sessions Judge, Faisalabad upon acceptance of their application submitted under Section 265-K, Cr.P.C. has been found by us to be entirely justified and dismissal of the petitioner's writ petition by the learned Judge of the Lahore High Court, Lahore has also been found by us to be unexceptionable. In the circumstances of this case mentioned above we have entertained an irresistible impression that through filing of his complaint under the Illegal Dispossession Act, 2005 the petitioner had tried to transform a bona fide civil dispute between the parties into a criminal case so as to bring the weight of criminal law and process to bear upon respondents Nos.2 to 4 in order to extract concessions from them. Such utilization of the criminal law and process by the petitioner has been found by us to be an abuse of the process of law which cannot be allowed to be perpetuated."

According to the latest view of the Hon'ble Supreme Court of Pakistan in case law titled as "Habibullah and others v. Abdul Mannan and others" (2012 SCMR 1533), the relevant portion is reproduced herein below:--

"Complainant while appearing as P.W.1 has not stated a single word that the appellants belong to a Qabza Group and were involved in such activities, so it is the complainant side who has failed to establish that the appellants belong to Qabza Group or they were land grabbers. The complainant side has not produced any evidence oral or documentary to establish that the appellants had the credentials or antecedents of being property grabbers. So, it was a dispute between two

individuals over immoveable property and as per allegation the appellants have taken illegal possession of the property, being rightful owners, from the tenant who has taken the property on rent and committed the default in payment of rent and electricity bills inasmuch as the appellants do not belong to a class of property grabbers or Qabza Group and no case was made to the judgment of a Full Bench of the Lahore High Court in "Zahoor Ahmad and others v. The State and others" (PLD 2007 Lahore 231) wherein it has been held that the Illegal Dispossession Act, 2005 was restricted in its scope and applicability only to those cases where a dispossession from immovable property has allegedly come about through the hands of a Groups/land mafia and the said Act was being invoked and utilized by the aggrieved persons against those who have credentials or antecedents being members of the Qabza Groups or land mafia. It was further held that the Illegal Dispossession Act, 2005 has been found to be completely nugatory to its contents as well as objectives. The aforesaid view was upheld by this Court in the case of "Mobashir Ahmad v. The State" (PLD 2010 SC 665). In view of the case-law referred above, it is established the credentials or antecedents of Qabza Group and are involved in illegal case in hand it has been found by us that there is no evidence oral or documentary to establish that the appellants belong to the Qabza Group or land grabbers. Even otherwise no such allegation has been made against the appellants in the complaint filed by the respondent Abdul Manan or in the FIR for the same incident lodged on the next day, or by the P.Ws. in their depositions made by them before the learned trial Court. Even P.W.3 Azhar Hussain, I.O. during the cross-examination has admitted that he had never heard about the appellants involvement in such like activities or their belonging to the group of land grabbers or Qabza Group rather the complainant is involved in such like cases."

In other judgment titled as "Muhammad Ihsan and others v. Muhammad Yousaf and others" (2007 MLD 1034), it has been held as under:--

"Beside the language of the preamble, a Full Bench of this Court has interpreted the term "Property Grabbers" used in the said Act as Qabza Group/Land Mafia and made it obligatory for the Court of Session to prima facie satisfy itself that the persons complained had the credentials/antecedents of property grabbing. In the case in hand, as noted above, there is no allegation of this kind against the petitioners thus, the impugned order directing return of possession to the respondents was coram non judice. Petitioners might have been forcibly dispossessed from the land in question but they have other remedies available to them under ordinary law of the land, as pointed out by the Full Bench of this Court

in the case, above referred, in the case of Zahoor Ahmad and 5 others v. The State and 3 others PLD 2007 Lahore 231 to which they may have resort for restitution of their possession, if proved. Scan of record and impugned order revealed that dispute amongst the parties was correctly decided and jurisdiction under the Illegal Dispossession Act, 2005 was wrongly assumed/exercised."

Even otherwise conjunctive reading of Section 7(1) and Section 8 of the Illegal Dispossession Act, 2005 would show that passing of order under Section 7(1) is only discretionary with the Court. Had it not been so, there was no occasion for the legislature to have incorporated a provision for putting the petitioner in possession under section 8 of the said Act on conclusion of trial. Therefore, in my opinion, the word "shall" used in section 7(1) will be read as "may" inasmuch as it is only a directory provision.

6. As the main complaint was not competent and maintainable hence the impugned order whereby interim relief of possession was given to respondent No.2 was also illegal. The impugned order has been passed without deciding the application under Section 265-K, Cr.P.C. which is also an illegality on the part of learned trial Court. It is also noticed by this Court that the evidence available in the shape of cursory statement has not been discussed in the impugned order. Reliance upon the report of SHO is also unwarranted. The impugned order is without assigning any reason even relevant provision of law is neither referred nor discussed.

7. For what has been discussed above, this writ petition is accepted and the impugned orders dated 02.11.2007, 25.01.2008 and 02.02.2008 are set aside and complaint under Section 3 of Illegal Dispossession Act, 2005 being not maintainable, is dismissed in the light of judgments reported as PLD 2007 Lahore 231, PLD 2010 Supreme Court 661 and 2012 SCMR 1533, as referred above, with no order as to cost.

YN/M-275/L Petition accepted.

2016 PLC (C.S.) 1099

[Lahore High Court]

Before Shahid Mubeen, J

ABDUL RAUF

Versus

GOVERNMENT OF THE PUNJAB through Secretary (Food), Civil Secretariat, Lahore and another

W.P.No.7261 of 2009, decided on 27th July, 2015.

(a) Civil Service---

----Promotion---Withholding of promotion due to pendency of enquiry---Scope---Promotion of employee was deferred due to pendency of enquiry against him---Validity---Pendency of enquiry and even minor penalty could not come in the way of promotion---Department was directed by High Court to place the matter before the departmental promotion committee within two months---Departmental promotion committee should consider the employee's case fairly, justly and in accordance with law, rules and regulations---Constitutional petition was accepted in circumstances.

2003 PLC (CS) 1496; 2008 PLC (CS) 1019 and 2009 PLC (CS) 40 rel.

(b) Punjab Service Tribunals Act (IX of 1974)---

----S. 4---Promotion---Denial of promotion---Appeal before Service Tribunal---Competency---When a civil servant was deferred for promotion, the case would fall within the ambit of fitness and against that order appeal before Service Tribunal was not competent.

2003 PLC (CS) 1496 rel.

Bilal Bashir Mian and Raja Tasawar Iqbal for Petitioner.

Asim Aziz Butt, Asstt. A.G. for the State along with Muhammad Asad SO (Estt.)

ORDER

SHAHID MUBEEN, J.--- Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has prayed that the

respondents may very kindly be directed to promote the petitioner to the post of Assistant Director (Food) BPS-17 right from the date of occurring of the vacancies i.e. 2003 when he took over the charge of the post of Assistant Director (Food), with all consequential back benefits.

2. Briefly the facts of the case are that the petitioner was appointed as Assistant Accounts Officer in the Food Department through Punjab Public Service Commission. It is further asserted in the writ petition that he became eligible for promotion to the post of Assistant Director (Food) BPS-17 in the year 2006 which post is lying vacant with the department since 2003 and the petitioner is holding the post of Assistant Director (Food) since 04.08.2003. However, the petitioner was considered by the Department Promotion Committee (DPC) but he was deferred on the following grounds:--

> "His qualification is M.Com. He joined Food Department in 1999 as Assistant Accounts Officer through Punjab Public Service Commission against initial requirement quota. He has more than seven years experience at his credit. His ACRs upto the year 2008 are complete and satisfactory. The ACR for the period 04.03.2008 to 13.08.2008 is pending with C.O. At present one enquiry on account of criminal negligence for non-ensuring safety of Govt. wheat in D. G. Khan District is pending against him. No recovery/printed draft para is pending against him. He is not clear for promotion due to pending enquiry."

3. It is contended by the learned counsel for the petitioner that pending enquiry is no ground for deferment of promotion. On the other hand learned Assistant Advocate General contends that he is a civil .servant, hence writ is not competent. In reply to this contention of the learned Assistant Advocate General, learned counsel for the petitioner contends that when a person is deferred for promotion on account of some pending enquiry then it becomes a case of fitness against which appeal before the Punjab Service Tribunal is not competent.

4. Arguments heard. Record perused.

5. It is an established law laid down by the Apex Court that pendency of enquiry and even minor penalty cannot come in the way of promotion. In the present case the departmental representative who produced the record did not disclose any penalty available in the petitioner's record except pendency of inquiry. Reference may be made to 2003 PLC (CS) 1496, 2008 PLC (CS) 1019 and 2009 PLC (CS) 40. When a civil servant is deferred for

promotion due to pendency of some enquiry the case does fall within the ambit of fitness and against that order appeal before the Punjab Service Tribunal is not competent.

6. In the attending facts and circumstances of the case, this Court has no option but to accept the writ petition. The respondents are directed to place the petitioner's promotion case before the Departmental Promotion Committee within a period of two months positively from the receipt of certified copy of this order. The Departmental Promotion Committee shall consider the petitioner's case fairly, justly and in accordance with law, rules and regulations. This exercise must be concluded within two months and result thereof be conveyed to the Deputy Registrar (Judicial) of this Court. This writ petition is disposed off in the above terms.

ZC/A-69/L Petition accepted.

2016 PLC 245

[Lahore High Court (Multan Bench)]

Before Shahid Bilal Hassan and Shahid Mubeen, JJ

DIRECTOR GENERAL, MULTAN DEVELOPMENT AUTHORITY and another

Versus

NASIR AHMAD TANVEER BAJWA

Review Petition No.13 of 2013, decided on 8th September, 2015.

Punjab Industrial Relations Act (XIX of 2010)---

----Ss.33 & 47---Civil Procedure Code (V of 1908), S.114 & O.XLVII---Notification No. F.5(2)/2003-AGP, dated 27-5-2003---Compulsory retirement---Grievance petition---Application for review of judgment of Single Judge of High Court---Scope---Grievance petition filed by the employee against order of his compulsory retirement having been dismissed by the Labour Court, employee filed appeal before Appellate Tribunal, which was dismissed---Employee assailed said order by filing constitutional petition, which was allowed by High Court---Employers through present review petition had assailed the order passed by Single Judge of High Court in the Constitutional petition---Employers had contended that their counsel made conceding statement before the High Court without instructions of an Officer Grade 17, without which conceding statement carried no weight in the eyes of law---Validity---High Court observed that Law Officers should not make conceding statement in the court, unless they had duly been instructed in writing by the

competent authority; and an officer not below the rank of Grade-17 should be present in the court to verify and reiterate such instructions---Presence of the concerned Officer must be recorded in the order of the court; and written instructions should be made a part of the record of the court---If an order was passed in ignorance of judgment of the Supreme Court, which was binding under Art.189 of the Constitution, same was liable to be reviewed---Impugned order was reviewed, and judgment of Single Judge was set aside, in circumstances.

PLD 2003 Journal 95; Faisalabad Development Authority v. Raja Jahangir Nasir and others 2004 SCMR 1247 and Pakistan through Ministry of Finance Economic Affairs and another v. FECTO Belarus Tractors Limited PLD 2002 SC 208 ref.
Jawad Dilawar for Petitioners.
Muhammad Anwar Awan for Respondent.

ORDER

The petitioners have called into question the validity and legality of order dated 27.06.2013 passed by learned Single Judge in Chamber whereby the writ petition of the respondent was allowed.

2. Briefly the facts of the case are that respondent was appointed as Head Clerk in Multan Development Authority, Multan and vide order dated 12.10.2002 he was compulsorily retired. The respondent challenged the retirement order dated 12.10.2002 before learned Punjab Labour Court, Multan by filing grievance petition. Ultimately, the grievance petition was dismissed vide order dated 30.05.2007 passed by the Punjab Labour Court, Multan. The respondent assailed the order dated 30.05.2007 by filing appeal before learned Punjab Labour Appellate Tribunal, Multan who vide judgment dated 16.11.2010 dismissed the same. The respondent assailed the aforesaid order by filing constitution petition which was allowed vide order dated 27.06.2013 passed by this Court. Through the instant review petition, the petitioners have assailed the order dated 27.06.2013 passed by learned Single Judge in Chamber of this Court.

3. Learned counsel for the petitioners contends that during the hearing of writ petition the conceding statement of learned counsel for the respondents was not made at the instructions of an officer of Grade-17 without which the said statement carries no weight in the eyes of law. He further contends that before making the conceding statement by the learned counsel for the respondents he should have sought instructions from an officer of Grade-17 from the concerned department.

4. On the other hand, learned counsel for the respondent has supported the impugned order.

5. Heard. Record perused.

6. It is now an established law that Law Officers should not make a conceding statement in Court unless they have duly been instructed in writing by the competent authority and an officer not below the rank of Grade-17 should be present in the Court to verify and reiterate such instructions. The presence of the concerned officer must be recorded in the order of the Court and written instructions should be made a part of the record of the Court. In this regard reference may be made to report of the Attorney General for Pakistan containing recommendations on the subject duly approved by the Hon'ble Supreme of Pakistan in Notification No.F.5(2)/2003, -- AGP dated 27.05.2003. The afore-noted recommendations are published in PLD 2003 Journal page 95.

7. The afore-noted recommendations have been approved in case titled "Faisalabad Development Authority v. Raja Jahangir Nasir and others" (2004 SCR 1247).

8. The afore-referred judgment was not brought into the knowledge of the learned Single Judge in Chamber of this Court by the learned counsel for the parties at the time of arguments which judgment is binding under Article 189 of Constitution of Islamic Republic of Pakistan, 1973, hence, this is an error apparent on the record.

9. It is also an established law that if an order is passed in ignorance of the judgment of Hon'ble Supreme Court of Pakistan, the same is liable to be reviewed by the same Court. Reference may be made to case reported as "Pakistan through Ministry of Finance Economic Affairs and another v. FECTO Belarus Tractors Limited" (PLD 2002 SC 208).

10. Relying upon the above-referred judgments the impugned order dated 27.06.2013 is reviewed and set aside. Consequently, writ petition is dismissed, leaving the parties to bear their own costs.

HBT/D-10/L Petition dismissed.

PLD 2016 Lahore 163

Before Ijaz ul Ahsan and Shahid Mubeen, JJ

MUHAMMAD ABID IQBAL---Appellant

Versus

DISTRICT ELECTION COMMISSIONER and 3 others---Respondents

I.C.A. No.1331 in W.P. No.29297 of 2015, decided on 21st October, 2015.

Punjab Local Government (Conduct of Elections) Rules, 2013--

----R. 14(10)---Law Reforms Ordinance (XII of 1972), S.3(2)---Intra-court appeal---Maintainability---Right of appeal availability of---Appellants had assailed original orders passed by Returning Officers either rejecting or accepting nomination papers---Appeals filed before appellate authority were dismissed and the order was maintained by Single Judge of High Court---Validity---Against the orders passed by Returning Officers appeal was provided under R.14(10) of Punjab Local Government (Conduct of Elections) Rules, 2013, therefore intra-court appeals were not competent as law applicable had provided one appeal against such orders under proviso to S.3(2) of Law Reforms Ordinance, 1972---Intra-court appeal was dismissed under circumstances.

Mst. Karim Baksh and others v. Hussain Bakhsh and another PLD 1984 SC 344 rel.

Muhammad Afzal Lone for Appellant (in I.C.A. No.1331-2015 and I.C.A. No.1338-2015).

Muhammad Ramzan Chaudhry for Appellant (in I.C.A. No. 1311-2015).

Arshad Ali Mahar for Appellant (in I.C.A. No.1321-2015).

Rai Haider Ali Khan Kharal for Appellant (in I.C.A. No. 1384-2015).

Ch. Faza Ullah for Appellant (in I.C.A. No. 1313-2015).

Fida Hussain Matta for the Appellant (in I.C.A. No. 1364-2015).

Fayyaz Ahmad Mehar for Appellant (in I.C.A. No. 1345-2015).

Rana Habib-ur-Rehman for Appellant (in 1.C.A. No. 1357-2015).

Shahnawaz for Appellant (in I.C.A. No. 1365-2015).

Rustam Nawab Lak for Appellant (in I.C.A. No. 1368-2015 and I.C.A. No. 1391-2015).

Azhar Abbas Thaheem for Appellant (in I.C.A. No. 1336-2015).

Ch. Fayyaz Ahmad Basra for Appellant (in I.C.A. No.1309-2015 and I.C.A. No. 1310-2015).

Mian Irfan Akram, Deputy Prosecutor General for the State.

Hafiz Adeel Ashraf, Election Commission of Pakistan.

ORDER

Through this single order, we will decide the instant Intra Court Appeal (No.1331 of 2015) as well as the connected Intra Court Appeals whose numbers and titles along with brief facts are given below:-

1. I.C.A. No.1331 of 2015 Muhammad Abid Iqbal v. District Election Commissioner, etc.
2. I.C.A. No.1311 of 2015 Din Muhammad v. District Election Commissioner Kasur.
3. I.C.A. No.1338 of 2015 Khalid Bashir v. District Election Commissioner, Kasur
4. I.C.A. No.1321 of 2015 Khushi Muhammad v. Returning Officer, etc.
5. I.C.A. No.1384 of 2015 Muhammad Latif v. Returning Officer etc.

The appellants filed their nomination papers for the seats of General Councillors, which were rejected by Returning Officer vide impugned order dated 17.09.2015 on the ground that the appellant, proposer and secondar are not enrolled in the ward. The appellants preferred appeals before the learned Appellate Authority, which were also dismissed vide impugned order dated 29.09.2015. Thereafter, the appellants filed writ petitions before this Court, which met with the same fate vide impugned judgment dated 2.10.2015 and 07.10.2015. Hence Intra Court Appeals.

6. I.C.A. No.1313 of 2015 Minhaj-ud-Din Ahmad v. Addl. District Judge/Appellate Authority, etc.

The appellant jointly filed nomination papers along with another person for the seats of Chairman and Vice Chairman, which were rejected by Returning Officer vide order dated 10.09.2015 on the ground that another person has withdrawn his nomination papers. The appellant preferred appeal before the learned Appellate Authority, which was also dismissed vide order dated 30.09.2015. Thereafter, the appellant filed writ petition before this Court, which met with the same fate vide impugned judgment dated 02.10.2015. Hence this Intra Court Appeal.

7. I.C.A. No.1364 of 2015 Khurram Shahzad v. District Returning Officer Kasur, etc.

8. I.C.A. No.1345 of 2015. Shahid Javed v. District Returning Officer, Faisalabad.

9. I.C.A. No.1357 of 2015 Ansar Ali v. Returning Officer, Lahore etc.

The appellants namely Khurram Shahzad, Shahid Javed and Ansar Ali filed nomination papers for the seats of General Councillors, which were rejected by Returning Officers vide orders dated 14.09.2015, 11.09.2015 and 17.09-2015 respectively on the ground that the

proposer is not registered voter of the ward. The appellant preferred appeals before the learned Appellate Authority, which were also dismissed vide orders dated 28.09.2015, 23.09.2015 and 29.09.2015 respectively. Thereafter, the appellants filed writ petitions before this Court, which met with the same fate vide impugned judgment dated 02.10.2015 and 05.10.2015. Hence lntra Court Appeals.

10 I.C.A. No.1365 of 2015 Irshad Ali v. Appellate Authority etc.
The appellant filed nomination papers for the seat of General Councillor, which were rejected by Returning Officer vide order dated 11.09.2015 on the ground that the proposer and secondar do not enlist in the same ward. The appellant preferred appeal before the learned Appellate Authority, which was also dismissed vide order dated 28.09.2015. Thereafter, the appellant filed writ petition before this Court, which met with the same fate vide impugned judgment dated 07.10.2015. Hence Intra Court Appeal.

11. I.C.A. No.1368 of 2015 Zeeshan Abbas v. Appellate Authority etc.
The appellant is candidate for the seat of General Councillor. Respondent No.3/writ petitioner did not file his nomination papers due to seat adjustment with the appellant and his other family members. After expiry of last date for submission of nomination papers, respondent No.3 filed an appeal before the learned Appellate Authority with wrongful submission that despite deposit of candidature fee by him, the Returning Officer refused to receive his nomination papers, which was dismissed vide order dated 12.10.2015. Thereafter, he moved writ petition before this Court, which was allowed vide order dated 15.10.2015. The appellant has challenged the impugned order dated 15.10.2015 through this intra Court Appeal.

12. I.C.A. No.1336 of 2015 Muhammad Hameed Ullah v. Addl. District Judge, etc.

13. I.C.A. No.1309 of 2015 Syed Imran Hassan Kazmi v. Returning Officer, etc.
The appellants namely Muhammad Hameed Ullah and Syed Imran Hassan Kazmi filed nomination papers for the seat of General Councillor, which were rejected by Returning Officer vide order dated 17.09.2015 on the ground that the candidate is not registered voter of the ward. The appellant preferred appeal before the learned Appellate Authority, which was also dismissed vide order dated 06.10.2015 and 28.09.2015. Thereafter, the appellants filed writ petitions before this Court, which met with the same fate vide impugned orders dated 09.10.2015 and 01.10.2015. Hence lntra Court Appeal.

14. I.C.A. No.1310 of 2015 Syed Imran Hassan Kazmi v. Returning Officer, etc.

The appellant filed nomination papers for the seat of General Councillor, which were rejected by the learned Returning Officer vide order dated 17.09.2015 on the ground that the candidate is not registered voter of the ward whereas the nomination papers of respondent No.2 namely Ammad-ul-Hassan who is contesting candidate for the same ward has been accepted by the Returning Officer. Thereafter, without availing the remedy of appeal before the learned Appellate Authority, he directly filed writ petition before this Court, which was dismissed vide order dated 06.10.2015. Hence the Intra Court Appeal.

15. I.C.A. No.1391 of 2015 Qammar Abbas v. Returning Officer, etc.
The appellant filed nomination papers for the seat of General Councillor, which were accepted by Returning Officer vide order dated 09.10.2015. Respondent No.3 preferred appeal before the learned Appellate Authority, which was not entertained by the Appellate Authority. The respondent No.3 filed writ petition before this Court, which was accepted and nomination papers of the appellant were rejected vide impugned judgment dated 19.10.2015. Hence this Intra Court Appeal.

2. At the very outset, a question was put to the learned counsel for the appellants that how these Intra Court Appeals are competent in view of proviso to subsection (2) of section 3 of the Law Reforms Ordinance, 1972. They contended that the impugned orders passed by the learned Single Judge in Chambers are illegal and unlawful. However, they failed to advance any reasonable and plausible arguments to address the question as to how these Intra Court Appeals are competent.

3. We have heard the learned counsel for the appellants at great length and examined the record.

4. Admittedly in these appeals either nomination papers were accepted or rejected and against acceptance or rejection of nomination papers an appeal is provided under Sub-rule (10) of Rule 14 of the Punjab Local Government (Conduct of Elections) Rules, 2013, which reads as follows:-

> An appeal against the decision of the Returning Officer rejecting or accepting the nomination papers of the candidate may be preferred by any person present at the time of scrutiny under Sub-rule (1) to the concerned District and Sessions Judge or any other Judicial Officer nominated for the purpose by the Election Commission."
> The proviso to subsection (2) of section 3 of the Law Reforms Ordinance, 1972, is reproduced as under:--

"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."

If we read the provision of Sub-rule (10) of Rule 14 of the Punjab Local Government (Conduct of Elections) Rules, 2013 in juxtaposition with proviso to subsection (2) of section 3 of the Law Reforms Ordinance, 1972, it leaves no ambiguity that where one appeal or one revision or one review is provided against the original order then Intra Court Appeal is not competent. Admittedly the original orders have been passed by the Returning Officers either rejecting or accepting the nomination papers against which an appeal is provided under Sub-rule (10) of Rule 14 of the Punjab Local Government (Conduct of Elections) Rules, 2013. Therefore, these Intra Court Appeals are not competent as law applicable has provided one appeal against such orders under proviso to subsection (2) of section 3 of the Law Reforms Ordinance, 1972. Reference may be made to case titled Mst. Karim Baksh and others v. Hussain Bakhsh and another (PLD 1984 SC 344). Reference may also be made to unreported order dated 12.10.2015 passed in I.C.A. No. No.1305 of 2015 in case titled Ahmad Raza and another v. Chief Election Commissioner, etc.

In I.C.A. No. 1309 of 2015 right of appeal was not availed by the appellant before the Appellate Authority under Sub-rule (10) of Rule 14 of the Punjab Local Government (Conduct of Elections) Rules, 2013. However, the non-filing of appeal does not make the Intra Court Appeal competent as right of appeal under the above-mentioned rule was available to him.

4. Sequel to the above, these Intra Court Appeals have no force, hence dismissed with no order as to cost.

MH/M-342/L Appeals dismissed.

PLD 2016 Lahore 262

Before Shahid Mubeen, J

MUHAMMAD ANWAR---Petitioner

Versus

MUHAMMAD IKHLAS and 6 others---Respondents

Writ Petition No.21539 of 2015, decided on 13th July, 2015.

Punjab Land Revenue Rules, 1968---

----R. 19(2)(d)---Constitution of Pakistan, Art.25---Constitutional petition---Appointment of woman as lambardar---Discrimination---Scope---Contention of petitioner was that a female could not be appointed as lambardar---Validity---Discrimination for sole reason that candidate was a woman was violative of Art.25 of the Constitution---Rule 19(2)(d) of Punjab Land Revenue Rules, 1968 was violative of Art.25(2) of the Constitution---No bar existed for a female to be appointed as lambardar---Petitioner was absentee and such a person could not be appointed as lambardar---No one had vested right to be appointed as lambardar---High Court under Art.199 of the Constitution was not a court of appeal for considering the case of appointment of lambardar---High Court could only examine if there was any jurisdictional error in the order passed by the revenue authorities---Concurrent findings recorded by the revenue authorities did not require any interference while exercising constitutional jurisdiction by High Court---Appointment of respondent as lambardar was legal and same did not require any interference by the High Court---Constitutional petition was dismissed in limine.

Mst. Nasreen Iqbal v. Member (Revenue) Board of Revenue, Punjab, Lahore and another PLD 1993 Lah. 423; Mst. Sarwari Bibi v. Arshad Ali Khan and others 2007 YLR 702; Mst. Zubaida Begum v. Member (Judicial, Board of Revenue, Punjab, Lahore and another 2002 YLR 3393; Mushtaq Hussain v. Mst. Naseem Akhtar and others PLD 1982 SC 271; Shrin Munir and others v. Government of the Punjab through Secretary Health, Lahore and another PLD 1990 SC 295; Haji Muhammad Zaman Khan v. Member Board of Revenue Punjab and others 2014 SCMR 164; Ch. Ghulam Ullah v. Board of Revenue, West Pakistan, Lahore and 4 others `1984 CLC 2973; Masood Ahmad v. Member (Revenue), Board of Revenue and others 1982 CLC 357; M. Nazir Ahmad v. Muhammad Aslam and others 2013 SCMR 363 and Abdul Ghafoor v. The Member (Revenue) Board of Revenue and another 1982 SCMR 202 rel.

Malik Saleem Iqbal Awan for Petitioner.

ORDER

SHAHID MUBEEN, J.---Briefly the facts of the case are that one Abdul Rehman was permanent Lamberdar of Chak No.337/G.B., Tehsil and District, T.T. Singh. On his death the post of Lamberdar fell vacant. Applications were invited for the appointment of Lamberdar. Tehsildar, T.T. Singh recommended the name of Muhammad Ramzan, but DDO(R), T.T. Singh recommended the name of Azra Parveen, (respondent No.2). DO(R), Faisalabad after observing codal formalities appointed Muhammad Ikhlas as lamberdar vide order dated 26.8.2010. Aggrieved by the order dated 26.8.2010 four appeals were filed before EDO(R), T.T. Singh which were transferred to EDO(R), Faisalabad by order of Senior Member, Board of Revenue vide order dated 7.12.2010. Respondent No.6 EDO(R) T.T. Singh appointed Azra Parveen (respondent No.2) as lamberdar of the said Chak. Feeling aggrieved by the order dated 7.12.2010, four RORs were filed out of which ROR No.308/2011 was filed by the present petitioner. Vide order dated 31.3.2015, the revision petition was dismissed, hence, this petition.

2. It is contended by learned counsel for the petitioner that respondent No.2 is debarred under Clause (d) of sub-rule 2 of Rule 19 of West Pakistan Land Revenue Rules, 1968 to be appointed as Lambardar. The relevant clause reads as under:-

> "A female is not ordinarily eligible for appointment to the office of a headman, but may be appointed, when she is sole owner of the estate; in which the appointment has to be made, or, for special reasons."

3. This provision came under discussion in number of cases and in case law titled as "Mst. Nasreen lqbal v. Member (Revenue), Board of Revenue, Punjab, Lahore and another" (PLD 1993 Lah. 423), it has been held as under:-

> "Viewed from this angle, it is but obvious that clause (d) of sub-rule (19) clearly offends against the command of sub-Article (2) of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973. On its plain wording, the only ground for non-appointment of a female as Lambardar is her sex. The discrimination is so obvious that it calls for no further comment except for notice may be taken of the argument of the learned counsel for the respondent that clause (d) is not violative of sub-Article (2) of Article 25 of the Constitution, but merely provides that ordinarily a female should not be appointed. This argument, on the face of it, is fallacious as the clause in question certainly places females at a disadvantage.

As has been pointed out by learned counsel for the petitioner, the post of a Lambardar is no more ceremonial in nature as in addition to the commission which is payable to a Lambardar on the various Government dues collected by him, grant of 100 Kanals of land is also attached to that post. The refusal to appoint a female as Lambardar merely on account of her sex would amount to deprivation of that property. In the face of clear provisions of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, such injustice cannot be allowed to prevail."

In another judgment reported as "Mst. Sarwari Bibi v. Arshad Ali Khan and others" (2007 YLR 702) it has been held as under:-

"Viewing from any angle the petitioner cannot be ignored for the appointment, only on the ground of her being a female, if she is otherwise most suitable for such appointment. The impugned order dated 9.4.2003 passed by learned Member Board of Revenue, speaks of the suitability of respondent No.1 only. It is silent with regard to suitability of the petitioner for the appointment in question.

In case law titled as "Mst. Zubaida Begum v. Member (Judicial, Board of Revenue, Punjab, Lahore and another" (2002 YLR 3393) it has been held as under:-

"I have gone through the several documents placed on record of this writ petition, with the assistance of the learned counsel. By now it is well settled that in the matter of appointment of a Lumbardar the opinion of the District Collector holds much weight. I find that after comparing the comparative merits of the two candidates, he found that apart from the fact that she is daughter of the deceased Lumbardar she is residing in Chak No.263/R.B. where her children are studying and that after the death of her father she had been performing the duties of a Lumbardar. The only objection before the respondent No.2 was that she is a female being a non-resident of the said Chak, is not a fit person to be appointed as a Lumberdar. The learned District Collector found the fact that the petitioner is resident of Chak and proceeded to appoint her as Lumbardar. The learned Commissioner while dealing with the appeal of the respondent No.2 agreed with the Collector. The learned Member, Board of Revenue proceeded to set aside the order only with reference to rule 19(2)(d) of the Land Revenue Rules, 1968. The precise reason is that she is a female. Now the matter stands settled in the case of Shrin Munir and others v. Government of the Punjab through Secretary Health, Lahore and another (PLD 1990 SC 295) whereby any discrimination against women for the sole reason that they are women, has been held to be violative of Article 25 of the Constitution. Now on the same touchstone the said rule 19(2)(d) of

the Land Revenue Rules, 1968 has been held to be violative of the said provisions of the Constitution of the Honourable Supreme Court of Pakistan while disallowing Civil Petition No.828/L of 1993 against the said judgment of this Court being relied upon by the learned counsel for the petitioner. 1, therefore, do not find that the learned respondent No.1 while passing the impugned order has proceeded in violation of the law as laid down by the superior judiciary of the country and his order is without lawful authority."

In case law titled as "Mushtaq Hussain v. Mst. Naseem Akhtar etc." (PLD 1982 Supreme Court 271), it has been held as under:-

"The learned counsel further contended that Ghulam Razaq died on 26.10.1978 and according to the rule quoted above, the petitioner, who was the younger brother of the deceased Lambardar, was the nearest eligible heir being the descendant of Abdul Ghani, in the male line, and Mst. Nasim Akhtar respondent, therefore, was not entitled to be appointed as Lambardar. This argument has no force as there is nothing in the rules to deprive the respondent of the right of Lambardari by applying the Rules of primogeniture. Under rule 19(2)(d) of the West Pakistan Land Revenue Rules, 1968 a female is not ordinarily eligible for the office of a headman but may be appointed when she is the sole owner of the estate for which the appointment has to be made, or for special reasons in other cases. Under this rule a woman can be appointed as Lambardar. Therefore, there was no violation of the law and the orders of the Revenue Authorities are not without jurisdiction. This petition is, accordingly, dismissed.

Lastly, in a celebrated judgment reported as "Shrin Munir and others v. Government of the Punjab through Secretary Health, Lahore and another" (PLD 1990 SC 295), it has been held that any discrimination against women for the sole reason that they are women, has been held to be violative of Article 25 of the Constitution.

4. Relying upon the afore-noted judgments it can safely be concluded that rule 19(2)(d) of the West Pakistan Land Revenue, Rules, 1968 is violative of Article 25 (2) of the Constitution of Islamic Republic of Pakistan and there is no bar for a female to be appointed as Lambardar.

5. The next argument of learned counsel for the petitioner is that petitioner is having more qualification than that of respondent No.2. According to him, the petitioner is B.A. L.L.B whereas respondent No.2 is F.A. This contention of learned of the petitioner is fully

answered in case law titled as "Haji Muhammad Zaman Khan v. Member Board of Revenue Punjab and others" (2014 SCMR 164) as under:-

> "The argument that petitioner is F.A. and respondent is Middle pass and therefore be given preference is not tenable in law: first, because Rule 17 of the Land Reform Manual does not list it as one of the factors to be taken into account; second, the level of education of a candidate could be one of the considerations which the revenue officer may keep in view at time of appointment of a Lambardar. It is, however, the totality of qualifications, virtues and experience of candidates which should ultimately weigh in the process."

6. According to the record, it appears that petitioner is absentee and an absentee cannot be appointed as Lambardar as has been held in case law titled as "Ch. Ghulam Ullah v. Board of Revenue, West Pakistan, Lahore and 4 others" (1984 CLC 2973) as under:

> "Rule 16 specifies the grounds for dismissal of a village headman. A headman appointed is liable to dismissal from the post of Lambardar if owing to his age, physical or mental incapacity or absence from the estate he is unable to discharge the duties of his office. Combined reading of rule 17(ii)(c) with rule 16(ii)(c) goes to show that an heir entitled to succeed to the office of Lambardari can be ignored by the appointing authority on the ground of his absence from the estate, if in the opinion of the authority his absence from the estate hindered the performance of his duties as Lambardar."

And in case law titled as Masood Ahmad v. Member (Revenue), Board of Revenue and others" (1982 CLC 357) it has been held as under:-

> "The authorities have not treated the matter of the appointment of the Lambardar under rule 17, but, obviously, under rule 19 of the W P. Land Revenue Rules. A perusal of the orders clearly shows that the merits and demerits of the various candidates were considered and on findings of fact which are concurrent now by all the forums below the decision was reached that respondent No.4 is more suited to the appointment than the petitioner. The fact of the petitioner being related to the deceased Lambardar was also taken into consideration but it was found that be being an absentee and not living in the Chak and doing his business elsewhere in Sargodha would not be able to discharge his duties and thus his case would attract the provisions of rule 18(2)(c) of the aforesaid Rules. Now explanation to rule 19 empowers the Collector to refuse to appoint a person as Lambardar who is claiming the post as an heir on the ground which would justify the dismissal of that person

from the office of Headman. That being so, rule 18(2)(c) could legitimately be read in rule 19 while making an appointment of a Lambardar thereunder. No exception can therefore be raised to the manner of appointment of respondent No.4 as Lambardar and holding that the petitioner is not so entitled."

7. Even otherwise, no one has vested right to be appointed as Lambardar. In this regard reliance can be placed on latest pronouncement of Hon'ble Supreme Court of Pakistan in case law titled as "M. Nazir Ahmad v. Muhammad Aslam and others" (2013 SCMR 363) in which it has been held as under:-

"As the entire effort of the revenue authorities in this behalf should be to find out and locate the most suitable person for the job, because no one, as mentioned above, has a vested right to the appointment, rather a Lambardar is saddled with certain responsibilities in connection with the collection of the land revenue, Abiana and other government dues etc. therefore, for choosing the best available person, on whom trust can be reposed, the condition and requirement of qualifications in strict terms, which may be adhered to in some other kinds of recruitments in the government service etc. especially in relation to and by a given and a sepecific date meant for applying for such posts/appointments, should, not be strictly followed in the lambardari matter."

8. This Court while considering the case of appointment of lamberdar, is not supposed to sit as a Court of appeal, but only has to examine, if there is any jurisdictional error in the order of revenue authorities. Reliance is placed on "M. Nazir Ahmad v. Muhammad Aslam and others" (2013 SCMR 363).

9. If any other judgment is needed then reference may be made to case law titled as "Abdul Ghafoor v. The Member (Revenue) Board of Revenue and another" (1982 SCMR 202).

10. The findings of revenue authorities except DO(R) are concurrent in nature which does not require any interference by this Court while exercising its constitutional jurisdiction, hence, appointment of respondent No.2 by the revenue authorities is legal and does not require any interference by this Court.

11. The upshot of the above discussion is that this writ petition has no force, hence, dismissed in limine.

ZC/M-256/L Petition dismissed.

PLD 2016 Lahore 536

Before Shahid Mubeen, J

KISHWAR PARVEEN and others---Petitioners

Versus

DISTRICT JUDGE, GUJRAT and others---Respondents

Writ Petition No.24836 of 2014, decided on 29th September, 2015.

Family Courts Act (XXXV of 1964) ---

----S. 5, Sched---Suit for recovery of maintenance allowance---Paternity of minor---Determination of---Scope---Husband disowned paternity of the minor son---Family Court decreed the suit for recovery of maintenance allowance but Appellate Court remanded the matter with the direction to determine the legitimacy of the minor son---Contention of wife was that question of paternity could only be decided by the civil court---Validity---Question of paternity could not be determined by the Family Court---Appellate Court could not remand the case to determine the paternity of the minor---Appellate Court had exceeded its jurisdiction---Family court as well as appellate court were not court of civil jurisdiction---Only civil court could adjudicate upon the paternity of minor---Impugned order passed by the Appellate Court was set aside and case was remanded for decision afresh in accordance with law---Constitutional petition was accepted in circumstances.

Iftikhar Hussain and another v. Muhammad Aslam and others 1991 MLD 1500 and Mst. Aziz Begum v. Faiz Muhammad PLD 1965 (WP) Lah. 399 rel.

Muhammad Asif Bhatti for Petitioners.

ORDER

SHAHID MUBEEN, J.---Mr. Nisar Akbar Bhatti, Advocate has filed his power of attorney on behalf of respondent No.3.

2. Through the instant writ petition, the petitioners have called in question the legality and validity of impugned judgment and decree dated 07.07.2014 passed by respondent No.1/learned District Judge, Gujrat and prayed for enhancement of maintenance of the petitioner is fixed by respondent No.2/learned Judge Family Court, Gujrat vide judgment and decree dated 30.05.2012.

3. Briefly the facts of the case are that petitioners instituted a suit for recovery of maintenance allowance alleging therein that marriage of petitioner No.1/Kishwar Parveen was solemnized with the respondent No.3/Mukhtar Ahmad on 14.01.2007. The relations were remained strained and defendant left for South Africa and parents of the defendant kicked her out and she was never paid any maintenance allowance. During the pendency of this suit, on 22.06.2011 an amended plaint was filed to the effect that on 25.10.2010 minor son Shavaiz Rehman was born as such minor was impleaded as plaintiff No.2 in the suit and she also claimed birth expenses borne out by her parents of the minor and claimed maintenance allowance at the rate of Rs.20,000/- per month. The suit was resisted by the respondent No.3 by filing written statement and it was alleged in written statement that he had divorced the petitioner No.1/Kishwar Sultana and he disown paternity of minor Shavaiz Rehman on the ground that Kishwar Parveen eloped with someone and thereafter minor plaintiff was born. Pre-trial reconciliation proceedings, declared failed, interim maintenance allowance to the extent of minor was fixed and whereafter following issues were framed:-

1. Whether the plaintiff are entitled to get interim maintenance allowance? If so, at what rate and for what period?OPP.

2. Whether the plaintiff No.2 is entitled to get birth expenses @ Rs.24, 750/-? OPP

3. Whether the plaintiff have got no cause of action to file the instant suit? OPD

4. Relief

4. Thereafter, the defendant/respondent No.3 was proceeded against ex parte and after recording of ex parte evidence suit was decreed ex parte by learned Judge Family Court, Gujrat/respondent No.2 vide judgment and decree dated 30.05.2012 in the terms that both plaintiffs were found entitled to recover maintenance allowance at the rate of Rs.2500/- per month from the date of birth till their legal entitlement along with 10% annual increase. Plaintiff No.1/petitioner No.1 was also found entitled maintenance allowance at the rate of Rs.2500/- per month for her Iddat period only besides she was found entitled to recover delivery expenses of Rs.24750/- as prayed for. The petitioners feeling aggrieved with the said judgment and decree dated 30.05.2012 filed an appeal before the respondent No.1/District Judge, Gujrat which was disposed of through impugned judgment and decree dated 07.07.2014 and case was remanded to the learned Trial Court, Gujrat for

framing of necessary issues with regard to alleged divorce of petitioner No.1 and legitimacy of petitioner No.2.

5. It is contended by learned counsel for the petitioners that impugned judgment and decree dated 07.07.2014 passed by respondent No.1/District Judge, Gujrat with regard to remand of case to learned Trial Court, Gujrat is illegal and unlawful as the question of paternity can only be decided by the civil court and same is liable to be set aside. On the other hand, learned counsel for respondent No.3 supported the impugned judgment and decree.

6. Heard. Record perused.

7. The question of paternity cannot be determined by the Judge Family Court and as such the learned District Judge in appeal could not remand the case to learned Judge Family Court to determine the paternity of the minor. Reliance is placed upon the judgment reported as "Iftikhar Hussain and another v. Muhammad Aslam and others" (1991 MLD 1500).

8. The learned District Judge, Gujrat has exceeded his jurisdiction because he can only exercise jurisdiction vested under Family Courts Act, 1964. The learned Judge Family Court as well as the court of learned District Judge is not a court of civil jurisdiction as understood in Code of Civil Procedure. It is only a civil court which can adjudicate upon the paternity of minor. Reference may be made upon a case reported as "Mst. Aziz Begum v. Faiz Muhammad" (PLD 1965 (WP) Lahore 399).

9. The upshot of the above discussion is that this writ petition is allowed. The impugned order dated 07.07.2014 passed by respondent No.1/District Judge, Gujrat is set aside and the case is remanded to the learned District Judge, Gujrat to decide it afresh in accordance with law leaving the parties to bear their own cost.

ZC/K-38/L Petition allowed.

2016 YLR 2418

[Lahore (Multan Bench)]

Before Shahid Mubeen, J

KHAWAR JAHANGIR---Petitioner

Versus

AURANGZEB and 5 others---Respondents

C. R. No. 928 of 2015, decided on 17th August, 2015.

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

----O. XXXIX, Rr. 1, 2 & O. VII, R. 11---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Application for grant of temporary injunction---Rejection of plaint while deciding application for interim injunction---Scope---Trial Court rejected the plaint while deciding application for grant of temporary injunction but Appellate Court remanded the case---Validity---While rejecting plaint only contents of the same should be considered---Plaint, in the present case, disclosed cause of action---Trial Court had passed impugned order in violation of its earlier order whereby same application under O. VII, R. 11, C.P.C. was dismissed---No fresh application for rejection of plaint had been moved---Order passed on the earlier application for rejection of plaint had attained finality---Trial Court only intended to dispose of application for grant of temporary injunction and arguments to that extent had been heard---Plaint could not be rejected while hearing arguments on application under O. XXXIX, Rr. 1 & 2, C.P.C.---Rejection of plaint, in the circumstances was not justified---No illegality or material irregularity had been pointed out in the impugned order passed by the Appellate Court---Revision was dismissed in limine.

Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited PLD 2012 SC 247; Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others 1994 SCMR 826; Mushtaq Hussain v. Province of Punjab through Collector Jhelum District and 6 others 2003 MLD 109; Muhammad Tariq Mahmood and 2 others v. Anjuman Kashmiri Bradari Khisht Faroshan through President Abdul Ashfaq and 21 others 2003 CLC 335; Mst. Amina v. Muhammad Easa and 11 others 2008 YLR 1405 and Iftikharul Haq v. District Canal Officer and others 2005 CLC 1740 rel.

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

----O. VII, R. 11---Plaint, rejection of---While rejecting plaint only contents of the same had to be looked into.

Ch. Ihsan Ullah for Petitioner.

ORDER

SHAHID MUBEEN, J.---Brief facts giving rise to the institution of present revision petition are that respondents Nos.1 and 2 filed a suit for declaration before learned trial court, Vehari praying therein that the orders dated 26.11.2008, 29.6.2009 and 13.3.2010 passed by the official respondents be declared as illegal and unlawful and based on mala fide and are liable to be set aside. The suit was resisted by the petitioner by filing written statement. The petitioner instituted an application under Order VII, Rule 11, C.P.C. for the rejection of the plaint, which was dismissed vide order dated 24.9.2012 by learned trial Court. The learned trial court after receiving reply by respondents Nos.1 and 2 vide order dated 17.11.2012 not only dismissed the application for grant of temporary injunction but also rejected the plaint under Order VII, Rule 11, C.P.C. The respondents Nos.1 and 2 instituted an appeal on 01.12.2012 before the District and Sessions Judge, Vehari, which was accepted by way of impugned order dated 13.5.2015 and the case was remanded to the learned trial court for its decision afresh after framing of issues and recording of evidence by the parties.

2. It is contended by learned counsel for the petitioner that impugned order is illegal and unlawful. It is further contended that while deciding the application for grant of temporary injunction the plaint can also be rejected.

3. Heard. Record perused.

4. It is settled principle of law that while rejecting the plaint only contents of the plaint are to be looked into. Reliance is placed on a celebrated judgment of Hon'ble Supreme Court of Pakistan reported as "Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited" (PLD 2012 Supreme Court 247). Relevant portion is reproduced herein below:-

> "After considering the ratio decidendi in the above case, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.
>
> Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the

contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.

Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint."

From the bare perusal of the plaint it discloses a cause of action. Learned trial court has passed order dated 17.11.2012 in complete oblivion of its earlier order dated 24.9.2012 whereby application under Order VII, Rule 11, C.P.C. filed by the present petitioner was dismissed. It is to be noted that no fresh application has been filed by the petitioner under Order VII, Rule 11, C.P.C. for the rejection of the plaint. It is also discernable from the record that order dated 24.9.2012 has not been assailed by availing appropriate remedy hence same has attained finality. It appears from bare perusal of impugned order that court only intends to dispose of the application for grant of temporary injunction and the arguments to that extent has been heard by learned trial court hence rejection of plaint is not justifiable. It is also an established law that in such like situation the rejection of plaint while hearing arguments on an application under Order XXXIX, Rules 1 and 2, C.P.C. cannot be passed. The difference between Order XXXIX, Rules 1 and 2, C.P.C. and Order

VII, Rule 11, C.P.C. has been elaborately discussed in case law reported as "Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others" (1994 SCMR 826). The relevant portion is reproduced herein below:-

> "A plain reading of the Order VII, Rule 11, C.P.C. would show that the rejection of plaint under this provision of law is contemplated at a stage when the court has not recorded any evidence in the suit. It is for the reason precisely, that the law permits consideration of only averments made in the plaint for the purpose of deciding whether the plaint should be rejected or not for failure to disclose cause of action or the suit being barred under some provision of law. The court while making action for rejection of plaint under Order VII, Rule 11, C.P.C. cannot take into consideration pleas raised by the defendant in the suit in his defence as at that stage the pleas raised by the defendants are only contentions in the proceedings unsupported by any evidence on record. However, if there is some other material before the court apart from the plaint at that stage which is admitted by the plaintiff, the same can also be looked into and taken into consideration by the court while rejecting the plaint under Order VII, Rule 11, C.P.C. Beyond that the court would not be entitled to take into consideration any other material produced on record unless the same is brought on record in accordance with the rules of evidence. We may point out here that there is marked different between the scope of proceedings of an application under Order XXXIX, Rules 1 and 2, C.P.C., filed by the plaintiff for grant of temporary injunction in a pending proceeding and the rejection of the plaint under Order VII, Rule 11, C.P.C., on account of failure to disclose a cause of action in the plaint or the plaint being barred under some provision of law. In the former case, the court while deciding the application for grant of temporary injunction ascertains existence or otherwise of a prima facie case, balance of convenience and the possibility of irreparable injury to the party seeking injunction in case the relief is withheld. While considering existence or otherwise of a prima facie case in proceedings under Order XXXIX, Rules 1 and 2, C.P.C., the court is not only entitled to look into the pleadings of the plaintiff and documents filed by him in support of case but it can also take into consideration the documents of pleadings filed by the defendant. However, the courts while rejecting a plaint under Order VII, Rule 11, C.P.C. on the ground that the plaintiff failed to disclose any cause of action or the suit is barred under some provision of law, the extent of examination of relevant facts by the court to reach these conclusions has to be only on the basis of averments made in the plaint and any other material or document which is admitted by the plaintiff. The reason for this different approach while rejecting a plaint under Order VII, Rule 11, C.P.C. is quite obvious. In the

former proceedings (under Order XXXIX, Rules 1 and 2, C.P.C.) even if the court reaches the conclusion that the plaintiff has failed to make out a prima facie case, it can only refuse to grant temporary injunction and reject the application under Order XXXIX, Rules 1 and 2, C.P.C. but this rejection cannot result in the dismissal of the suit which proceeds to trial notwithstanding a finding by the court that the plaintiff has failed to make out a prima facie case for grant of temporary injunction. On the contrary, if the court reaches the conclusion that the plaint failed to disclose any cause of action or suit appears to be barred under some law, the proceedings come to an end immediately and the plaintiff is non-suited before he is allowed an opportunity to lead evidence and substantiate his allegation made in the plaint. We are, therefore, of the view that the rejection of plaint at a preliminary stage when the plaintiff has not led any evidence in support of his case, is possible only if the court reaches this conclusion on consideration of the statements contained in the plaint and other material available on record before the court which the plaintiff admits as correct."

This judgment of the Hon'ble Supreme Court of Pakistan has consistently been followed in case laws reported as "Mushtaq Hussain v. Province of Punjab through Collector Jhelum District and 6 others" (2003 MLD 109), "Muhammad Tariq Mahmood and 2 others v. Anjuman Kashmiri Bradari Khisht Faroshan through President Abdul Ashfaq and 21 others" (2003 CLC 335), "Mst. Amina v. Muhammad Easa and 11 others" (2008 YLR 1405) and "Iftikharul Haq v. District Canal Officer and others" (2005 CLC 1740). Learned counsel for the petitioner failed to point out any illegality and material irregularity in the impugned order.

5. The ratio of above judgments is that while passing order on an application for the grant of temporary injunction, plaint cannot be rejected.

6. For what has been discussed above, this petition has no force, hence, same is hereby dismissed in limine.

ZC/K-32/L Revision dismissed.

2016 YLR 2462

Lahore High Court (Rawalpindi Bench)

Before Atir Mahmood and Shahid Mubeen, JJ

LAND ACQUISITION COLLECTOR (M-I) NATIONAL HIGHWAY AUTHORITY ISLAMABAD and 4 others---Appellants

Versus

ZAHIR SHAH and 5 others---Respondents

R.F.A. No. 141 of 2011, heard on 4th May, 2016.

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

----Ss. 18 & 31(2)---Reference to court---Maintainability---Receiving compensation without objection--- Effect--- If compensation was received without any protest on the part of the person interested then reference would not be maintainable---Land owners had received compensation without protest---Bar to file reference was applicable in the case---Impugned judgment and decree passed by the Referee Judge were set aside---Appeal was allowed in circumstances.

Wali Ahmad v. Collector Land Acquisition and others 1985 SCMR 224 distinguished.
Government of N.-W.F.P. and others v. Akbar Shah and others 2010 SCMR 1408 rel.

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

----Art. 132--- Evidence--- Statement of witness which was not cross-examined by the other side would be accepted to be true.

Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi 1991 SCMR 2300 rel.

Akram Shaheen and Mesum Mehdi for Appellants.

Sh. Kamran Shahzad for Respondents.

Date of hearing: 4th May, 2016.

JUDGMENT

SHAHID MUBEEN, J.---The appellants have instituted this Regular First Appeal under section 54 of the Land Acquisition Act, 1894, praying therein that the judgment and decree

dated 13.03.2010 passed by the learned Senior Civil Judge, Attock be set aside and Award No.7 dated 08.06.2004 be restored and maintained, in the interest of justice.

2. Briefly the facts of the case as discernable from this appeal are that the appellants acquired land measuring 04 kanals 03-marlas comprising khasra No.1079 khewat No.425/670 situated in Mauza Wardag, Tehsil and District Attock, for the construction of Islamabad-Peshawar motorway through Award No.07 dated 08.06.2004. The appellants paid compensation amounting to Rs.607,966/- to the respondents. The compensation paid at the time of acquisition was correctly assessed in accordance with law and the same was more than the market rate. The compensation was worked out by the District Assessment Committee on the basis of average sale price in the village. Keeping in view the market value and other relevant factors the rates as received from the District Officer Revenue and approved by the Board of Revenue Punjab Lahore were fixed being reasonable and fair. The respondents had not raised any objection on the assessed compensation and received the same without any protest. The respondents filed a reference under section 18 of the Land Acquisition Act 1894 before the learned Senior Civil Judge Attock. The reference was contested by the appellants by filing written statement wherein they denied the averments made in the reference.

3. Out of the divergent pleadings of the parties the following issues were framed by the learned trial court:-

> "1. Whether the reference in question is not maintainable under section 18 of the LAA? OPR
>
> 2. Whether the reference is barred by time? OPR
>
> 3. Whether the compensation awarded to the petitioners is inadequate and they are entitled to its enhancement, if so, to what extent? OPA
>
> 4. Relief."

4. The parties led their evidence pro and contra to prove their respective contentions. After scanning the entire record and available evidence, the learned trial court vide impugned judgment and decree dated 13.03.2010 accepted the reference filed by the respondents and modified the Award to the extent that the respondents are entitled to receive compensation at the rate of Rs.300,000/- per kanal along with 15% Compulsory Acquisition Charges and 8% Compound Interest. Hence this Regular First Appeal.

5. Learned counsel for the appellants submits that reference under section 18 of the Land Acquisition Act (I of 1894), was not competent as the respondents had received compensation as determined by the Land Acquisition Collector through Award No.7 without raising any objection. He further submits that the respondents had no locus standi to file reference under section 18 of the Land Acquisition Act, 1894 read with second proviso to subsection (2) of section 31 of the Act ibid. On the other hand learned counsel for the respondents contends that the respondents received the compensation under protest. He further submits that filing of reference under section 18 of the Land Acquisition Act 1894 would amount to protest as envisaged under second proviso to subsection (2) of section 31 of the Act ibid. He relies on case titled Wali Ahmad v. Collector Land Acquisition and others (1985 SCMR 224).

6. We have heard the learned counsel for the parties and also perused the record of this case with their able assistance.

7. The respondents in paragraph No.1 of their reference filed under section 18 of the Land Acquisition Act, 1894, stated that an amount of Rs.607,966/- was paid to them in accordance with Award No.7/2004. It is nowhere mentioned in the reference that they had received the compensation under protest. Further Zahir Shah, one of the respondents, appeared as AW-I and categorically stated in his examination-in-chief that compensation of Rs.607,966/- was paid in respect of acquired land. He too had not stated that the same was received under protest.

8. Contrary to that, in preliminary objection No.2 of their written statement, the appellants have specifically stated that reference under section 18 of the Land Acquisition Act, 1894 is not maintainable as the respondents received compensation without raising any protest. In support of their stance they produced Aftab Ahmad Patwari as RW-1 who categorically stated in his examination-in-chief that compen-sation was received by the respondents without any protest. It is pertinent to mention here that the learned counsel for the respondents neither made any suggestion nor put any question that they had received the compensation under protest.

9. It is an established principle of law that a statement of a witness made in his examination-in-chief which is material to the controversy of the case, if not challenged by the other side directly or indirectly, then such unchallenged statement should be given full credit and the portion not cross-examined, will be accepted to be true. Reference may be made to the case law titled "Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi" (1991 SCMR 2300).

10. It is an established principle of law that if compensation is received without any protest on the part of the person interested whose land has been acquired, then the reference under section 18 of the Land Acquisition Act, 1894 read with second proviso to subsection (2) of section 31 of the Land Acquisition Act, 1894, is not maintainable. For facility of ready reference, the second proviso to subsection (2) of section 31 of the Act ibid is reproduced herein below:-

> "(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted.-
>
> Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount.-
>
> Provided also that no person who has received the amount otherwise than under protest shall be entitled to make any application under section 18.-" (emphasis supplied).

11. As the respondents had received compensation without protest, therefore, the second proviso to subsection (2) of section 31 of the Land Acquisition Act, 1894, reproduced herein above, is fully applicable and constitutes a bar to the respondents' right to claim the reference under section 18 of the Act ibid, as they can no longer be treated persons interested. Reference may be made to case titled Govt. of N.W.F.P. and others v. Akbar Shah and others (2010 SCMR 1408). The relevant portion of the judgment is reproduced herein below:-

> "It is established on the record that the respondents/plaintiffs had received compensation as determined by the Land Acquisition Collector through the Award without any protest. The respondents/plaintiffs had no lawful right even to file reference under section 18 of the Land Acquisition Act read with sections 30 and 31(2) of the Land Acquisition Act."

As already observed above the reference is not maintainable, therefore, there is no need to discuss the merits of the case.

12. Learned counsel for the respondents has relied upon case titled Wali Ahmad v. Collector Land Acquisition and others (1985 SCMR 224) but the said judgment is

distinguishable on facts. In the said judgment the Award was made by the Collector on 29.07.1970 but before any compensation could be paid the appellant (of the said judgment) on 24.08.1970 applied under section 18 for making a reference to the Court. The reference was received by the Court on 22.04.1971. It was after this that the appellants received compensation on 30.05.1971 on furnishing the requisite bond. In the case in hand the situation is entirely different and from the available record it is manifestly clear that the respondents had received the compensation without any protest on 31.08.2004, much prior to the filing of reference under section 18 of the Land Acquisition Act, 1894. The respondents had not placed on record any documentary proof that they had protested over the receipt of compensation prior to the filing of reference before the civil court. The contention of the learned counsel for the appellants is further supported by the document Ex.R/4 , which shows that the respondents had received the compensation of Rs.607,966/- without raising any protest on their part on 31.08.2004.

13. The upshot of the above discussion is that this appeal is accepted and the impugned judgment and decree dated 13.03.2010 passed by the learned Senior Civil Judge, Attock is hereby set aside. No order as to costs.

ZC/L-6/L Appeal allowed.

PLJ 2016 Lahore 335

***Present*: SHAHID MUBEEN, J.**

PERVAIZ AKHTAR--Petitioner

versus

GOVERNMENT OF PUNJAB, etc.--Respondents

W.P. No. 28283 of 2012, decided on 23.11.2015.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Allotment of quarter--Parent concession scheme--Entitlement--Validity--Petitioner had no vested right for government accommodation--Case of son of petitioner does not fall within ambit of Para-7 of policy as petitioner's son is neither servant at principal seat, nor in Pb. civil secretariat and Pb. Govt., therefore, he was not entitled for government accommodation. [Pp. 337, 340 & 341] A, B, C & D

Mr. Shahid Azeem, Advocate for Petitioner.
Mr. Muhammad Arif Yaqub Khan, Addl. Advocate General for Respondents.
Date of hearing: 23.11.2015.

ORDER

Through this writ petition, the petitioner seeks direction to Respondent No. 1/Chief Secretary for allotment of Quarter No. K-63, Wahdat Colony, Lahore in the name of his son namely Qasim Pervez Constable (No. 21287).

2. Briefly the facts of the case are that petitioner retired as Naib Tehsildar at Lahore in BS-15 after serving 42 years in service. The petitioner was allotted two room junior quarter below entitlement. The petitioner retired on 23.06.2012. The petitioner made an application to the respondents for allotment of quarter No. K-63, Wahdat Colony, Lahore which was already in his occupation, in the name of either of his sons who qualify for the said allotment under Parent Concession Scheme. In response to the said request of the petitioner, the Chief Minister, Punjab was pleased to direct Additional Chief Secretary to examine the case of the petitioner and put up a summary within 07-days. This letter was written to the Additional Chief Secretary on 24.03.2012 but no report was sent inspite of reminder dated 25.5.2012. Being disappointed from the respondents, the petitioner filed Writ Petition No. 17225/2012 before this Court which was disposed of *vide* order dated 29.06.2012 directed Respondent No. 2 to decide representation of the petitioner in

accordance with law. Respondent No. 2 in compliance of order dated 29.06.2012 passed in W.P. No. 17225/2012, Respondent No. 2/Additional Chief Secretary considered only son of the petitioner namely Abdul Aziz, Security Guard (BS-1), Jinnah Hospital, Lahore and rejected application on the ground that petitioner's son does not qualify for the allotment of said quarter under Allotment Policy, hence, this writ petition.

3. It is contended by learned counsel for the petitioner that his son namely Qasim Pervez Constable (21287) Punjab Constabulary BS-05 is fully qualified to be accommodated under Allotment Policy under Parent Concession Scheme. He further submits that application to the extent of his son Abdul Aziz has illegally and unlawfully been rejected. Further submits that it is a case of discrimination as one Amir Salamat, Mazhar Hussain and Hafiz Imran Khan have been accommodated according to the Policy which they are not entitled. On the other hand learned Addl. Advocate General contends that petitioner's son does not qualify for allotment of the quarter as per Allotment Policy-2009 particularly Paras No. 7, 15 and 30.

4. Heard. Record perused.

5. For the following reasons this writ petition is liable to be dismissed:--

(i) As per Para No. 15 of the Allotment Policy no one can claim a vested right to provide residential accommodation which is reproduced herein below:--

"The Provincial Government has no legal obligation to provide residential accommodation to any Government servant and no Government servant has any vested legal right or claim to the allotment of Government owned residential accommodation."

The petitioner has no vested right for government accommodation. Reliance is placed on case law titled as *"Dil Awaiz Khan v. Government of Punjab through Secretary Colonies Department and another"* (PLD 2014 Lahore 50). The relevant portion of the judgment is reproduced herein below:

"A vested right is created when it is mature in every respect and no contingency exists before its completion. When merely the passing of formal order remains to finalize the status of a claimant then according to the Hon'ble Supreme Court in *Nabi Ahmed and another v. Home Secretary, Government of West Pakistan, Lahore and 4 others* (PLD 1969 SC 599 at page 616) his entitlement qualifies as a vested right. The relevant extract of the said judgment is reproduced below:

"What is a vested right? According to the Oxford English Dictionary, "vested" means "clothed, robed, dressed especially in ecclesiastical vestments…. vested rights essentially differ…. from rights which are contingent…. that is, completely created vested interests may perhaps be defined as rights based not upon contract but upon custom". A close examination of these meanings and explanations reveals that a vested right is free from contingencies, but not in the sense that it is exercisable anywhere and at any moment."

Reference may also be made to the case law titled as *"Muhammad Anwar v. Muhammad Zubair Asif and 4 others"* (1998 MLD 617). The relevant portion of the judgment is reproduced herein below:

"In these circumstances, it was not open to the Trial Court to substitute its own decision as regards merit position of both the applicants for the allotment of a Government accommodation for there is no vested right under the law in any Government servant to claim allotment of Government accommodation and if in these circumstances the functionaries of the State found petitioner more eligible, deserving and needy as compared to Respondent No. 1, the same could not have been interfered with or held *mala fide* as such the findings on Issues Nos. 6, 7 and 3 are hereby reversed and the said issues are decided in favour of the petitioner."

Reference may also be made to the judgment of a Division Bench of Lahore High Court, Lahore reported as *"Asif Mahmood v. Deputy Commissioner, Sheikhupura and another"* (2005 MLD 589). The relevant portion of the judgment is reproduced herein below:--

"It is also settled principle of law that it is the prerogative of the Competent Authority to allot the Government accommodation to the employee or not and it is not a vested right of any Government employee to retain the house as of right and the Constitutional petition is not maintainable as per law laid down by the Honourable Supreme Court in *Syed Tahir Hussain's case* (PLD 1962 SC 75).

References may also be made to the case laws reported as *"Maqsood Ahmed Toor and 4 others v. Federation of Pakistan through the Secretary to the Government of Pakistan, Ministry of Housing and Works, Islamabad and others"* (2000 SCMR 928) and *"Agha Nadeem v. Additional Secretary Welfare and 3 others"* (2014 PLC (C.S.) 268) and *"Agha Nadeem v. Additional Secretary Welfare, Government of the Punjab, Services and General Administration Department Lahore and 2 others"* (2013 PLC (C.S.) 306).

(ii) The petitioner applied for the allotment of said government accommodation in the name of his son Qasim Pervez, Police Constable No. 21287 under Parent Concession Scheme *vide* his application dated 24.02.2010 through Chief Minister Directive dated 25.02.2010. His request was considered and *vide* letter dated 15.03.2010 the petitioner was informed that competent authority has considered his request and regretted being contrary to the Allotment Policy. The petitioner has not challenged the order dated 15.03.2010 which has attained finality. This is so stated by respondents in their report and parawise comments as preliminary Objection No. 2.

(iii) This writ petition suffers from laches on the face of it as order was passed on 15.03.2010 whereas the writ petition was filed on 15.11.2012 after a delay of about 03 years.

(iv) Earlier the petitioner filed a Writ Petition No. 17225/2012 for allotment of said government accommodation in the name of his son namely Abdul Aziz which was disposed of by this Court *vide* order dated 29.06.2012 with the following observations:--

"Learned counsel for the petitioner states that he would be satisfied, if the direction be issued to the Respondent No. 2 to decide the application pending before him.

2. Let a copy of this petition alongwith all the annexure be transmitted to Respondent No. 2, who shall treat this petition as representation of the petitioner and take a decision thereon after providing opportunity of hearing to the petitioner strictly in accordance with law within a period of one month."

The department considered representation of the petitioner and decided the same *vide* order dated 31.08.2012 as under:--

"4. AND WHEREAS, so far as request of the applicant for allotment of subject quarter in the name of his son Mr. Abdul Aziz, Security Guard (BS-1), Jinnah Hospital, Lahore is concerned, it is clear as per para 30(a) of the Allotment Policy "the allottees on their retirement will be entitled to have their allotments transferred in the names of their real sons/daughters, belonging to the eligible department only and is serving in Basic Scale equivalent or higher than required for the allotment of the said Government residence, subject to rent clearance and all utility bills. The retiring Government servant should apply for such allotment within a period of one year before his/her retirement". Mr. Abdul Aziz belongs to ineligible department i.e. Health Department and cannot be allotted a government accommodation, under Parent Concession Scheme, out of the Pool of

S&GAD. Moreover, the said residence is also above his entitlement. Hence his request is contrary to Para-30(a) of the Allotment Policy.

5. AND WHEREAS, it is pertinent to mention here that the Chief Minister, Punjab has also regretted the request of the applicant on a summary being above entitlement and the applicant belongs to ineligible department.

6. NOW THEREFORE, after having gone through the record and affording opportunity of personal hearing, I, SUHAIL AAMIR, am of the view that request/representation of Mr. Pervaiz Akhtar regarding allotment of Quarter No. K-63, Wahdat Colony, Lahore to Mr. Abdul Aziz, Security Guard (BS-01), Jinnah Hospital, Lahore, under Parent Concession Scheme is not covered under Allotment Policy. Hence, the same is rejected."

It appears that petitioner is in the habit of filing writ petitions and at no cost wants to vacate the government residence.

(v) The petitioner applied for allotment of said government accommodation in the name of his son Qasim Pervez, Police Constable No. 21287. In this regard Para-7 of the Policy is reproduced herein below:-

"Only the Government servants posted at the Principal Seat, Lahore High Court, Lahore, Punjab Civil Secretariat and Provincial Assembly of Punjab, posted at Lahore, are eligible for allotment of Government owned accommodation. A Government servant who is transferred out of Lahore or out of the institutions referred above will lose his eligibility after expiry of the period for which he or his family can retain possession of the residential accommodation as specified in Para-33.

The case of the son of the petitioner does not fall within the ambit of Para-7 of the Policy as petitioner's son is neither servant at Principal Seat, Lahore High Court, Lahore, nor in Punjab Civil Secretariat and Provincial Assembly of Punjab, therefore, he is not entitled for the said government accommodation.

(vi) The petitioner's son is also not entitled under Para-30(a) of the Policy as he does not belong to eligible departments as stated in Para No. 7 of the Allotment Policy.

(vii) As far as the contention of learned counsel for the petitioner that one Amir Salamat, Mazhar Hussain and Hafiz Imran Khan have been accommodated under Parents Concession Scheme is concerned, if allotments have made in their favour then the

petitioner should have impleaded them as party so that they may explain the allegation leveled by the petitioner. However, if allotment has been made in violation of policy, the department should take action against them in accordance with law and policy applicable. There is another aspect that if they have been accommodated illegally this does not amount to discrimination as two wrongs cannot make one right. Reference may be made to case law (1998 SCMR 882 and 2011 SCMR 1239).

(vii) According to report and parawise comments the disputed quarter has been allotted to Hafiz Muhammad Aslam Staff Car Driver, S&GAD, hence, this writ petition is liable to be failed on the ground that petitioner has not impleaded him as he was necessary party to whom disputed quarter has been allotted.

(viii) The petitioner submitted an application to the Chief Minister for some favourable order and when the same was declined, he filed this writ petition, therefore he has estopped to file the same.

(ix) According to report and parawise comments the application of his son namely Qasim Pervez was considered and regretted on 15.03.2010, therefore, he is guilty of concealment of facts, hence, he is not entitled for discretionary relief. Reference may be made to PLD 1973 SC 236.

6. Sequel to the above, this writ petition has no force, hence, dismissed with no order as to cost.

(R.A.) Petition dismissed

PLJ 2016 Lahore 365

[Multan Bench Multan]

***Present*: SHAHID MUBEEN, J.**

Mst. BASHIRAN BIBI--Petitioner

versus

ADJ, etc.--Respondents

W.P. No. 3646 of 2009, decided on 17.9.2015.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Suit for recovery of dowry article, dismissal of--Dowry article was proved through evidence--List of dowry article was not exhibited--Validity--Statement of witnesses--Dowry articles were received back in presence of witnesses as petitioner do not want to live with husband hence, dowry articles were taken back through *panchayat* as well as relatives--Iqrar nama bears his thumb impression--No illegality with material irregularity in impugned judgment and decree--Petitioner had failed to point out any jurisdictional error and illegality in impugned judgment and decree passed by appellate Court--Petition was dismissed. [P. 367] A, B & C

Mr. Tariq Muhammad Iqbal Chaudhry, Advocate for Petitioner.

Ch. Saleem Akhtar Warraich, Advocate for Respondent No. 2.

Date of hearing: 17.9.2015.

ORDER

Through the instant writ petition, the petitioner has called in question the legality and validity of impugned judgment and decree dated 09.04.2009 passed by learned Additional District judge, chichawatni.

2. Briefly the facts of the case are that petitioner instituted a suit for recovery of dowry articles of alternative Rs. 2,40,000/-. The suit was resisted by Respondent No. 2 by filing written statement. The controversy led to the framing of following issues:--

(i) Whether the plaintiff is entitled for recovery of dowry Articles as per list annexed with the plaint or alternative Rs. 2,40,000/- as prayed for? OPP

(ii) Whether the Court lacks jurisdiction to try this suit and suit to the extent of Defendant No. 2 is triable by the Civil Court Tandlianwala? OPP

(iii) Whether the plaintiff has no cause of action? OPD

(iv) Whether the suit is false, frivolous and defendant is entitled for compensatory costs under Section 35-A of C.P.C.? OPD

(v) Relief.

3. The parties led their evidence pro and contra to prove their respective contentions. The suit of the petitioner was partially decreed to the extent of Rs. 1,00,000/- in lieu of dowry articles. Respondent No. 2 filed appeal which was accepted *vide* impugned judgment and decree dated 09.04.2009 and the suit of the petitioner for recovery of dowry articles was dismissed.

4. It is contended by learned counsel for the petitioner that she proved dowry articles through her evidence. The judgment and decree of the appellate Courts suffers from misreading and non-reading of evidence available on the record. On the other hand, learned counsel for Respondent No. 2 supported the impugned judgment and decree passed by the appellate Court.

5. Heard. Record perused.

6. It is pertinent to mention here that petitioner while appearing as PW-1 in her examination-in-chief has not exhibited the list of dowry articles. Even otherwise lis of dowry articles has not been got exhibited in the statement of any of the witnesses. In her examination-in-chief she has not specifically mentioned the dowry articles which were given to her at the time of marriage. Statement of DW-2 Mamand who is real brother of the petitioner is of great importance. He stated in his examination-in-chief that few articles of dowry were given to the petitioner. The dowry articles given to the petitioner were received back in presence of the witnesses as petitioner do not want to live with Respondent No. 2 hence, dowry articles were taken back through Panchayat as well as relatives. In this regard Iqrar Nama Exh. D/2 was written. He stated that Iqrar Nama bears his thumb-impression as Exh. D/2/1. Nothing could be brought out in lengthy cross-examination conducted on DW-2. The finding of the learned appellate Court is in accordance with the evidence available on record and there is no illegality with material irregularity in the impugned judgment and decree. Learned counsel for the petitioner has failed to point out any misreading and non-reading of evidence available on the record. Even in case of judgments at variance the view of the appellate Court shall prevail. Learned counsel for the petitioner has failed to point out any jurisdictional error and illegality in the impugned judgment and decree passed by the appellate Court.

7. Sequel to above discussion, this writ petition having no force is **dismissed** leaving the parties to bear their own costs.

(R.A.) Petition dismissed

PLJ 2016 Lahore 582

[Multan Bench Multan]

Present: **SHAHID MUBEEN, J.**

GHULAM NAZIK etc.--Petitioners

versus

ZTBL etc.--Respondents

W.P. No. 15956 of 2014, decided on 25.2.2016.

Constitution of Pakistan, 1973--

----Art. 199--Qanun-e-Shahadat Order, (10 of 1984), Art. 114--Constitutional petition--Voluntary Golden Handshake Scheme--Availed VGHS by filing option--Option cannot be withdrawn--Voluntary and eligible employees were at liberty to make decisions--Validity--Option once exercised within prescribed period shall be irrevocable and cannot be withdrawn--As petitioners had submitted options within prescribed period voluntarily, therefore, under V.G.H.S. it will be irrevocable and petitioners were debarred to withdraw same, even if they withdrew their option before its acceptance--Petition was also liable to be failed on principle enshrined in Art. 114 of QSO. [Pp. 584 & 586] A

Mr. Muhammad Ali Siddiqui, Advocate for Petitioners.

Ch. Saleem Akhtar Warraich, Advocate for Respondents.

Date of hearing: 25.2.2016.

ORDER

Through this writ petition, the petitioners have called into question the legality and validity of impugned orders dated 02.01.2003, 26.03.2003, 25.04.2003 and 28.07.2003 passed by the respondents-bank and also sought direction that proceedings taken thereunder may also be quashed and the petitioners be reinstated in service with full back benefits with effect from the date of passing of impugned orders.

2. Briefly stated the facts of the case are that the respondent-bank floated a Voluntary Golden Handshake Scheme wherein the last date for exercising option was given as 05.09.2002, which was subsequently extended to 12.09.2002. Petitioners opted for the said scheme as the Authority was putting pressure on them and they were also subjected to frequent discriminatory behavior of the respondent-bank. However, after passing by considerable time when the respondent bank did not respond to the options exercised by the petitioners and no intimation to this effect was given, the petitioners opted to withdraw

the same by filing applications. Despite the in-time withdrawal of the said applications, respondent-bank accepted the options and directed the petitioners to be relieved without payment of any dues. The petitioners assailed the said impugned orders before Federal Service Tribunal who *vide* a consolidated judgment dated 15.08.2005 partially accepted the appeal by holding that the petitioners are entitled to be reinstated and would not be relieved till all their dues under the said scheme. Feeling aggrieved by the said consolidated judgment of the Federal Service Tribunal, the petitioners assailed the same before Hon'ble Supreme Court of Pakistan by filing CPs Nos. 2558/2005, 2489/2005, 2491/2005, 2492/2005 and 2493/2005. The said petitions were held to be abated and the decision of Federal Service Tribunal was held to be ineffective *vide* order dated 09.08.2006. Later on by filing CM. in the CPs. the Hon'ble Supreme Court of Pakistan directed the petitioners to avail remedy against the impugned orders issued by the respondent bank by way of filing writ petitions before the Hon'ble High Court. Hence, this writ petition.

3. It is contended by learned counsel for the petitioners that they opted to avail Voluntary Golden Handshake Scheme by filing option Form No. PD/30/2002 dated 19.08.2002, however, before acceptance by the respondents, same was withdrawn *vide* letters dated 18.11.2002, 12.12.2002, 07.01.2003 and 08.01.2003, however, the respondents have illegally and unlawfully accepted the options under the said scheme *vide* impugned letters. He further submits that they be reinstated with full back benefits. Learned counsel for the petitioners further submits that options were given under pressure.

4. On the other hand, learned counsel for the respondents contended that scheme *ibid* was voluntary and without putting any pressure on its employees. He further states that under Sub Para (vii) of Para-4 of the scheme options once exercised within prescribed period cannot be withdrawn, later on.

5. Heard. Record perused.

6. From careful perusal of voluntary Golden Handshake Scheme dated 19.08.2002, it appears that the same is purely voluntary and eligible employees are at liberty to make their decisions, which is also discernable from sub-para (vii) of Para-4 of the scheme *ibid*, which is reproduced herein below:-

> "The option once exercised within prescribed period shall be irrevocable and cannot be withdrawn."

It is an admitted fact that the petitioners opted the scheme *vide* option Form No. PD/30/2002 dated 19.08.2002 which was accepted by the respondent-austerities on

28.07.2003. The bare perusal of sub-para (vii) of Para-4 of the scheme *ibid* shows that the option once exercised within the prescribed period shall be irrevocable and cannot be withdrawn. As the petitioners have submitted the options within the prescribed period voluntarily, therefore, under the said Sub Para (vii) of Para-4 of the Scheme *ibid* it will be irrevocable and the petitioners are debarred to withdraw the same, even if they withdrew their option before its acceptance.

7. The petitioners availed remedy before the learned Federal Service Tribunal alongwith others by assailing the impugned orders which was dismissed *vide* judgment dated 15.08.2005. The respondent-authorities assailed the judgment dated 15.08.2005 handed down by the learned Federal Service Tribunal, Islamabad by filing Civil Petitions No. 2810 to 2827 of 2005, which were dismissed and the Hon'ble Supreme Court of Pakistan held as under:

> "We have heard the learned counsel and. have perused the record of the case. There is no cavil to the proposition that the option once exercised of Golden Handshake Scheme within the prescribed period would be irrevocable and could not be withdrawn. The learned Federal Service Tribunal has held so and dismissed the appeals of the respondents through Para-18 of the impugned judgment.

The Hon'ble Supreme Court of Pakistan further held as under:--

> "As far as directions in Para 19 of the impugned judgment are concerned, these are based, on equity and fair play, without infringing any rule or statue.
>
> These directions have been passed in the interest of justice and do not cause prejudice either to the petitioner or to the respondent. The case law cited by the learned counsel is distinguishable. It is paramount duty of this Court to do complete justice. As already noted above, in our opinion the directions given in Para 19 of the impugned judgment were given to ensure fair play between the parties and need no interference."

Reference may further be made to a case titled *"National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others"* (2011 SCMR 446), the relevant portion of which is reproduced herein below:

> "13. In the above background, writ petitions were filed in the High Court of Sindh and the Lahore High Court, which were allowed by the impugned judgments. But the fact of the matter is that the respondents, having exercised the option to retire under the GHS, were deemed to be retired from service on and from the cut-off date. On that score, they could not be treated at par with those employees who had

not exercised such an option and were still continuing in service. A reasonable classification in terms of the law laid down by this Court in *I.A. Sharwani v. Government of Pakistan* (1991 SCMR 1041) did exist between the two categories of employees, i.e. those who had exercised the option and those who had not exercised the option. As such, the learned counsel for the respondents failed to point out discrimination prohibited under Article 25 of the Constitution. The learned counsel for the appellant-Bank has rightly contended that at the time of receiving the pensionary benefits worked out under the GHS, none of the respondents had raised the issue of admissibility of the ad hoc relief granted subsequently. Rather, all of them had received the said dues without any objection on that score. Thus, they could not have competently resorted to legal proceedings, either before the Service Tribunal or before the High Court, that too after efflux of a long time in many of the cases, for the purpose of getting such ad hoc relief or other emoluments, such as annual increments etc., taken into consideration and getting the retirement benefits recalculated. In this view of the matter, no valid grievance could be made on account of the fact that they were actually relieved from service on a subsequent date. The fact remains that they were paid emoluments in full for the period they worked after they had opted for retirement under the GHS and had received the retirement benefits accordingly. Thus, on merits no case is made out in favour of the respondents."

Further reference may be made to case tilled *"State Bank of Pakistan v. Khyber Zaman and others"* (2005 AC 479). The relevant portion of judgment is reproduced herein below:

"A careful perusal of the GHSS as reproduced herein above would reveal that it was totally "voluntary" in nature and it was optional for the employees of the State Bank of Pakistan to accept it or otherwise. It was, however, made clear in the GHSS that option once exercised would be irrevocable. There was no element of inducement or compulsion and by no stretch of imagination it can be said that they were trapped to opt GHSS which was to be opted or otherwise by an employee "freely" and "voluntary".

8. The contention of the petitioners that the options were exercised by them under coercion and pressure has been vehemently denied by the respondent-authorities which brings the case of the petitioners within the area of disputed question of fact which does not fall within the domain of this Court while exercising the constitutional jurisdiction under Article 199 of Constitution of the Islamic Republic of Pakistan, 1973, as the same requires evidence.

9. This petition is also liable to be failed on the principle enshrined in Article 114 of Qanun-e-Shahadat Order, 1984, which is reproduced herein below:

> **114. Estoppel.--**When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

> A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.
>
> The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

10. Sequel to the above, this writ petition is dismissed, however, the respondent-authorities are directed to proceed with the case of the petitioners under Para-19 of the judgment of the learned Federal Service Tribunal which was upheld by the Hon'ble Supreme Court of Pakistan. No order as to cost.

(R.A.) Petition dismissed

PLJ 2016 Lahore 596

Present: **SHAHID MUBEEN, J.**

MUKHTAR AHMAD SHAHEEN--Petitioner

versus

DIRECTOR OF NATIONAL SAVINGS, etc.--Respondents

W.P. No. 10255 of 2012, decided on 8.2.2016.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Appointment as gunman--Allegation of willful absence from duty--Dismissal from service is a major penalty--Validity--It is an established principle of law that major penalty of dismissal of service cannot be imposed without holding regular inquiry--Petitioner was issued show cause notice and service of petitioner was regulated by statutory rules which required regular inquiry before imposing major penalty--After issuance of show-cause notice, civil servants was dismissed from service--Petition was allowed. [P. 597] A

PLD 2008 SC 451, 2009 SCMR 339 *ref.*

Ch. Saleem Akhtar Warraich, Advocate for Petitioner.

Mr. Shaukat Bilal Bangish, Standing Counsel for Pakistan for Respondents.

Date of hearing: 8.2.2016.

ORDER

Through the instant writ petition under Article 199 of Constitution of Islamic Republic of Pakistan, 1973 the petitioner has called into question the legality and validity of impugned order dated 18.07.2012 whereby the petitioner was dismissed from his service and impugned order 02.05.2012 whereby departmental appeal of the petitioner was also dismissed.

2. Briefly the facts of the case are that the petitioner was appointed as Gunman Multan Region on 22.09.2003 in respondents' department. Thereafter, Respondent No. 3 issued a show-cause notice dated 22.03.2012 on the false allegation of willful absence from duty at National Savings Centre Vehari from 11.05.2011 to 13.05.2011. The petitioner denied the said allegation levelled against him. Vide order dated 02.05.2012 without providing the opportunity of defence, the respondents dismissed the petitioner from his service. Petitioner preferred a departmental appeal dated 25.05.2012 against the said order before

Respondent No. 1 but the same was also dismissed *vide* order dated 18.07.2012. Hence, this writ petition.

3. It is contended by the learned counsel for the petitioner that the impugned orders dated 18.07.2012 and 02.05.2012 have been passed in violation of principle of natural justice. He further submits that dismissal from service is a major penalty, therefore, without holding regular inquiry such like order cannot be passed.

4. On the other hand learned Standing Counsel for Pakistan has supported the impugned order.

5. Heard. Record perused.

6. It is an established principle of law that major penalty of dismissal of service cannot be imposed without holding a regular inquiry. Admittedly, the petitioner was issued a show-cause notice dated 22.03.2012 and the service of the petitioner was regulated by the statutory rules i.e. Government Servants (Efficiency and Discipline) Rules, 1973 which required regular inquiry before imposing major penalty. In this case after issuance of show-cause notice, the petitioner was dismissed from service. Reference may be made to case titled *Tariq Mahmood vs. District Police Officer T.T. Singh and another* (PLD 2008 SC 451). Reference may also be made to case titled *Muhammad Haleem and another vs. General Manager (Operation) Pakistan Railways Headquarter, Lahore and others* (2009 SCMR 339). The relevant portion of the judgment is reproduced herein below:

> "2. From a bare perusal of aforementioned show-cause notice and statements of allegations it is noted that they are verbatim. It is also that the allegations levelled against them were with regard to the illegal supply of electricity and water belonging to railway to the resident of Muchar Colony including one Sultan Hotel. These charges could have been proved only by producing evidence showing that the petitioners were responsible for providing electricity and water belonging to the railways to the residents of Mucher Colony and Sultan Hotel but instead of doing so the respondents in their wisdom thought it fit that there was no need to hold an inquiry without specifying as to why there was no need for holding an inquiry and how the charges/misconduct which were questions of fact would be proved without holding an inquiry. In other words initiation of the proceedings against the petitioners was based on illegalities as the observation of doing away with the inquiry was contrary to the pronouncement made by this Court in a large number of cases that where the allegation/charge misconduct is of the nature

requiring production of evidence to prove the same then holding of a departmental inquiry is a necessary condition and dispensation thereof cannot be made as in the first place there would be no evidence or material in possession of the department to establish and prove the charge/allegation of fact and, secondly that the civil servant proceeded against would be deprived of his right to defend, himself properly as it would not be possible for him to cross-examine the witnesses who would depose against him and from their cross-examination he could elicit favourable and beneficial statements. It is a settled principle of law that when the initial order or the very act which relates to the initiation of a proceeding is contrary to law and illegal then all subsequent proceedings and actions taken on the basis of such, illegal and unlawful action would have no basis and would fail. If any authority is required in support of the above the same is available form the case of *Mansab Ali v. Amir and 3 others* PLD 1971 SC 124. It also surprising that the Tribunal while hearing the appeals of the petitioner got involved and entangled itself in technicalities without taking into consideration the above illegalities. There is no doubt that the petitioners did not assail their orders of dismissal by filing the departmental appeals and instead they submitted legal notices through their advocates which, could not be equated or treated as appeal under the Removal from Service (Special Powers) Ordinance, 2000 but completely ignored the illegalities and shortcoming committed by the Railway Authorities and on the basis of the failure of the petitioners to comply with the provisions of law penalized them while completely ignoring and overlooking the respondent/Railway Department's illegal, unlawful actions, and contravention of law which resulted in illegal dismissal of the petitioners."

7. Sequel to the above, this writ petition is accepted and the impugned orders are set aside. The petitioner is re-instated into service. The case of the petitioner is remanded to the respondent authorities who shall hold regular inquiry by associating the petitioners and all other concerned and shall pass a speaking order within a period of 90-days after receipt of certified copy of this order under intimation to Deputy Registrar (Judicial) of this Court.

(R.A.) Petition accepted.

PLJ 2016 Lahore 636

[Bahawalpur Bench Bahawalpur]

***Present*: SHAHID MUBEEN, J.**

IFTIKHAR HUSSAIN--Petitioner

versus

DISTRICT JUDGE, RAHIM YAR KHAN etc.--Respondents

T.A. No. 1 of 2016, decided on 6.1.2016.

Transfer Case--

----Irresponsible utterances of litigants--Attitude and conduct of presiding officer was pre-judicial--Sufficient ground for transfer of cases from one Court to other--Validity--Mere suspicion or artificial apprehension was not sufficient for transfer of case--Petitioner had not placed on record some tangible evidence in support of allegation--A bald statement containing allegation was not sufficient to allow transfer--Whereby application was dismissed after calling comments from presiding officer of trial Court who denied allegation leveled in petition--Whereby the application was dismissed after calling the comments from trial Court who denied allegations leveled in petition--Petition was dismissed.

[Pp. 638 & 639] A & B

Mirza Muhammad Nadeem Asif, Advocate for Petitioner.

Date of hearing: 6.1.2016.

ORDER

Through the instant transfer application, applicant seeks transfer of rent petition and civil suit with the same title *"Muhammad Mazhar v. Iftikhar Hussain"* filed by the Respondent No. 3 and civil suit titled *"Iftikhar Hussain v. Muhammad Mazhar Javed"* filed by the applicant from the Court of learned Senior Civil Judge, District Rahim Yar Khan/Respondent No. 2 to any other Court of competent jurisdiction at District Rahim Yar Khan.

2. Brief facts of the application are that a rent petition and a civil suit filed by the Respondent No. 3 against the applicant is pending adjudication before Respondent No. 2 and fixed for hearing on 13.01.2016 and 05.01.2016 respectively. The applicant has filed an application before Respondent No. 1 for transfer of said cases from the Court of

Respondent No. 2 to any other Court of competent jurisdiction, which was dismissed *vide* order dated 04.01.2016. Hence, this petition.

3. It is contended by the learned counsel for the petitioner that behavior of the learned trial Court is partial against the petitioner, hence, he will not get justice by the presiding Officer of the trial Court. Further contends that opposite party is uttering that learned Trial Court is going to decide the case in his favour.

4. Arguments heard. Record perused.

5. The utterances of the opposite party to the litigation made outside the Court can in no manner be termed sufficient ground for transfer of cases from one Court to other as the Presiding Officer obviously would not be responsible for the irresponsible utterances of the litigants before him. The contention of the learned counsel for the petitioner that the learned trial Court is partial against the petitioner is not supported by the record and appears to be an afterthought and has been made out to seek transfer of cases. It is to be remembered that the transfer of case is deemed expedient whenever it is noticed or apprehended that the attitude and conduct of the Presiding Officer was prejudicial. However, in order to sustain the bias against the judge, it must be shown that some act or expression of judge must be available or visible on record. Mere suspicion or artificial apprehension was not sufficient for transfer of the case. The petitioner has not placed on record some tangible evidence in support of the allegation. A bald statement containing the allegation was not sufficient to allow the transfer.

6. From the arguments of the learned counsel for the petitioner, it appears that he is alleging that the presiding officer is biased, therefore, he will not get justice. To controvert this argument, reference may be made to a case reported as *"Farooq Ahmad Khan Leghari and 37 others v. Sh. Muhammad Rashid, Chairman , Federal Land Commission and another"* (PLD 1981 Lahore 159) passed by learned Division Bench of this Court, relevant portion of the same is reproduced herein below:--

> "53. It is important to note that this concept of bias is repugnant to Islamic Law. The Holy Qur'an, enjoins upon decision-makers to adjudicate in every matter dispassionately without fear or favour. It exhorts to prepare themselves for the doing of the job than be discouraged. The purpose behind is to build up such a character in decision makers that they are able to do justice irrespective of the parties before them or their personal likes or dislikes of the parties or the subject-matter. Further, it also wants to inculcate in the litigants a habit of accepting a fact

for ever that no injustice shall visit them even though the decision maker is a close relation, a friend or enemy of any one of them.

"54. In Chapter XXXVIII, Verse 27 Qur'an commands "O David Lo! We have set thee a viceroy in the earth, therefore, judge aright between mankind, and follow no desire that it beguile thee from the way of Allah, Lo! Those who wander from the way of Allah have an awful doom, for as much as they forgot the day of reckoning." Verse 153, Chapter VI provides:

> "Give full measure and full weight in justice. We task not any soul beyond its scope. An if ye give your word, do justice thereunto, even though it be (against) a kinsman; and fulfill the covenant of Allah. This He commandeth you that haply ye may remember.

Similarly in Chapter IV, Verse 135, it is laid down:

> "O ye who believe! Be ye staunch in justice, witnesses for Allah, even thought it be against yourselves or (your) parents or (your) kindred, whether (the case of) a rich man, or a poor man, for Allah is nearer unto both (than ye are). So follow not passion lest you lapse (from truth) and if ye lapse or fall away, then lo! Allah is ever informed or what ye do."

Chapter V, Verse 8:

> "O ye who believe! Be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that ye deal most justly. Deal justly, that is nearer to your duty. Observe your duty to Allah. Lo! Allah is informed of what ye do."

55. It will be seen from the above provisions that God Almighty enjoins upon the judges not to let their passions lead them astray or away them from the path of justice set down for them. The only exception made is that if a decision-maker thinks that he will not be able to do justice in a given situation, he may decline to take up that job, for God Almighty does not task any soul more than its scope. However, if he gives a word i.e. undertakes and does not decline to do that, he shall be answerable if he does not perform it dispassionately. Consequently, the lapse or otherwise of a decision-maker is to be judged from the decision itself and not from other circumstances. Again a decision may be quashed by a higher authority in appeal or revision on the ground that it is not correct or valid but it will not be interfered with for the reason that there was real likelihood of bias in view of the

facts surrounding the decision-maker viz-a-viz that case. Rather, the decision-maker may be personally liable in case there is a deliberate lapse.

6. I have gone through the order dated 04.01.2016 passed by the learned District Judge, Rahim Yar Khan whereby the application was dismissed after calling the comments from learned presiding officer of trial Court who denied the allegations leveled in the petition. From perusal of record, it reveals that learned presiding officer of trial Court has not declined that he will not be able to do justice in given situation.

7. Sequel to the above discussion, this petition has no force, hence, same is **dismissed in limine** with no orders as to cost.

(R.A.) Petition dismissed

PLJ 2016 Lahore 743 (DB)

[Rawalpindi Bench Rawalpindi]

Present: **ATIR MAHMOOD AND SHAHID MUBEEN, JJ.**

BASHIR ULLAH KHAN--Appellant

versus

MUHAMMAD RAMZAN--Respondents

R.F.A. No. 151 of 2010, heard on 17.6.2015.

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

----O.XVIII R. 3--Closing right of evidence--Request to adjourn case for cross-examination of witnesses--When case has not been adjourned on request of appellant/plaintiff provision of Rule 3 of Order XVII of CPC cannot be invoked--Adjournment has been made by appellant/plaintiff even then adjournment has not been opposed by other side, hence, provision of Rule 3 of Order XVII of CPC cannot be applied.

[P. 746] A & B

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

----O.XVII R. 3--Closing of evidence--Applicability of provisions of Order 17 Rule 3, CPC--Instead of closing evidence or appellant/plaintiff the Court would seek extension for decision of the case but in no way it was lawful for Court to close evidence and dismissed the suit while applying provision of Rule 3 of Order XVII of CPC. [P. 746] C

Sardar Abdul Raziq Khan, Advocate for Appellant.
Mr. Muhammad Atif Ferzauq Raja, Advocate for Respondent No. 2.
Date of hearing: 17.6.2015.

JUDGMENT

Shahid Mubeen, J.--Briefly facts of the case are that the appellant/plaintiff instituted a suit for specific performance on the basis of agreement to sell dated 07.03.2007 regarding land measuring 270 Kanals out of total land measuring 3153 Kanals, 17 Marlas fully described in the head note of the plaint. This land is situated in Mouza Fatehullah, Tehsil Hasanabdal, District Attock. The rate of disputed land was fixed @ Rs.21,000/- per kanal. He paid Rs.25,00,000/- on 07.03.2007 through Bank Draft and thereafter he paid Rs. 10,00,000/- on 02.05.2007. He again paid Rs. 10,00,000/- cash on 03.09.2007 and got signatures of respondent/defendant. In this way he paid totally Rs.45,00,000/- to the respondent. According to the terms and conditions of the agreement to sell respondent was bound to transfer the suit land till 07.06.2007 after receiving remaining consideration of Rs.11,70,000/- but he denied which led to the institution of the present suit. The respondent/defendant denied the execution of agreement to sell and alleged that it is based on fraud. He prayed for dismissal of the suit. Out of divergent pleadings of the parties, following issues were framed on 27.02.2009:--

1. Whether the plaintiff is entitled to get decree for specific performance of agreement dated 07.03.07 regarding land 270 kanal on the basis of grounds set out in the plaint? OPP.

2. Whether the plaintiff is entitled to get decree as prayed for on the basis of ground set out in the plaint? OPP.

3. Whether the plaintiff has no cause of action to file this suit, hence the same is liable to be dismissed? OPD.

4. Whether the plaintiff is estopped by his words and conduct to bring this suit and the same is liable to be dismissed? OPD.

5. Whether the suit is bad due to non-joinder of necessary parties and the same is liable to be dismissed? OPD.

6. Relief

The case was fixed for recording of evidence of appellant/plaintiff on 16.4.2009. *Vide* order dated 26.1.2010, the evidence of the appellant/ plaintiff was closed while applying provision of Rule 3 of Order XVII CPC and the suit was dismissed for want of evidence *vide* impugned judgment and decree dated 26.01.2010.

2. It is contended by learned counsel for the appellant/plaintiff that on last date i.e. 23.12.2009, the case was not adjourned on his request. On that date examination-in-chief of three witnesses of appellant/plaintiff were recorded and request was made by the respondent/defendant to adjourn the case for cross-examination then, the case was adjourned for cross-examination for 26.1.2010. It appears from order dated 26.1.2010 that the remaining part of the order had been dictated later on with the remarks that no further opportunity will be given as it is a direction case and the appellant/plaintiff and witnesses were directed to appear on the said date. On the fateful date i.e. 26.1.2010 the suit was dismissed while applying provision of Rule 3 Order XVII CPC.

3. On the other hand, learned counsel for the respondent/defendant supported the impugned judgment and decree.

4. Now it is to be seen by this Court whether provision of Rule 3 of Order XVII of CPC has been correctly applied by the Court or not? To better appreciate rival contentions of the parties it will be conducive to reproduce the provision of Rule 3 of Order XVII of CPC as under:

> **"3.Court may proceed notwithstanding either party fails to produce evidence, etc.--**Whether any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform, any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

5. Now order dated 23.12.2009 is also reproduce herein below:

"23.12.2004 مدعا علیہ حاضر/منجانب کلرک حاضر

7:00 مدعی، گواہان حاضر نہ ہے۔

10:40 کونسل مدعا علیہ حاضر۔ مدعی حاضر

3 کس گواہان منظور الہی/فخری خان حاضر

3 کس گواہان کے بیانات قلمبند شد جرح کے لئے التوا کی استدعا کرتے ہیں۔ برائے جرح بتقرر 26.1.2010 پیش ہووے۔ مزید الستقرا نہ دیا جائے گا۔ دعوی ڈائریکشن ہے۔ مدعی و گواہان کو پابند کیا جائے گا۔

6. It is evident from the bare perusal of order dated 23.12.2009 that no request was made by the appellant/plaintiff on the said day, whereas the statement of three witnesses of the appellant/plaintiff were recorded. It was the respondent/defendant who requested to adjourn the case for cross-examination of the witnesses produced by the appellant/plaintiff. In such like situation when the case has not been adjourned on the request of appellant/plaintiff the provision of Rule 3 of Order XVII of CPC cannot be invoked. Reference may be made to case laws titled as *"Maulvi Abdul Aziz Khan v. Mst. Shah Jahan Begum and 2 others"* (PLD 1971 Supreme Court 434), *"Jindwadda and others v. Abdul Hamid and another"* (PLD 1990 Supreme Court 1192), *"Qutab-ud-Din v. Gulzar and 2 others"* (PLD 1991 Supreme Court 1109). Even otherwise, for the sake of argument, it is presumed that (adjournment has been made by the appellant/plaintiff even then the adjournment has not been opposed by the other side, hence, the provision of Rule 3 of Order XVII of CPC cannot be applied. Reference may be made to case law titled as *"Syed Tasleem Ahmad Shah v. Sajawal Khan etc.* (1985 SCMR 585) and *"Shamshad Khan and another v. Arif Ashraf Khan and 2 others "*(2008 SCMR 269). The order dated 23.12.2009 has been passed by the Civil Judge, Attock in a slipshod manner, without applying of judicious mind perhaps due to the fact that it was a direction case. In such like situation, instead of closing evidence of the appellant/plaintiff the Court should seek extension for decision of the case but in no way it was lawful for the Court to close evidence and dismissed the suit while applying provision of rule 3 of Order XVII of CPC. Reference may be made to case law titled as *"Pervaiz Afzal and others v. Sh. Hussan Ali and another"* (1994 CLC 951) and *"Mst. Kaniz Fatima v. Ghulam Mustafa"* (1994 MLD 174).

4. For what has been discussed above, the impugned judgment and decree dated 26.01.2010 based on order dated 23.12.2009 is not sustainable in the eyes of law, hence, this appeal is allowed and impugned judgment and decree dated 26.01.2010 is set aside. The case is remanded to the learned District Judge who shall assign the same to the Court of competent jurisdiction and the transferee Court shall decide the suit within a period of three months after receipt of file, positively. No order as to costs.

(R.A.) Appeal allowed.

PLJ 2016 Lahore 771

[Multan Bench Multan]

***Present*: SHAHID MUBEEN, J.**

***Malik* MUHAMMAD HASHIM AWAN--Petitioner**

versus

CHIEF SECRETARY PUNJAB, etc.--Respondents

W.P. No. 5309 of 2010, decided 23.2.2016.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Rules of Punjab Road Transport Corporation--Non statutory--Golden Handshake Scheme--Process of closing down--Retired from service--Adhoc relief--Payment of pensionary benefit--Effect prospectively and not retrospectively--Notification--Question legality and validity of order--Maintainability of petition--Validity--Petitioners were retired from service in year 1997 whereas notification for which they want to take advantage was issued in year 2002, therefore, they cannot take benefit of notification as it is an established principle of law that notification takes effect prospectively and not retrospectively--It is an established law that in Policy matters High Court should not interfere unless Policy is arbitrary. [P. 774] A & B

1994 SCMR 1024; PLD 2010 SC 676; 2014 SCMR 982;
2013 SCMR 1707 & PLD 2014 SC 1 *ref.*

Mr. Muhammad Khan Ghauri, Advocate for Petitioner

Mr. Mudassar Shahzad-ud-Din, Advocate for Respondent.

Mr. Aziz-ur-Rehman Khan, AAG alongwith *Mirza Saleem Baig*, Asstt. (Legal) PRTC Transport Deptt.

Date of hearing: 23.2.2016

ORDER

Through the instant writ petition the petitioners have called into question the legality and validity of order dated 07.09.2006 and 27.10.2009 whereby relief claimed by them was refused by the respondents.

2. The relevant facts for the disposal of this writ petition are that the Punjab Road Transport Corporation (PRTC) offered Golden Handshake Scheme-97 *vide* Letter No. PRTC/Reg-208/97/412, dated 21.06.1997 to its employees in the process of closing down the PRTC. The petitioners and many other employees accepted the offer and were retired from service w.e.f. 30.06.1997. In compliance of order dated 21.06.2006 passed by this

Court in Writ Petition No. 3139/2006 filed by the petitioners, Respondents No. 2 and 4 intimated to the petitioners *vide* impugned letter dated 07.09.2006 that the inclusion of Adhoc Relief of Rs. 300/- p.m. in Basic Pay of PRTC retired employees for payment of pensionary benefits is not permissible under the rules. However, move-over will be considered by the Committee after giving personal hearing to each petitioner. The petitioners moved an application dated 07.10.2009 to the respondents for the grant of annual increment/move-over in accordance with the rules and orders of this Court. Respondent No. 4 *vide* impugned letter dated 27.10.2009 submitted a report/letter to the Govt. of Punjab to the effect that as regards the grant of annual increment, it is not covered under the rules as according to Finance Department Notification dated 03.01.2002, this facility is allowed to employees of Govt. w.e.f. 01.06.2000 whereas the employees of PRTC were retired prior to this date. Hence this writ petition.

3. It is contended by the learned counsel for the petitioners that the petitioners are entitled for the grant of annual increment/ move over on completion of six months service from 01.12.1996 to 30.06.1997 in the year of their retirement i.e. 1997. He further contends that the cut-off date i.e. 01.06.2000 mentioned in Notification dated 03.01.2002 is discriminatory qua the petitioners. On the other hand learned Assistant Advocate General assisted by learned counsel for the respondent- department has supported the impugned orders. Learned counsel for the respondents submits that rules of Punjab Road Transport Corporation are non-statutory, therefore, writ petition is not competent. He further submits that the petitioners were retired from service in the year 1997, therefore, they cannot take benefit of Notification No. FD(PC)10-1/78 dated 03.01.2002 as it will operate prospectively.

4. Arguments heard. Record perused.

5. The contention of learned counsel for the respondent-department that the rules of the Punjab Road Transport Corporation are non-statutory has not been controverted by the learned counsel for the petitioners, therefore, writ petition is not competent. While disposing of Writ Petition No. 21496 of 2009 *vide* order dated 3.11.2010 it has been held that rules of PRTC employees are non-statutory, therefore, writ petition is not competent. In another case titled Mst. Razia Sultana vs. Govt. of Punjab, etc., *vide* order dated 26.02.2001 passed in ICA No. 124/2001, Hon'ble Division Bench of this Court has held that the rules of the Punjab Road Transport Corporation are non-statutory, therefore, writ petition is not competent. Reference may also be made to case titled *M.H. Mirza vs. Federation of Pakistan through Secretary Cabinet Division Government of Pakistan, Islamabad*

and 2 others (1994 SCMR 1024) in which it has been held by the Hon'ble Supreme Court of Pakistan as under:--

> "6. Sections 37, 38, 50 and 51 of the C.D.A. Ordinance, 1960 (Ordinance XXIII of 1960) are relevant. An examination of these provisions shows that the CDA was itself to determine the terms and conditions of its employees and that the Government had no say in the matter. None of its Regulations whether framed by it itself or adopted by reference had a statutory basis in law. This view is supported by the view taken in *Ch.Abdul Rashid v. Capital Development Authority, Islamabad and another* (PLD 1979 Lahore 803) and the *Principal, Cadet College, Kohat and another v. Muhammad Shoab Qureshi* (PLD 1984 SC 170). The adoption of the rules of the Government or their application by reference will not lend a statutory cover or content to these rules, as held in *Lahore Central Co-Operative Bank Limited v. Saif Ullah Shah* (PLD 1959 SC (Pak.) 210) and finally very recently in *Chairman, Pakistan Council of Scientific and Industrial Research, Islamabad and 3 others v. Dr. Mrs. Khalida Razi* (Civil Appeal No. 270 of 1993). There being no statutory rules in the field, a Constitution petition was not at all competent on the subject."

Further reference may also be made to case titled *Pakistan International Airline Corporation and others vs. Tanweer-ur-Rehman and others* (PLD 2010 SC 676). The relevant portion of the judgment is reproduced herein below:

> "19. However, this question needs no further discussion in view of the fact that we are not of the opinion that if a corporation is discharging its functions in connection with the affairs of the Federation, the aggrieved persons can approach the High Court by invoking its constitutional jurisdiction, as observed hereinabove. But as far as the cases of the employees, regarding their individual grievances, are concerned, they are to be decided on their own merits namely that if any adverse action has been taken by the employer in violation of the statutory rules, only then such action should be amenable to the writ jurisdiction. However, if such action has no backing of the statutory rules, then the principle of Master and Servant would be applicable and such employees have to seek remedy permissible before the Court of competent jurisdiction."

Further reference may be made to case titled *Syed Nazir Gillani versus Pakistan Red Crescent Society and another* (2014 SCMR 982) wherein it has been held as under:

"4. Having heard learned counsel for the petitioner at some length, we find that it has now been well settled that the Rules framed by the Pakistan Red Crescent Society are non-statutory and on that count the writ petition was not maintainable."

In the aforesaid judgment reference has also been made to case titled *Pakistan Defence Officer's Housing Authority v. Lt. Col. Syed Jawaid Ahmad* (2013 SCMR 1707).

6. Moreover, it is an admitted fact that the petitioners were retired from service in the year 1997 whereas notification for which they want to take advantage was issued in the year 2002, therefore, they cannot take benefit of the said notification as it is an established principle of law that the notification takes effect prospectively and not retrospectively. Reliance is placed on case titled *"Commissioner of Sales Tax (West), Karachi v. Messrs Kruddsons Ltd."* (PLD 1974 SC 180), relevant portion of which is reproduced as under:

"It is well settled proposition that a notification by the Provincial Government cannot operate retrospectively to impair an existing right or to nullify the effect of a final judgment of a competent Court even if the notification be expressly so designed."

Reliance is also placed on case titled *"Messrs Army Welfare Sugar Mills Ltd and others v. Federation of Pakistan."* (1992 SCMR 1652).

7. This Court fully agrees with the finding given in Para No. 3 of impugned order dated 27.10.2009, which is reproduced herein below:

"3. As regards the grant of annual increment, it is not covered under the Rules as according to Finance Department Notification No. FD(PC)10-1/78(Pt.II) dated 3.1.2002, this facility is allowed to the employees of the Government Servant w.e.f. 01.06.2000 whereas the PRTC employees were retired prior to this date."

8. Even otherwise the notification dated 3.1.2002 whereby the concession has been made admissible w.e.f. 1.6.2000 could be said to be a Policy of the Government which has been made for the benefit of those employees retiring on or after 1.6.2000. It is an established law that in Policy matters this Court should not interfere unless the Policy is arbitrary. Reference may be made to case titled *Dossani Travels Pvt. Ltd. and others versus Messrs Travels Shop (Pvt) Ltd. and others* (PLD 2014 SC 1).

9. Sequel to the above, this writ petition is devoid of force, hence dismissed leaving the parties to bear their own cost.

(R.A.) Petition dismissed.

PLJ 2016 Lahore 775

[Multan Bench, Multan]

***Present*: SHAHID MUBEEN, J.**

FAYYAZ HUSSAIN--Petitioner

versus

NATIONAL BANK OF PAKISTAN, etc.--Respondents

W.P. No. 6129 of 2009, decided on 24.2.2016.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Withdrawal benefits of advance increments--Petitioner was allowed five increments on basis of higher qualification--Not entitled to recover paid amount of increments for period of 14 years under principle of *locus poenitentiae*--Validity--Petitioner was allowed to receive five increments on basis of his qualification/B.A. by bank--Petitioner had received increments *bona fide* and without committing any fraud upon bank--As disputed amount had been received by petitioner, therefore, bank was not entitled to recover amount drawn by petitioner under principle of *locus poenitentiate*. [P. 776] A PLD 1992 SC 207 *ref.*

Malik Ghulam Qasim Rajwana, Advocate for Petitioner.
Ch. Altaf Hussain, Advocate for Respondents.
Date of hearing: 24.2.2016.

ORDER

Through the instant writ petition under Article 199 of Constitution of Islamic Republic of Pakistan, 1973 the petitioner has called into question the legality and validity of impugned office order dated 13.05.2009 issued by Regional HR Chief, National Bank of Pakistan, D.G. Khan and letter dated 19.05.2009 issued by Manager, National Bank of Pakistan, Qasba Gujrat whereby the respondents withdrew the benefits of advance increments which were awarded to the petitioner on having higher qualification.

2. Briefly the facts of the case are that the petitioner was appointed as Cashier Grade-I in National Bank of Pakistan on 20.05.1995. The petitioner was allowed five increments on the basis of higher qualification/B.A. In consequence of this order, the petitioner continued to draw the pay fixed in terms of the said order. The Respondent No. 3 *vide* office order dated 13.05.2009 withdrew the said benefit of advance increments given to the petitioner

since 1995. Similarly, the Respondent No. 5 has also issued letter dated 19.05.2009 on the same subject. Hence, this writ petition.

3. It is contended by the learned counsel for the petitioner that the respondents are not entitled to recover the paid amount of increments for a period of 14-years under the principle of *locus poenitentiate*.

4. On the other hand, learned counsel for the respondents submits that the writ petition is not competent as their rules are non-statutory. He further states that the petitioner was not entitled to have incentives increments as he has not improved his qualification during service as mentioned in Circular No. 23/93 dated 31.03.1993 issued by respondents' bank. He further submits that rules framed in the year 1980 are non- statutory which impliedly repealed Rules, 1973.

5. Heard. Record perused.

6. The contention of the learned counsel for the respondents that the writ petition is not competent as Rules, 1980 of respondents' bank are non-statutory, has no force. The rules of National Bank of Pakistan Staff Service Rules 1973 were framed with prior approval of the Federal Government. The same could only be repealed by subsequent rules with prior approval of Federal Government Rules, 1980 were undoubtedly framed but merely framing of those Rules would not repeal the earlier statutory Rules, therefore, this objection is overruled. As the rules of respondents' bank of 1973 are statutory, therefore, writ petition is competent. Reference may be made to a case reported as *"National Bank of Pakistan and another v. Punjab Labour Appellate Tribunal and 2 others"* (1993 SCMR 105).

7. The petitioner was allowed to receive five increments on the basis of his qualification/B.A. by the respondent's bank. The petitioner has received the said increments *bona fide* and without committing any fraud upon the respondents. As the disputed amount has been received by the petitioner, therefore, the respondents are not entitled to recover the amount drawn by the petitioner under the principle of *locus poenitentiate*. Reference may be made to a case reported as *"The Engineer in Chief Branch through Ministry of Defence, Rawalpindi and another v. Jalaluddin"* (PLD 1992 Supreme Court 207). Relevant portion of the judgment is reproduced herein below:

> "It is therefore, clear that the Tribunal has also not disputed the contention of the appellant that respondent was not entitled to be fixed in Grade-11 of National Pay Scale. The principle of *locus poenitentiae* was invoked by the learned Tribunal in aid of the respondent. Having gone through the facts of the case, we have come to the

conclusion that this principle is not attracted in the present case. Additionally, under Section 21 of the General Clauses Act, the authority which can pass an order, is entitled to vary, amend, add to or to rescind that order. The order under which the payment was made to the respondent had no sanction of law. *Locus poenitentiae* is the power of receding till a decisive step is taken. But it is not a principle of law that order once passed becomes irrevocable and it is past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of an illegal order. The appellants when came to know that on the basis of incorrect letter, the respondent was granted Grade-11, they withdrew the said letter. The principle of *locus poenitentiae* would not apply in this case. However, as the respondent had received the amount on the *bona fide* belief, the appellant is not entitled to recover the amount drawn by the respondent during the period when the latter remained in the field. Learned counsel for the appellants had submitted that the appellants had drawn Rs. 12,890.86 (Rupees twelve thousand, eight hundred, ninety and paisa eighty six only) during this period but the Engineer-in-Chief had directed the recovery of Rs. 1,860.00 only (Rupees one thousand, eight hundred, sixty and paisa nil only). We consider that as far as the recovery of amount in question is concerned, the principle of *locus poenitentiae* would be applicable and the appellants are not entitled to recover the amount. The appellants have themselves taken a liberal view and the recovery of only 12 months is being made."

8. For what has been discussed above, this writ petition is allowed and the impugned office order dated 13.05.2009 and impugned letter dated 19.05.2009 are hereby declared as illegal and without lawful authority. No order as to costs.

(R.A.) Petition allowed.

PLJ 2016 Lahore 801

Present: **SHAHID MUBEEN, J.**

SARDAR MUHAMMAD UMAR--Petitioner

versus

GOVERNMENT OF PUNJAB, etc.--Respondents

W.P. No. 32535 of 2015, decided on 20.11.2015.

Land Acquisition Act, 1894 (I of 1894)--

----Ss. 4, 5, 6, 11 & 18--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Land was acquired for public purpose--Notification--Validity of notification was challenged--Acquisition proceedings--Validity--Award had been announced after considering claim relating to land of petitioner and if compensation awarded was not acceptable to him, he had a right to file a reference under Section 18 of Act--Declaration has got presumption of conclusive evidence of fact that land was acquired for public purpose--Land being agriculture would not be acquired and instead government land should be acquired, there was no prohibition with regard to acquisition of land for its being culturable or non-culturable. [Pp. 803, 804 & 805] A, B & C

PLD 2009 SC 217; PLD 2008 SC 335 *ref.*

Mr. Zain Sikandar, Advocate for Petitioner.

Rana Shamshad Khan, Addl. Advocate General for State alongwith Qaiser Raza Hussain, Land Acquisition Collector Office of Collector, District Lahore.

Date of hearing: 20.112015.

ORDER

Through the instant writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called into question the legality and validity of Notifications No. LAC/616-2014 dated 18.11.2014, No. SR/606, dated 09.02.2015 and No. SR/2252, dated 04.05.2015 issued under Sections 4, 5 and 6 of the Land Acquisition Act, 1894 respectively.

2. Briefly facts of the case as discernable from the contents of this petition are that the petitioner is owner of land measuring 116 kanals and 07 marlas situated in Mouza Manga Ottar Tehsil Raiwind, District Lahore falling in Khewat Nos. 124 and 128 Khatooni Nos. 223 and 227 according to record of rights for the year 2011-2012. Out of the said land, *vide* notifications dated 18.11.2014, 09.02.2015 and 04.05.2015, land measuring 20 kanals, 06 marlas and 170 Sq.ft. was acquired by the Punjab Government Population Welfare

Department, Lahore, for public purpose namely "Establishment of Provincial Warehouse Punjab". The petitioner filed his objections *vide* applications dated 10.03.2015 and 12.09.2015 before Respondent No. 3 but he did not receive any response. Hence this writ petition.

3. It is contended by the learned counsel for the petitioner that adjacent to the land of the petitioner sufficient government land is available, therefore, the respondent should acquire the same land instead of land of the petitioner. He further states that the acquisition proceedings are violative of fundamental rights of holding property as enshrined in Articles 23 and 24 of the Constitution of Islamic Republic of Pakistan, 1973. He further states that his land being agriculture should not be acquired. On the other hand learned Additional Advocate General contends that the acquisition proceedings have been carried out in accordance with the provisions of Land Acquisition Act, 1894. He further states that the land in question is required for public purpose. He further states that the law does not differentiate between agriculture and non-agriculture land when the same is required for public purpose. He further states that objection regarding availability of government land in the area is no ground for the acquisition of proposed land.

4. Arguments heard. Record perused.

5. The land of the petitioner has been acquired in accordance with law for the purpose namely "Establishment of Provincial Warehouse Punjab", by the Government of Punjab, Population Welfare Department, Lahore. After observing all legal formalities Respondent No. 3/Land Acquisition Collector, Lahore, has announced the award under Section 11 of the Land Acquisition Act, 1894 on 10.11.2015. The petitioner is estopped to file the instant writ petition as he availed adequate remedy in the shape of filing objections under Section 5(a) of the Act *ibid*, which was duly discussed during inquiry conducted by Respondent No. 3/Land Acquisition Collector, Lahore and subsequently approved by Respondent No. 4/Commissioner Lahore Division *vide* Letter No. SR/1936, dated 14.04.2015. The award has been announced after considering the claim relating to the land of the petitioner and if the compensation awarded is not acceptable to him, he has a right to file a reference under Section 18 of the Act *ibid*.

6. The petitioner has challenged the *vires* of the notifications of Sections 4, 5 and 6 of the Land Acquisition Act, 1894. This argument of the learned counsel for the petitioner is fully answered in a Suo Motu Case No. 13 of 2007 reported in PLD 2009 SC 217 wherein the Hon'ble Supreme Court of Pakistan has held as under:

"The Act provides a systematic scheme for taking measurements of the property, assessment of its value and payment of compensation to the person interested, besides remedy for adjudication of rights of aggrieved persons in accordance with well-known norms of administration of justice. In the case involving any dispute of measurement of property or determination of its market value, the Act provides a remedy through a reference by the Collector to the Civil Court for settlement of these disputes where parties have the opportunity to adduce evidence in support of their stance. Similarly, disputed factual questions regarding non-fulfillment of conditions precedent for issuance of notification under the Act and the question as to whether acquisition is for public purpose or not, can be determined by the Civil Court. In the instant case, prima facie laying of Housing Scheme for the utility/use of public-at-large, as compared to some individuals, is a public purpose within the meaning of Section 4 of the said Act which was published in official gazette and copies thereof were affixed at conspicuous places at the land under acquisition, thus, the requirements of law were sufficiently met."

The other contention of learned counsel for the petitioner that instead of acquiring land of the petitioner, the respondent should acquire the adjacent land of the government, which is lying vacant. The contention of the learned counsel for the petitioner regarding the availability of land owned by the government is no ground to question the acquisition of the proposed land. The acquiring agency has to see the suitability of the land for the purpose of proposed scheme.

7. In this case notification under Section 6 of the Land Acquisition Act, 1894, has been issued as well, which provision is reproduced herein below:-

"6. Declaration that land is required for a public purpose.--(1) .....

(2) .....

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the Provincial Government may acquire the land in manner herein after appearing."

According to sub-section (3) of Section 6 of the Act *ibid*, the declaration has got the presumption of conclusive evidence of the fact that the land was acquired for the public purpose. Reference may be made to case titled *Muhammad Ashiq and another vs. Water and Manpower Development Authority, Lahore through Chairman, WAPDA House and another*

reported in PLD 2008 SC 335. The relevant portion of the judgment is reproduced herein below:

> *"8. We have found from the above noted para that the land was being acquired by the Government at the public expenses. Secondly, the land was being required for public purpose, namely, for the construction of WAPDA offices and official residential colony. This aim and purpose was again reiterated and declaration to that effect was also got published by the Provincial Government under Section 6 of the Land Acquisition Act, 1894. According to sub-section (3) of Section 6 of the Land Acquisition Act, 1894, the said declaration has got the presumption of conclusive evidence of the fact that the land was acquired for the public purpose. After the publication of this declaration, the presumption was to be rebutted by the present petitioners through sound material and cogent evidence. Mere plea that the land of Seth Abid and his relative was not acquired although it was situated within the area surrounded by the area being acquired for the public purpose or the acquisition was based on mala fides. The explicit words of acquisition of land in dispute, by the Government at the public expense in the Notification under Section 4 of the Land Acquisition Act, 1894 are sufficient to hold that the land was being acquired by the Government for the purpose of construction of WAPDA offices and residential colony. The Government was to decide as to which land was suitable for its purpose. Therefore, no mala fides could be attributed to the Government merely on this plea. The plethora of judgments have found place in the judgments of the learned Division Bench as well as the learned Single Judge in Chamber of the Lahore High Court, Lahore, which need not be repeated in this judgment."*

As regards the other contention of the learned counsel for the petitioner that the land of the petitioner being agriculture should not be acquired and instead Government land should be acquired, there is no prohibition in the Land Acquisition Act, 1894 with regard to acquisition of land for its being culturable or non-culturable.

8. The Land Acquisition Act, 1894, permits the acquisition of land in accordance with the provisions thereof. The expression "land" has been defined in Section 3(a) of the Act *ibid* in the following terms:

"3. Definitions

In this Act, unless there is something repugnant in the subject or context:

(a) the expression "land" includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

The aforesaid definition of expression of "land" used in the Act of 1894 does not distinguish between culturable or non-culturable land, whether situated in the vicinity of town or not.

The learned counsel for the petitioner has been unable to point out any provision in the statute i.e. the Land Acquisition Act, 1894, which exempts culturable land from acquisition thereunder.

9. Sequel to the above, this writ petition has no force, hence dismissed leaving the parties to bear their own cost.

(R.A.) Petition dismissed.

PLJ 2016 Lahore 809

Present: **SHAHID MUBEEN, J.**

ABDUL RAZZAQ--Petitioner

versus

LAHORE DEVELOPMENT AUTHORITY, etc.--Respondents

W.P. No. 21608 of 2015, decided on 14.7.2015.

Constitution of Pakistan, 1973--

----Art. 199--Punjab Employees Efficiency Discipline and Accountability Act, 2006, S. 7(b)--Constitutional petition--Show-cause notice--Dismissed from service--No further inquiry can be initiated by way of notice--Validity--It is settled principal of law that writ petition is not maintainable against show-cause notice, summons or notice as final order is yet to be passed and if any adverse order is passed then petitioner may be at liberty to challenge same by taking all objections/points available to him--Show-cause notice, summons or notice may be assailed before High Court in Constitutional jurisdiction--Therefore, interference of High Court in matter is not warranted by law--Writ petition was premature and not maintainable against intermediate stages or steps of departmental disciplinary proceedings--If an order of dismissal was passed in an inquiry, petitioner ceased to be a civil servant on passing of such an order and one who stands dismissed from service could not be further dismissed from it. [Pp. 810 & 811] A, B & C

Mr. Mehboob Azhar Sheikh, Advocate for Petitioner.

Date of hearing: 14.7.2015.

ORDER

The petitioner through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has prayed that a writ may kindly be issued to the effect that

the petitioner being a dismissed employee cannot be proceeded under Punjab Employees, Efficiency, Discipline and Accountability Act, 2006, therefore, initiation of inquiry be declared illegal, unlawful and *ultra vires* to the provisions of Punjab Employees Efficiency Discipline and Accountability Act, 2006 (PEEDA Act, 2006) and order/notices dated 18.06.2015 and 30.06.2015 may kindly be ordered to be set aside.

2. Briefly the facts of the case discernable from this petition are that the petitioner was appointed as Assistant Director on 19.10.1993 in Lahore Development Authority. He was served with a show-cause notice dated 24.01.2014 under Section 7(b) of PEEDA Act, 2006. An inquiry was conducted and he was dismissed from service *vide* order dated 12.06.2014 under Section 2(f) of PEEDA Act 2006. The petitioner assailed the order dated 12.06.2014 by filing departmental appeal under Section 16 of the PEEDA Act 2006 before the Chief Engineer TEEPA. LDA, Lahore. However, the same could not be heard for a long time by the competent authority, forcing the petitioner to file *i.e.* Writ Petition 1769 of 2015, which is still pending before this Court. The petitioner again was served with a notice of inquiry dated 18.06.2015 as well as 30.06.2015 by the respondent authorities which he assails through the instant writ petition.

3. It is contended by the learned counsel for the petitioner mainly that he was dismissed from service *vide* order dated 12.06.2014, hence no further inquiry can be initiated against him by way of notice/order dated 18.06.2015 and 30.06.2015. It is further contended that as the petitioner is no more in service being dismissed employee, therefore, provisions of sub-sections (i), (ii) & (iii) of Section 4 of PEEDA Act, 2006, do not apply, hence notices referred to above may kindly be declared illegal. Learned counsel for the petitioner has relied upon 2013 SCMR 1707, 2015 SCMR 705 and 2014 PLC (CS) 353.

4. Arguments heard. Record perused.

5. It is settled principal of law that the writ petition is not maintainable against show-cause notice, summons or notice as final order is yet to be passed and if any adverse order is passed then the petitioner may be at liberty to challenge the same by taking all objections/points available to him. I am not persuaded to accept the contention of the learned counsel for the petitioner that show-cause notice, summons or notice may be assailed before this Court in Constitutional Jurisdiction. Therefore, interference of High Court in the matter is not warranted by law. The writ petition at present stage is premature and not maintainable against intermediate stages or steps of departmental disciplinary proceedings. The respondent authorities are fully competent to issue the impugned notice/order of inquiry. In the instant case the petitioner has been served only

with notice of inquiry. He should put up his appearance before the respondent authorities and file his reply in defence whatever he likes.

In this regard reference may be made to 1969 SCMR 154, 2000 SCMR 1017, 2002 SCMR 805, 2008 PLC (CS) 129, 2001 PLC (CS) 939, 1984 CLC 142, 2002 CLC 42 and PLJ 2002 Lahore 1479.

6. The other contention of learned counsel for the petitioner that as he had already been dismissed from service, hence even on a fresh ground he cannot be proceeded against. In support of his argument he relies upon Section 4 of PEEDA Act 2006 which reads as under:

"(4) It shall apply to--

(i) employees in government service;

(ii) employees in corporation service; and

(iii) retired employees of government and corporation service; provided that proceedings under this Act are initiated against them during their service or within one year of their retirement."

The answer to this contention of learned counsel for the petitioner has been completely given in case law titled *Abdul Hague Shah vs. Assistant Commissioner/Collector, Saddar Sub-Division Gujranwala* (1990 SCMR 782). In this case the contention of the petitioner was that if an order of dismissal was passed in an inquiry, the petitioner ceased to be a civil servant on passing of such an order and one who stands dismissed from service could not be further dismissed from it. This contention of the petitioner was squarely dealt with by the Hon'ble Supreme Court of Pakistan in Paragraph No. 5 of the judgment which reads as under:

> "5. As regards the second contention of the learned counsel for the petitioner there is a decision of this Court that pending an appeal a person dismissed from service has to be treated as in service (reported as *Rashid Ahmad v. The State* PLD 1972 SC 271 at page 277."

7. Admittedly against the dismissal order dated 12.06.2014 the Writ Petition No. 1769 of 2015 is pending before this Court.

8. The relied upon judgments by the learned counsel for the petitioner are altogether on different facts and circumstances and law, hence are distinguishable.

9. For what has been discussed above, this petition has no merit, hence dismissed in limine.

(R.A.) Petition dismissed

KLR 2016 Civil Cases 67

[Lahore]

Present: SHAHID MUBEEN, J.

Mehmood Anwer, etc.

Versus

Addl. District Judge, etc.

Writ Petition No. 14906 of 2012, decided on 15th October, 2015.

CONCLUSION

(1) Plaintiff while filing suit for specific performance is bound to implead the subsequent vendee provided that such subsequent sale and name of the subsequent vendee is in his knowledge.

SPECIFIC PERFORMANCE --- (Impleadment of subsequent vendee)

Constitution of Pakistan (1973)---

---Art. 199---Specific Relief Act, 1877, S. 12---Civil Procedure Code, 1908, O. I, R. 10---Suit for specific performance---Impleadment of subsequent vendee---Concurrent findings of Courts below did not suffer from any illegality and material irregularly---In order to avoid multiplicity of litigation and to protect right of subsequent vendee she should be impleaded as party to defend her right in suit land, if any---Impleadment of subsequent vendee could not be said mere formality or an exercise in routine but a dire requirement of the circumstances---All such three parties were supposed to have interacted among themselves with regard to sale and purchase of one and same property---Writ petition dismissed.

(Para 5, 6, 8)

Ref. 1997 SCMR 171.

دعویٰ تعمیل مختص میں مابعد خریدار کو فریق مقدمہ بنانے کیلئے درخواست درست طور پر منظور ہوئی تھی۔ ہائی کورٹ نے رٹ پٹیشن خارج کر دی۔

[In specific performance suit, application for impleadment of subsequent vendee was correctly allowed. High Court dismissed writ petition].

For the Petitioners: **Ch. Abdul Majeed, Advocate.**

For the Respondents: **Mian Ghulam Rasool, Advocate.**

Date of hearing: **15th October, 2015**.

ORDER

SHAHID MUBEEN, J. --- Through the instant writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, petitioners have called into question the legality and validity of order dated 15.10.2011 passed by learned Civil Judge, Faisalabad whereby the application under Order I, Rule 10, C.P.C. filed by respondents No. 3 and 4 was allowed and order dated 19.05.2012 passed by learned Additional District Judge, Faisalabad whereby the revision petition of the petitioners was dismissed.

2. Briefly the facts of the case are that respondents No. 3 and 4 instituted a suit for specific performance of agreement to sell dated 23.06.2003 with respect to land fully described in the head note of the plaint. They also challenged the legality and validity of sale-deed bearing No. 1753, dated 20.10.2005 in favour of petitioners and respondents No. 13 to 15. The suit was fully contested by respondents by filing written statement. Out of the divergent pleadings of the parties ten issues including Relief were framed. The respondents No. 3 and 4 filed an application under Order I, rule 10, C.P.C. for impleading the Mst. Kalsoom Akhtar/petitioner No. 2 as party to the suit in whose favour Abdul Majeed, the original owner got executed sale-deed bearing No. 2014, dated 15.12.2005. This application was contested by the petitioners. Therefore, vide order dated 15.10.2011 passed by learned Civil Judge, Faisalabad, the application was allowed and Mst. Kalsoom Akhtar who is petitioner No. 2 in this writ petition was allowed to be impleaded as party to the suit. The order dated 15.10.2011 was assailed by petitioner No. 1 and respondents No. 13 and 15 which was dismissed vide order dated 19.05.2012, passed by learned Additional District Judge, Faisalabad, hence, this writ petition.

3. It is contended by the learned counsel for the petitioners that Mst. Kalsoom Akhtar petitioner No. 2 is neither necessary nor proper party. The application has been filed just to prolong the proceedings. On the other hand, learned counsel for respondents No. 3 and 4 has supported the impugned orders passed by Courts below with the assertion that petitioner No. 2 Mst. Kalsoom Akhtar is necessary and proper party being subsequent vendee.

4. Arguments heard. Record perused.

5. The concurrent findings of Courts below do not suffer from any illegality and material irregularity. Mst. Kalsoom Akhtar/petitioner No. 2 has purchased the share of the property by Abdul Majeed without numbers in the disputed Khewat. Even otherwise, in order to avoid multiplicity of litigation and to protect the right of Mst. Kalsoom Akhtar/petitioner No. 2 she should be impleaded as party to defend her right in the suit land, if any. It is be borne in mind that Abdul Majeed is the owner from whom the respondents No. 3 and 4 as well as the petitioner No. 1 and respondents No. 13 to 15 and petitioner No. 2 i.e. Mst. Kalsoom Akhtar, have purchased the property.

6. Plaintiffs/respondents No. 3 and 4 while filing the suit for specific performance were bound to implead the subsequent vendee, provided that such subsequent sale and the name of subsequent vendee is in their knowledge. The impleadment of subsequent vendee cannot be said mere formality or an exercise in routine but a dire requirement of the circumstances. All such three parties are supposed to have interacted among themselves with regard to the sale and purchase of one and same property. Their action and conduct individually are most likely to give rise to certain facts which are co-related to the actions and conduct of all other. Some facts are alleged while others are withheld by all or some of the parties surrounding one pivotal question in dispute. In these conditions, the conduct of all factual side being directly co-related and interdependent, hence, they all must face each other in one trial or proceedings. When the evidence of the parties is recorded, each must have opportunity to cross-examine the other. Such valuable opportunity is denied to the parties when they face each other separately in different trials where one of them is isolated in each of the proceedings. Facts which are suppressed in one suit for one's own convenience might not be easily suppressed when all at one time are available before the Court.

7. Reference may also be made to the case reported as "Rashid Ahmad v. Mst. Jiwan and 5 others" **(1997 SCMR 171)** relevant portion of which is reproduced as under:---

> "We have heard the learned counsel for the appellant. The respondents did not appear and contest the appeal. The learned Judge in Chambers declined to implead the appellant as respondent in the pending R.S.A. solely on the ground that the property was transferred in his favour by one of the parties to the pending litigation during the pendency of 1st appeal. The view taken by the learned Judge in Chambers does not appear to be correct. The doctrine of lis pendens contained in Section 52 of the Transfer of Property Act, 1882 merely provides that a transfer of immovable property during pendency of a suit, which is not collusive in nature, in which the right to such immovable property is directly and specifically in question,

cannot defeat or affect the rights of any party to the proceedings under any decree or order which may be made in such suit. This provision does not preclude the transferee pendente lite from being made a party to the pending proceedings on the basis of such transfer. Order XXI, Rule 10, C.P.C. which regulates the proceedings of a suit provides that in cases of assignment, creation or devolution of any interest during pendency of suit, the suit may be continued by or against the person to or upon whom such interest has come or devolved. Another provision which is relevant in such situation is Section 146 of C.P.C. which provides that where any proceedings may be taken or application may be made by or against any person claiming under him. Provisions of Section 146 and Order 22, C.P.C. apply equally to appeals."

8. Sequel to the above, this writ petition having no force is **dismissed** leaving the parties to bear their own costs.

Petition dismissed.

2016 UC 277

Before Shahid Mubeen, J. (Lahore)

W.P. No. 21445 of 2015 dismissed on 13.7.2015.

A-COM DISTRIBUTORS---Petitioner

versus

SHAHID MAHMOOD---Respondent

Punjab Consumer Protection Act, 2005---

S. 4. Application under S. 4 seeking dismissal/rejection of complaint filed under the Act against applicant would be rightly dismissed by Consumer Court with costs of Rs. 5,000/- when application was found to be false, frivolous and filed with *mala fide* intention to prolong the proceedings in complaint before Consumer Court. High Court upholding such order of Consumer Court and dismissing writ petition filed to challenge it. (P. 279)

Zaheer-ud-Din for petitioner.

ORDER

SHAHID MUBEEN, J.---The petitioner filed an application under Section 4 of Punjab Consumer Protection Act, 2005 praying therein that the complaint be dismissed being faise with special costs. This application was dismissed *vide* order dated 7.7.2015.

2. Briefly the facts of the case are that respondent No. 2 filed a complaint under Section 25 of Punjab Consumer Protection Act, 2005, against respondent No. 3. This application was contested by respondent No. 3 by filing reply to the same. The evidence of the petitioner has been completed and the case has been fixed for recording of evidence of respondent No. 3. The petitioner moved an application under Section 4 of Punjab Consumer Protection Act, 2005 for the dismissal of the complaint or in alternate for the rejection of the complaint. This application was duly contested by the respondent No. 2. Learned District Consumer Court, Lahore *vide* impugned order dated 7.7.2015 dismissed the application subject to payment of costs of Rs. 5000/-.

3. It is contended by the learned counsel for the petitioner in fact he has filed an application for impleadment as party in the complaint. It is further contended by the learned

counsel that the complaint is barred by limitation as same has been filed after 30-days according to Section 28(4) of the Punjab Consumer Protection Act, 2005. The applicant is neither service provider nor manufacturer according to Punjab Consumer Protection Act, 2005, hence, same is not maintainable as no notice under Section 28 of the Punjab Consumer Protection Act, 2005 has served upon the petitioner.

4. Heard. Record perused.

5. From the bare perusal of the application, it reveals that petitioner in his application under Section 4 of the Punjab Consumer Protection Act, 2005 has prayed for the dismissal or rejection of the complaint and not for impleading himself as party. The evidence of respondent No. 2 has been completed and case is fixed for recording of evidence of respondent No. 3 for which last opportunity was granted. It appears that the application has been filed with *mala fide* intention just to prolong the proceedings. The application appears to be false, frivolous and imposition of cost of Rs. 5000/- is justified.

6. From the contents of the complaint the same appears within time as has been fully described by the learned District Consumer Court, Lahore in the said impugned order. The other contention of the learned counsel for the petitioner has also been fully discussed by the Court. The petitioner may file application for impleadment as party.

7. For what has been discussed above, this petition has no merits and **dismissed** with no orders as to costs.

Impugned Order Upheld/Writ Petition Dismissed.

2017 CLC 273

[Lahore (Bahawalpur Bench)]

Before Shahid Mubeen, J

IFTIKHAR HUSSAIN----Petitioner

Versus

DISTRICT JUDGE, RAHIM YAR KHAN and others----Respondents

T.A. No.1 of 2016, decided on 6th January, 2016.

Civil Procedure Code (V of 1908)---

----Ss. 24 & 24-A----Transfer application---Mere utterances of opposite party/suspicion/artificial apprehension not sufficient ground for transfer---Allegations of partiality and bias to be supported with record---Petitioner filed application for transfer of petition and civil suit to any other court on the ground that trial court was partial towards him---Bias in a Court---Proof---Transfer application was dismissed by the District Judge on appeal---Utterances of the opposite party to the litigation made outside the court, could in no manner be termed as sufficient ground for transfer of the cases from one court to another---Presiding Officer would not be responsible for the irresponsible utterances of the litigants---Contention of the applicant that the trial court was partial against him was not supported by the record and the same appeared to be an afterthought---In order to sustain the bias against the judge, some act or expression of the judge must be shown to have been available or visible on record---Petitioner had not placed on record some tangible evidence in support of the allegation---Mere suspicion or artificial apprehension was not sufficient for transfer of the cases---Bald statement containing the allegations was not sufficient to allow the transfer---Transfer of a case was deemed expedient whenever the attitude and conduct of the Presiding Officer was noticed or apprehended to be prejudicial---If the Presiding Officer thought that he would not be able to do justice in a given situation, then, he might decline to take up the case, but if he did not decline to do that, then, he would be answerable if he did not perform his duty dispassionately---Lapse or otherwise of the Presiding Officer/decision maker, however, was to be judged from the decision itself and not from other circumstances---Presiding Officer had denied the allegations levelled against him before the court below and had not declined that he would not be able to do justice in the given situation---Transfer application was, therefore, dismissed in limine in circumstances.

Farooq Ahmad Khan Leghari and 37 others v. Sh. Muhammad Rashid, Chairman, Federal Land Commission and another PLD 1981 Lah. 159 rel.

Mirza Muhammad Nadeem Asif for Petitioner.

ORDER

SHAHID MUBEEN, J.--- Through the instant transfer application, applicant seeks transfer of rent petition and civil suit with the same title "Muhammad Mazhar v. Iftikhar Hussain" filed by the respondent No.3 and civil suit titled "Iftikhar Hussain v. Muhammad Mazhar Javed" filed by the applicant from the court of learned Senior Civil Judge, District Rahim Yar Khan/respondent No.2 to any other court of competent jurisdiction at District Rahim Yar Khan.

2. Brief facts of the application are that a rent petition and a civil suit filed by the respondent No.3 against the applicant is pending adjudication before respondent No.2 and fixed for hearing on 13.01.2016 and 05.01.2016 respectively. The applicant has filed an application before respondent No.1 for transfer of said cases from the Court of respondent No.2 to any other Court of competent jurisdiction, which was dismissed vide order dated 04.01.2016. Hence, this petition.

3. It is contended by the learned counsel for the petitioner that behavior of the learned trial court is partial against the petitioner, hence, he will not get justice by the presiding officer of the trial court. Further contends that opposite party is uttering that learned Trial Court is going to decide the case in his favour.

4. Arguments heard. Record perused.

5. The utterances of the opposite party to the litigation made outside the Court can in no manner be termed sufficient ground for transfer of cases from one Court to other as the Presiding Officer obviously would not be responsible for the irresponsible utterances of the litigants before him. The contention of the learned counsel for the petitioner that the learned trial court is partial against the petitioner is not supported by the record and appears to be an afterthought and has been made out to seek transfer of cases. It is to be remembered that the transfer of case is deemed expedient whenever it is noticed or apprehended that the attitude and conduct of the Presiding officer was prejudicial. However, in order to sustain the bias against the judge, it must be shown that some act or expression of judge must be available or visible on record. Mere suspicion or artificial apprehension was not sufficient for transfer of the case. The petitioner has not placed on

record some tangible evidence in support of the allegation. A bald statement containing the allegation was not sufficient to allow the transfer.

6. From the arguments of the learned counsel for the petitioner, it appears that he is alleging that the presiding officer is biased, therefore, he will not get justice. To controvert this argument, reference may be made to a case reported as "Farooq Ahmad Khan Leghari and 37 others v. Sh. Muhammad Rashid, Chairman, Federal Land Commission and another" (PLD 1981 Lahore 159) passed by learned Division Bench of this Court, relevant portion of the same is reproduced herein below:-

> "53. It is important to note that this concept of bias is repugnant to Islamic Law. The Holy Qur'an, enjoins upon decision-makers to adjudicate in every matter dispassionately without fear or favour. It exhorts to prepare themselves for the doing of the job than be discouraged. The purpose behind is to build up such a character in decision makers that they are able to do justice irrespective of the parties before them or their personal likes or dislikes of the parties or the subject-matter. Further, it also wants to inculcate in the litigants a habit of accepting a fact for ever that no injustice shall visit them even though the decision maker is a close relation, a friend or enemy of any one of them.
>
> "54. In Chapter XXXVIII, Verse 27 Qur'an commands "O David Lo! We have set thee a viceroy in the earth, therefore, judge aright between mankind, and follow no desire that it beguile thee from the way of Allah, Lo! Those who wander from the way of Allah have an awful doom, for as much as they forgot the day of reckoning." Verse 153, Chapter VI provides:
>
> "Give full measure and full weight in justice. We task not any soul beyond its scope. An if ye give your word, do justice thereunto, even though it be (against) a kinsman; and fulfill the covenant of Allah. This He commandeth you that haply ye may remember.

Similarly in Chapter IV, verse 135, it is laid down:

> "O ye who believe! Be ye staunch in justice, witnesses for Allah, even thought it be against yourselves or (your) parents or (your) kindred, whether (the case of) a rich man, or a poor man, for Allah is nearer unto both (than ye are). So follow not passion lest you lapse (from truth) and if ye lapse or fall away, then lo! Allah is ever informed or what ye do."

Chapter V, verse 8:

> "O ye who believe! Be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that ye deal most justly. Deal justly, that is nearer to your duty. Observe your duty to Allah. Lo! Allah is informed of what ye do."

55. It will be seen from the above provisions that God Almighty enjoins upon the judges not to let their passions lead them astray or away them from the path of justice set down for them. The only exception made is that if a decision-maker thinks that he will not be able to do justice in a given situation, he may decline to take up that job, for God Almighty does not task any soul more than its scope. However, if he gives a word i.e. undertakes and does not decline to do that, he shall be answerable if he does not perform it dispassionately. Consequently, the lapse or otherwise of a decision-maker is to be judged from the decision itself and not from other circumstances. Again a decision may be quashed by a higher authority in appeal or revision on the ground that it is not correct or valid but it will not be interfered with for the reason that there was real likelihood of bias in view of the facts surrounding the decision-maker viz-a-viz that case. Rather, the decision-maker may be personally liable in case there is a deliberate lapse.

6. I have gone through the order dated 04.01.2016 passed by the learned District Judge, Rahim Yar Khan whereby the application was dismissed after calling the comments from learned presiding officer of trial court who denied the allegations levelled in the petition. From perusal of record, it reveals that learned presiding officer of trial court has not declined that he will not be able to do justice in given situation.

7. Sequel to the above discussion, this petition has no force, hence, same is dismissed in limine with no orders as to cost.

SL/I-3/L Application dismissed.

2017 MLD 141

[Lahore (Rawalpindi Bench)]

Before Shahid Mubeen, J

ZUBAIR KHAN---Petitioner

Versus

HABIB UR REHMAN and another---Respondents

C.R. No.835 of 2015, decided on 28th April, 2016.

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

----Ss.151 & 12(2)---Limitation Act (IX of 1908), Art. 181---Inherent jurisdiction of court---Scope---Petition for setting aside of decree passed in an application under S.12(2), C.P.C.---Limitation---Application moved under S. 12(2), C.P.C. was dismissed for non-prosecution and petition to set aside the said order was dismissed being time barred---Validity---No provision in Civil Procedure Code, 1908 existed to recall/set aside the order dismissing the application for restoration of petition under S. 12(2), C.P.C,---Litigant could not be left without any remedy---Inherent jurisdiction of court could be invoked when there was no other specific provision to deal with the issue---Petitioner could claim relief under S. 151, C.P.C. in circumstances---No limitation had been prescribed to invoke inherent jurisdiction of the court and application so filed would be governed by Art. 181 of Limitation Act, 1908---Application to invoke inherent jurisdiction could be filed within three years when right to apply accrued---Limitation was mixed question of law and fact---Petitioner had made efforts to explain the delay by projecting sufficient cause---Application under S.12(2), C.P.C. was dismissed at 12.45 (after noon)---High Court observed that cases should not be dismissed in the early hour of the day---Court should refrain from dismissing the cases in default till end of the day when the court was rising---Even mistake with regard to date of hearing could be bona fide by misapprehension of counsel or wrong communication by clerk of Court---Impugned orders were set aside and application filed under S. 12(2), C.P.C. would be deemed to be pending before the Trial Court who should decide the same in accordance with law---Revision was allowed accordingly.

Inayat Masih v. Member (Revenue), Board of Revenue and 2 others 1985 CLC 1609; House Building Finance Corporation v. Mrs. Sarwar Jehan PLD 1992 Kar. 329; PLD 1979 SC 18; PLD 1985 Pesh. 35; PLD 1981 Pesh. 339; 1981 SCMR 533; PLD 1995 Kar. 267 and PLD 1957 Lah. 420 rel.

(b) Administration of justice---

----Law favours adjudication of cases on merits rather than on technicalities.

Ch. Muddasir Niaz for Petitioner.

Nemo for Respondent No.1.

ORDER

SHAHID MUBEEN, J.---None has entered appearance on behalf of respondent No. 1, therefore, he is proceeded against ex parte.

2. Through the instant revision petition under section 115, C.P.C., the petitioner has called into question the legality and validity of order dated 09.07.2015 whereby the application of the petitioner under section 12(2), C.P.C. was dismissed due to non-prosecution and order dated 02.09.2015 whereby application of the petitioner to set-aside the order dated 09.07.2015 was also dismissed being time barred passed by respondent No.2.

3. Briefly stated the facts of the case are that petitioner was tenant under respondent No.1 qua a shop at Railway Carriage Factory, Shopping Centre, Dhoke Hasu, Rawalpindi for the business of photo studio at the rate of Rs.5000/- per month as rent and security amount has also been deposited by the petitioner to respondent No.1 at the time of taking possession of said shop. The petitioner had paid rent of the shop regularly through cheque No.9659078 amounting to Rs.11,000/- and cheque No.9659079 amounting to Rs.8000/- to the respondent No.1 but he with mala fide intention by tampering the cheque No. 9659078 mentioned the amount Rs.211,000/- in place of Rs.11,000/- and registered an FIR No.28 dated 27.01.2011 offence under Section 489-F, Police Station Gunjmandi, Rawalpindi against the petitioner and the petitioner remained in jail due to said FIR. The petitioner filed an application for opinion of hand writing expert before learned Judicial Magistrate, Rawalpindi on 10.05.2011 which was dismissed as the compromise was affected between the parties and the petitioner was acquitted from the charge. The petitioner again started his shop under the tenancy of respondent No.1 and civil litigation regarding shop was also remained pending between the parties which was come to an end in shape of withdrawal of suit as well as appeal on the basis of compromise between the petitioner and respondent No.1. The petitioner was informed through his counsel that an execution petition regarding judgment and decree dated 15.01.2013 passed by learned Additional District Judge, Rawalpindi was pending adjudication before learned Additional District Judge,

Rawalpindi. The petitioner filed an application under section 12(2), C.P.C. which was admitted and the operation of judgment and decree dated 15.01.2013 was suspended by the learned Additional District Judge, Rawalpindi vide order dated 17.03.2014. On 28.05.2015 the case was transferred to the Court of respondent No.2 and next date was given as 09.07.2015 which was due to misunderstanding was noted as 16.07.2015 by the learned counsel for the petitioner and on 09.07.2015 the case was dismissed due to non-prosecution. The petitioner filed an application for setting aside order dated 09.07.2015 which was dismissed by respondent No.2 being time barred on 02.09.2015. Hence this civil revision.

4. Learned counsel for the petitioner contends that sufficient cause was given in the application that the counsel noted wrong date as 17.7.2015 instead of 09.07.2015. Further submits that as sufficient cause was given in the application therefore the learned court should frame issue giving an opportunity to the petitioner to explain his absence on 09.07.2015. Further contends that as sufficient cause was given in the application therefore dismissal of the application on account of fact that same should have been filed within 30-days has no force. Further submits that application was supported by an affidavit therefore the dismissal is illegal as there is no counter affidavit by the respondent No.1 as application was dismissed without hearing the other party. Further submits that application for restoration of application under section 12(2), C.P.C. is governed under Article 181 of the Limitation Act, 1908 which provides period of three years from the date when the right to apply accrues.

5. I have heard the learned counsel for the petitioner and perused the record carefully.

6. The petitioner's application under section 12(2), C.P.C. was dismissed in default vide order dated 09.07.2015. The petitioner filed an application for setting aside of said order on 02.09.2015 which was dismissed by the learned court vide impugned order dated 02.09.2015 on the same day, being barred by time. A thorough survey of C.P.C. will indicate that there is no provision for recalling/setting aside the order dismissing the application for restoration of an application under section 12(2), C.P.C. It will not be out of place to mention here that there are many other proceedings under C.P.C. in respect of which no procedure has been laid down if the same is dismissed for non-prosecution. However, a litigant suffering from such difficulty cannot be left without any remedy because law favours adjudication of cases on merits rather than on technicalities, therefore, in such a situation inherent jurisdiction of the court can be invoked which has been conferred upon the trial, appellate and revisional courts in terms of Section 151, C.P.C.

However, subject to the condition that no other specific provision to deal with the issue is available under C.P.C.

7. As it has been observed herein above that there is no specific provision under C.P.C. to restore the application under section 12(2), C.P.C. dismissed for non-prosecution, therefore the petitioner can claim relief under section 151, C.P.C. It can safely be concluded that for filing of application to invoke inherent jurisdiction of the court no limitation has been prescribed under a particular Article of Limitation Act, 1908, hence, an application so filed shall be governed by residuary provision i.e. Article 181 of the Limitation Act, 1908 according to which application for which no period of limitation has been provided elsewhere in the Schedule or Section 48 of C.P.C., prescribed time limit shall be three years when the right to apply accrues.

8. The application filed by the petitioner could be said to have been filed under Section 151, C.P.C. for restoration of application under section 12(2), C.P.C. Reference may be made to case law reported as "Inayat Masih v. Member (Revenue), Board of Revenue and 2 others" (1985 CLC 1609). The relevant portion of the judgment is reproduced herein below:--

> "5. No provision of law, has been cited in support of the period of limitation applicable to the restoration petition. In absence of such a provision, the Board of Revenue, was possessed of inherent jurisdiction to order restoration of the petitioner provided sufficient cause was shown for the default. In this case, as observed, learned Member, has proceeded to dismiss the petition for restoration solely on the ground that it was barred by time. This, in my view was not a correct approach. Restoration petition could not be thrown out on ground of limitation. An application for restoration of an application for revision is not governed by any express period of limitation. Residuary Article 181 therefore, may be found to be applicable. In that context, the restoration petition, was obviously well within time."

Further reference may be made to case law titled as "House Building Finance Corporation v. Mrs. Sarwar Jehan" (PLD 1992 Karachi 329). Relevant portion of the judgment is reproduced herein below:--

> "The contention of the learned counsel that period for submission of application for restoration of revision application would be governed by Article 163 of the Limitation Act is misconceived. The said Article specifically provides for limitation for submission of application for restoration of suit. The Limitation Act, 1908 does not prescribe any limitation for application for restoration of Revision Application

and, therefore, residuary Article 181, which prescribes limitation for application for which no period of limitation is provided elsewhere in the First Schedule to the Limitation Act, 1908.

In the absence of specific provisions, the Court exercises inherent jurisdiction under section 151, C.P.C. for restoration of revision. No limitation is prescribed under the Limitation Act, 1908 for submission of such application. Therefore, the residuary Article 181 will be applicable. Under this Article, the limitation prescribed is 3 years from the date when the right to apply accrues. The learned counsel in this regard referred to the case of Umer Khan v. Wasim Raza and others (1990 MLD 1062)."

9. The dismissal of the application of the petitioner on the ground that same should have been filed within 30-days, in this regard it is pertinent to mention here that learned court has not referred any Article of the Limitation Act however, it will not be out of place to mention here that Article 163 of the Limitation Act,1908 is not applicable which provides period of limitation for submission of application for restoration of suit. Same is the position with regard to Article 164 of the Limitation Act, 1908 which provides a period of 30 days for setting aside a decree passed ex parte in a suit. In other words, this Article is also limited to suits. Reference may be made to case law PLD 1979 Supreme Court 18.

10. Even otherwise, in the case in hand, limitation is mixed question of law and fact particularly keeping in view the reasons for non-appearance as the petitioner has made efforts to explain the delay by projecting sufficient cause, therefore, in such like cases determination of limitation would be a factual controversy requiring evidence to be adduced by both the parties and it would not be safe and in the interest of justice to decide such issue without giving opportunity to the parties to adduce their evidence.

11. It is also discernable from the record that the application under section 12(2), C.P.C. was dismissed by learned judge at 12.45 p.m. It is now an established principle of law that the cases should not be dismissed in the early hour of the day and should refrain for dismissing the cases in default till end of the day when the court is rising. Reference may be made to case laws PLD 1985 Peshawar 35, PLD 1981 Peshawar 339 and

1981 SCMR 533.

12. Even the mistake about the date of hearing, was not a lapse of category, which could not rightly be excluded from scope of bona fide mistake as such mistake could occur by misapprehension of advocate and some time by unintentional wrong communication by

clerk of Court. Reference may be made to case law PLD 1995 Karachi 267 and PLD 1957 Lahore 420.

13. There is also an important fact that the application for restoration of application under section 12(2), C.P.C. was supported by an affidavit which was not rebutted by filing counter affidavit of the respondent No.1, therefore, the contents of the affidavit will be deemed to be true.

14. Sequel to the above, this civil revision is allowed and the impugned orders dated 09.07.2015 and 02.09.2015 are hereby set aside. The application under section 12(2), C.P.C. shall be deemed to be pending before the learned Additional District Judge concerned who shall decide the same strictly in accordance with law after hearing the parties. No order as to cost.

ZC/Z-19/L Revision allowed.

2017 MLD 590

[Lahore (Rawalpindi Bench)]

Before Shahid Mubeen, J

FATEH MUHAMMAD and 8 others---Petitioners

Versus

ALLAH DITTA and 5 others---Respondents

C.R. No.812 of 2010, decided on 27th April, 2016.

Civil Procedure Code (V of 1908)---

----S. 12(2) & O. XVII, R. 3---Ex-parte decree, setting aside of---Closure of evidence---Adjournment was granted on the previous date at the request of petitioners for production of their evidence---Trial Court had rightly invoked the provision of O. XVII, R. 3, C.P.C.---Petitioners by not producing their evidence had made impossible for the Trial Court to proceed further with the matter---No illegality or infirmity had been pointed out in the impugned judgments passed by the courts below---Revision was dismissed in circumstances.

Ahlian Moori Payeen through representative and others v. Ghulam Muhammad and 7 others 2010 CLC 902 distinguished.

Executive Engineer, Peshawar v. Messrs Tour Muhammad and Sons and 4 others 1983 SCMR 619; Sajida Mussarrat v. Muhammad Shafi and 2 others 1993 CLC 1514; Mst. Arifa Amjad and 2 others v. Abbas Tayyab Dar and another 1990 CLC 1743; Rana Tanveer Khan v. Naseer-ud-Din and others 2015 SCMR 1401; PLD 1990 SC 1192 and PLD 1991 SC 1109 rel.

Malik Nasrullah Awan for Petitioners.

Nemo for Respondents.

ORDER

SHAHID MUBEEN, J.---Through instant civil revision under section 115, C.P.C., the petitioners have called into question the legality and validity of impugned judgment dated 26.09.2009 (copy of decree not appended) passed by the learned Civil Judge, Pind Dadan Khan whereby the application of the petitioners for setting aside the ex parte judgment and decree dated 22.07.2005 in Civil Suit No.180 instituted on 22.10.2003 titled "Allah Ditta and others v. Fateh Muhamamd and others" was dismissed and impugned judgment and decree dated 24.06.2010 passed by learned Additional District Judge, Pind Dadan Khan whereby appeal against the judgment of learned Civil Judge, Pind Dadan Khan filed by the petitioners was also dismissed.

2. Vide order dated 11.12.2015, the respondents were proceeded against ex parte.

3. Briefly stated the facts of the case are that petitioner (Fateh Muhammad) filed an application under Section 12(2), C.P.C. for setting aside the judgment and decree in Civil Suit No.180 instituted on 22.07.2005 titled "Allah Ditta and others v. Fateh Muhammad and others" alleging that respondents have obtained the said decree through fraud and mis-representation. The respondents contested the said application through written reply. Out of the divergent pleadings of the parties following issues were framed:-

i). Whether the application does not lie legally? OPR

ii). Whether the petitioner has not filed this application according to law? OPR

iii). Whether the petitioners know about the suit and they should have filed appeal against the decree? OPR

iv). Whether the petitioners have not come to the court with clean hands? OPR

v). Whether the application has been filed just to delay and deprive the respondents from their legal share? OPR

vi). Whether the petitioners have filed this petition just to harass the respondents and they are entitled to special costs? OPR

vii). Whether the petitioners have no locus standi and application is based on mala fide? OPR

viii). Whether the ex parte decree dated 22.07.2005 titled Allah Ditta and others v. Fateh Muhammad and others is liable to be set aside? OPP

ix). Relief.

The application of the petitioners was dismissed and the right to produce evidence of the petitioners was closed by learned Civil Judge, Pind Dadan Khan vide impugned judgment dated 26.09.2009. The petitioners being aggrieved from the said judgment filed an appeal which was also dismissed by learned Additional District Judge, Pind Dadan Khan vide impugned judgment and decree dated 26.06.2010. Hence, this civil revision.

4. It is contended by learned counsel for the petitioners that neither the petitioners appeared in the Court nor their witnesses, therefore, the suit can be dismissed in default only and their right to produce evidence could not have been closed under Rule 3 Order XVII, C.P.C. as said Rule presupposes the presence of party before the court. He relied upon case law reported as "Ahlian Moori Payeen through representative and others v. Ghulam Muhammad and 7 others" (2010 CLC 902). He further contends that the learned trial court has wrongly applied provision of Order XVII Rule 3, C.P.C. while closing the evidence of the petitioners as on 14.04.2009 the evidence of the petitioners was present and on the said date the case adjourned as the counsel of respondents was not in attendance before the court.

5. I have heard the learned counsel for the petitioners and have gone through the record with his able assistance.

6. The first contention of learned counsel for the petitioners that as they did not appear on 26.09.2009, therefore, the court should have proceeded against ex parte under Order IX of C.P.C. instead of applying provision of Order XVII Rule 3, C.P.C. by closing their evidence. This contention of learned counsel for the petitioners has been completely answered in case law titled as "Executive Engineer, Peshawar v. Messrs Tour Muhammad

and Sons and 4 others" (1983 SCMR 619). The relevant portion of the judgment is reproduced herein below:--

> "This Rule applies where a party who is granted time to perform some act, not only fails to do so but is also absent on the date to which the hearing is adjourned. It is immaterial whether the adjournment was granted at the instance of the party or for other reasons. Where a defendant does not appear at an adjourned hearing, this rule applies irrespective of whether he appeared at the first hearing or not and the Court has to exercise its discretion its hands are not tied by the previous ex parte order. For these reasons we do not consider this petition has any merit and is, therefore dismissed."

This view of Hon'ble Supreme Court of Pakistan has been followed by this Court in case law titled as "Sajida Mussarrat v. Muhammad Shafi and 2 others" (1993 CLC 1514), in the following manner:--

> "The judgment of the Supreme Court was binding and shall prevail. It covered the case of a double default for the application of Order XVII, Rule 3 of Civil Procedure Code. My view in Division Bench case was that Rule 3, C.P.C. did not cover the case of double default. Be that as it may, plaintiff was allowed sufficient time and opportunity in adjournments but she failed to avail and utilize the time properly. Upon this view to the matter, it shall not be equitable to interfere and allow further indulgence to the defaulter-plaintiff. Civil Revision is dismissed in limine."

7. However, it is to be remembered that previously learned Division Bench in case titled "Mst. Arifa Amjad and 2 others v. Abbas Tayyab Dar and another" (1990 CLC 1743) had taken the view that application of Order XVII Rule 3 of Civil Procedure Code pre-supposed presence of the party before the Court.

8. The reliance of the learned counsel for the petitioners on case law reported as "Ahlian Moori Payeen through representative and others v. Ghulam Muhammad and 7 others" (2010 CLC 902) is of no help to him as the said judgment has been passed in ignorance of law laid down in case law reported as "Executive Engineer Peshawar v. Messrs Tour Muhammad and Sons and 4 others" (1983 SCMR 619), hence, it could be said to be judgment per incurium.

9. Order sheet reflects that issues were framed on 18.09.2006 and the case was adjourned for recording of evidence of the petitioners for 18.12.2006. On various dates including that of 18.12.2006, 29.01.2007, 09.03.2007, 16.05.2007, 18.07.2007, 06.09.2009, the case was

adjourned on the request of the petitioners. Order sheet further reflects that from 08.10.2007 to 14.03.2008, the case was adjourned for some other purposes. However, again on 21.04.2007, case was adjourned on the request of the petitioners with final last opportunity (emphasis supplied) for recording of evidence for 30.05.2008. On 30.05.2008 the case was again adjourned on the request of the petitioners for 29.07.2008. It also reflects from order sheet including that of 29.07.2008, the evidence was not produced and the case was adjourned for 30.10.2008. On 30.10.2008, the evidence of the petitioner was not present and the case was adjourned for recording of their evidence with final last opportunity for 15.12.2008. On 15.12.2008, the case was again adjourned on the request of the petitioners by giving them final last opportunity for 28.01.2009. On 28.01.2009 again evidence was not present and the final last opportunity was granted for recording of evidence of the petitioners and the case was adjourned to 26.02.2009. On 26.02.2009 once again evidence of the petitioners was not present and final last opportunity was granted for production of their evidence and the case was adjourned to 14.04.2009. On 14.04.2009, the evidence of the petitioners was present but the case was adjourned as counsel of respondents was not in attendance and the case was adjourned to 07.05.2009. On 07.05.2009, learned trial court was on leave and the case was adjourned to 09.07.2009. On 09.07.2009, the evidence of the petitioners was not in attendance and on their request the case was adjourned to 26.09.2009 for recording of their evidence. On 26.09.2009 neither the petitioners nor their evidence was in attendance, therefore, the learned trial court passed the impugned order dated 26.09.2009 whereby their application under Section 12(2), C.P.C. was dismissed.

10. Now it is to be seen that whether the learned trial court has correctly applied the provision of Rule 3 Order XVII or not? For ease of reference, rule 3 of Order XVII of C.P.C. is reproduced herein below:--

> "3. Court may proceed notwithstanding either party fails to produce evidence, etc.---Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

11. As on previous date i.e. 09.07.2009, the adjournment was granted at the request of the petitioners for production of their evidence, therefore, the learned trial court has rightly invoked the provision of Order XVII Rule 3, C.P.C. by closing their evidence. Reference may be made to latest celebrated judgment of the Hon'ble Supreme Court of Pakistan

reported in case law titled as "Rana Tanveer Khan v. Naseer-ud-Din and others" (2015 SCMR 1401). Relevant portions of the judgment are reproduced herein below:--

> "2. Heard. It has been argued that only within a period of 1 month and 26 days, the evidence of the appellant was closed; besides, the appellant should have been asked by the court to at least have his statement recorded; it is further argued that no direction was issued to the appellant to produce his evidence and thus the case is covered by the judgment of this Court (supra). Before proceeding further, it may be pertinent to mention here that the case Muhammad Arshad (supra mentioned in the leave granting order) by itself is only a leave granting order and is not the enunciation of law by this Court. Be that as it may, once the case is fixed by the Court for recording the evidence of the party, it is the direction of the court to do the needful, and the party has the obligation to adduce evidence without there being any fresh direction by the court, however, where the party makes a request for adjourning the matter to a further date(s) for the purposes of adducing evidence and if it fails to do so, for such date(s), the provisions of Order XVII, Rule 3, C.P.C. can attract, especially in the circumstances when adequate opportunities on the request of the party has been availed and caution is also issued on one of such a date(s), as being the last opportunity(ies). In the present case we have seen that the appellant was cautioned on two occasions, which means that the appellant was put to notice that if he fails to adduce evidence, action shall be taken.

> In the present case, as mentioned above, it is clear from the record that the appellant had availed four opportunities to produce his evidence and in two of such orders (the last in the chain) he was cautioned that such opportunity granted to him at his request shall be the last one, but still on the day when his evidence was closed in terms of Order XVII, Rule 3, C.P.C. no reasonable ground was propounded for the purposes of failure to adduce the evidence and justification for further opportunity, therefore, notwithstanding that these opportunities granted to the appellant were only in a span of about 1 month and 26 days, yet his case squarely fell within the mischief of the provisions ibid and his evidence was rightly closed by the trial court."

Further reference in this regard may also be made to PLD 1990 SC 1192, PLD 1991 SC 1109.

12. From bare perusal of order sheet, it is manifestly clear that the petitioners had made it impossible by not producing of their evidence for the learned trial court to proceed further with the matter, hence, the learned trial court has rightly invoked the provision of Rule 3, Order XVII, C.P.C.

13. The learned counsel for the petitioners has failed to highlight or point out any illegality and jurisdictional defect or any infirmity and perversity in the impugned judgment of the learned trial court as well as in the impugned judgment and decree of the learned appellate court.

14. Sequel to the above, this civil revision being devoid of any force is dismissed with no order as to cost.

ZC/F-14/L Revision dismissed.

2017 YLR 304

[Lahore (Rawalpindi Bench)]

Before Shahid Mubeen, J

NASRA MALIK---Petitioner

Versus

MUHAMMAD NAWAZ and 6 others---Respondents

C.R. No.458-D of 2010, decided on 19th April, 2016.

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

----S.11---Res judicata---Findings of fact---Scope---Appellate Court framed additional issues which had already been decided in another suit and remanded the case for decision afresh--- Validity--- Additional issues framed by the Appellate Court had already been decided by the Trial Court---Findings of fact recorded in the previous suit would be res judicata in the subsequent suit---Declaration given by a court with regard to issues that had been decided therein would be res judicata---Framing of additional issues was hit by principle of res judicata as judgments and decrees in the suit had attained finality--- Impugned judgment and decree passed by the Appellate Court were set aside---Appeal was to be deemed to be pending before the Appellate Court for decision afresh on merits--- Revision was allowed accordingly.

Muhammad Akbar and others v. Mst. Sahib Khatoon and others 1991 SCMR 1196 and Pir Bakhsh presented by his Legal Heirs and others v. The Chairman, Allotment Committee and others PLD 1987 SC 145 rel.

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

----S. 11---Res judicata---Applicability---Scope---Principle of res judicata would be applicable if court emanating the decision was competent to adjudicate the matter; matter directly and substantially in issue in the subsequent suit had been directly and substantially in issue in the former suit; former suit as well as present suit should have been between the same parties or between parties under whom they or any of them claimed or litigated under the same title in the former suit; court trying the former suit had been a court competent to try the subsequent suit and the suit in which such issue was subsequently raised had been heard and finally decided in the first suit.

Mehmood Azam Baloch for Petitioner.

Malik Abdul Ghafoor for Respondents.

ORDER

SHAHID MUBEEN, J.---Through instant civil revision under Section 115, C.P.C., the petitioner has called in question the legality and validity of impugned judgment and decree dated 10.03.2010 passed by the Additional District Judge, Jhelum whereby appeal of respondents Nos.1 to 3 was accepted and framed additional Issues Nos.1-A and 1-B and remanded the suits to the trial court for rehearing.

2. Briefly stated the facts of the case are that one Abdul Wahid was the owner in possession of the suit property measuring 20 kanals 19 marlas in the revenue estate of village and Tehsil Sohawa, District Jhelum. The said Abdul Wahid gifted the suit property and transferred its possession to one Karamat Hussain vide registered Deed dated 19.02.1994. After the death of Abdul Wahid on 12.11.1996, respondents Nos.1 to 3 filed a suit for pre-emption on the ground that the property was in fact sold to Karamat Hussain in lieu of Rs.1,50,000/- but due to mala fide to defeat the suit for pre-emption gift deed was prepared. In the said suit, Issue No.2 was framed which is under:--

"2. Whether the transaction in dispute is a sale and not gift."

This issue was decided against respondents Nos.1 to 3 that transaction was gift and not sale. Respondents Nos.1 to 3 filed an appeal which was also dismissed vide judgment and decree dated 11.06.1998 by learned Additional District Judge, Jhelum. In the meanwhile,

the said Karamat Hussain died on 17.06.1994 and mutation No.3776 dated 28.01.1996 for inheritance was sanctioned in favour of Taj Begum, mother, Basharat Hussain, Tariq Mehmood brothers and Sakina Bibi sister of Karamat Hussain who thereafter sold the inherited land in favour of Nasira Malik (petitioner in this case) vide sale deed dated 08.06.2000 and delivered the possession. Respondents Nos.1 to 3 filed two suits for declaration along with joint possession and cancellation of registered gift deed dated 19.02.1994 sanctioned in favour of Karamat Hussain and suit for declaration with consequential relief which was contested by the petitioner. The petitioner also filed a suit for perpetual and mandatory injunction. From the divergent pleadings of the parties, the learned trial court framed the following consolidated issues:--

i). Whether the registered deed No.41 dated 19.2.1994 and mutation No.3644 dated 5.3.1994 pertaining to impugned land/property is liable to be cancelled on the basis of fraud without consideration and mis-representation? OPP

ii). Whether the registered deed No.71 dated 08.06.2000, mutation No.4340 dated 29.6.2000, general power of attorney No.20 dated 6.5.2000, based on fraud, mis-representation and liable to be cancelled if the issue No.1 is proved in favour of the plaintiffs? OPP.

iii). Whether the plaintiffs Muhammad Altaf, Muhammad Razzaq, Muhammad Nawaz are entitled to a decree of declaration along with permanent injunction and mandatory injunction as prayed in their suits, if the issues Nos.1 and 2 are decided in their favour? OPP

iv). Whether the plaintiff Mst. Nasira Malik is entitled to a decree of permanent injunction as prayed in the suit? OPD

v). Whether the present suit is barred by law? OPD

vi). Whether the present suit is barred by limitation? OPD

vii). Whether the plaintiffs have got no cause of action to file this suit?OPD

viii). Whether the present suit filed by Muhammad Nawaz party is based on mis-statement of facts only to usurp the right of the defendants; hence, it is liable to be dismissed with special costs under Section 35-A of C.P.C.? OPD

ix). Relief.

Both the parties produced their evidence pro and contra to prove their respective contentions. Respondent No.3/plaintiff No.3 appeared in the witness box as PW-4 whereas Rabnawaz was examined as PW-1, Ghazanfar Ali as PW-2 and Dr. Muhammad Imtiaz Dar as PW-3. In documentary evidence, the certificate issued by PW-3, Dr. Imtiaz Dar was tendered as Exh.P1, copy of report under Section 173 Cr.P.C. as Exh.P/2, copies of FIR Nos.313, 240 and 433 respectively as Exh.P/3 to Ex.P/5 respectively, copy of report under Section 173 Cr.P.C. as Exh.P/6, attested copy of gift deed as Exh.P/7, copy of Jamabandi for the years 1992-93 as Exh.P/8, copy of death certificate of Abdul Wahid as Exh.P/9, copy of death certificate of Karamat Hussain as Exh.P/10 and copy of Khasra Girdawari from Rabi 1998 to 2000 as Exh.P/11.

3. Bashir Ahmad Tarar appeared as DW-1 whereas copies of registered deeds by Abdul Wahid deceased in favour of Muhammad Saeed and Muhammad Sajid were tendered as Exh.D/1 to Exh.D/3 respectively, copy of Jamabandi for the years 2004-05 as Exh.D/4 and copy of Jamabandi for the years 2004-05 as Exh.D/5.

4. All the three suits were dismissed by learned trial Court, vide judgment and decree dated 12.02.2008. The respondents Nos.1 to 3 assailed the same by filing appeal which was accepted by the learned Appellate Court vide impugned judgment and decree dated 10.03.2010, by remanding the case to the learned trial court for its decision afresh, after framing of following additional issues:--

> 1-A. Whether Karamat Hussain was never delivered possession of the land claimed to have been gifted to him by Abdul Wahid?OPP
>
> 1-B. Whether the impugned gift was made in favour of Karamat Hussain without any consideration/ reason whatsoever?OPP.

Hence, this civil revision.

5. It is contended by learned counsel for the petitioner that there was no need to frame additional issues as Issues Nos.1-A and 1-B as these issues had already been decided in suit titled "Altaf Hussain etc. v. Karamat Hussain", therefore, same are hit by principle of res judicata as enshrined in Section 11, C.P.C. On the other hand, learned counsel for the respondents supported the framing of additional issues.

6. Arguments heard. Record perused.

7. The controversy between the parties revolves around the applicability of Section 11, C.P.C., therefore, for case of reference said Section is reproduced herein below:-

"11. Res Judicata. - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

8. In order to constitute res judicata in the legal sense it has to be established not merely that the decision emanated from a Court in the exercise of its judicial functions but also that the Court was competent to adjudicate in respect of that matter, the matter directly and substantially in issue in the subsequent suit had been directly and substantially in issue in the former suit, the former suit as well as the present suit had and have been between the same parties or between parties under whom they or any of them claim, litigated under the same title in the former suit, the Court trying the former suit had been a Court competent to try the subsequent suit and the suit in which such issue is subsequently raised had been heard and finally decided in the first suit. The framing of additional issues by the learned appellate court is squarely falls within the ambit of section 11, C.P.C.

9. It is crystal clear from perusal of record that additional issues framed by learned appellate court had already been decided by the learned Civil Judge, 1st Class, Sohawa vide judgment and decree dated 27.06.1996 in suit for possession through pre-emption titled as "Altaf Hussain etc. v. Karamat Hussain". The relevant issue is reproduced herein below:--

2). Whether the transaction in dispute is a sale and not gift? OPP.

This issue was decided by the learned trial court in the following way:--

"Burden to prove this issue was upon the plaintiff to prove the fact that transaction in dispute is a sale and not gift and a very convincing evidence was required to prove this issue but plaintiff has miserably failed to prove that actually land has been sold and not gifted. Mutation in dispute has been produced on record. From the perusal of it, it is quite evident that Hiba mutation was sanctioned and defendant while appearing as DW-1 has supported this document, hence, it can safely be held that suit land was gifted and not sold. Issue is decided against the plaintiff."

10. It is also an established principle of law that findings of fact recorded in the previous suit would be res judicata in the subsequent suit. Reference may be made to the case law

titled as "Muhammad Akbar and others v. Mst. Sahib Khatoon and others" (1991 SCMR 1196).

11. It is also an established principle of law that the declaration given by a court is res judicata in respect of the issues that are decided therein. Reference may be made to case law titled as "Pir Bakhsh presented by his Legal Heirs and others v. The Chairman, Allotment Committee and others" (PLD 1987 SC 145).

12. The framing of additional issues is hit by principle of res judicata under Section 11, C.P.C. as the judgments and decrees in the pre-emption suit mentioned above have attained finality, hence, the issue of gift qua Karamat Hussain cannot be re-opened.

14. (sic) Sequel to the above, this civil revision is hereby accepted and impugned judgment and decree dated 10.03.2010 of Additional District Judge, Jhelum is set aside. The appeal shall be deemed to be pending before learned Additional District Judge, Jhelum, who shall decide the same afresh on merits after hearing the parties. No order as to costs.

ZC/N-25/L Revision allowed.

PLJ 2017 Lahore 75

[Bahawalpur Bench Bahawalpur]

***Present*: SHAHID MUBEEN, J.**

ARSHAD ALI CHEEMA, ASSISTANT DIRECTOR/CREDIT OFFICER--Petitioner

versus

PRESIDENT, ZTBL, HEAD OFFICE FAISAL AVENUE, ISLAMABAD and 4 others--Respondents

W.P. No. 4892 of 2014, decided on 17.10.2016.

General Clauses Act, 1897 (X of 1897)--

----S. 24-A--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Dismissal from service--Penalty of reduction by two stages lower in time scale of pay--Order was passed without assigning any reason--Validity--It is now an established principle of law that even an administrative/executive order must be passed with reasons--Public functionaries are duty bound to decide controversies after application of independent mind with reasons--Impugned appellate order has been passed in a mechanical way without

applying independent mind to facts and circumstances of case--Petition was allowed.[P.] A & B

Mr. Muhammad Arif Qureshi, Advocate for Petitioner.
Mr. Waheed ud Din Khan, Advocate for Respondent-Bank.
Date of hearing: 17.10.2016.

ORDER

Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has assailed the impugned orders dated 05.06.2014, 06.06.2009 and 05.08.2011 passed by the respondents.

2. Briefly stated the facts of the case are that the petitioner was charge sheeted on 08.05.2000 along with other co-accused under ZTBL Officers Services (E&D) Regulations, 1975 on certain allegations which resulted into dismissal of his services *vide* order dated 25.06.2001 passed by the Zonal head, ZTBL, Bahawalpur against which the petitioner preferred a service appeal before Federal Service Tribunal, which was abated and thereafter the petitioner filed W.P. No. 1711 of 2006 before this Court. The same was disposed of with the direction to the respondents to hold denovo inquiry against the petitioner *vide* order dated 24.01.2008. Consequently, *vide* order dated 18.12.2008 the petitioner was taken back to his duty. He was charge sheeted afresh and after conducting inquiry and keeping in view the findings of the inquiry officer, the Senior Vice President (DPD) *vide* impugned order dated 06.06.2009 imposed upon the petitioner major penalty of reduction by two stages lower in the time scale of pay of the petitioner for a period of three years and the intervening period from the date of the petitioner's dismissal i.e. 25.06.2001 to the date of his reinstatement i.e. 18.12.2008, was ordered to be adjusted towards leave due to any kind and the remaining period was ordered to be treated as EOL without pay. The petitioner being aggrieved of the said order, preferred an appeal before Executive Vice President (HR) which was also dismissed due to lack of merit *vide* impugned order dated 05.08.2011 which constrained the petitioner to file W.P. No. 5967/2011 before this Court which also met with the same fate and was dismissed *vide* order dated 27.09.2012. The petitioner then filed Civil Petition for Leave to Appeal before the Hon'ble Supreme Court of Pakistan. Vide judgment dated 14.05.2013 the same was converted appeal and the order dated 27.09.2012 passed by this Court was set aside and the case was remanded to this Court to decide the petitioner's W.P. No. 5967/2011 on merits. During the proceedings before this Court, the petitioner made a request that his appeal may be transmitted to Secretary Finance for decision. At the petitioner's request W.P. No. 5967/2011 was disposed of *vide* order dated

23.04.2014 with a direction to Secretary, Ministry of Finance to look into the grievance of the petitioner and decide the same within a period of two months. The Ministry of Finance in compliance of order of this Court, afforded an opportunity of hearing to the petitioner and *vide* order dated 05.06.2014 disposed of the appeal of the petitioner with the direction to the petitioner to avail his remedy before an appropriate forum. Hence, this writ petition.

2. It is mainly contended by learned counsel for the petitioner that impugned order dated 05.08.2011 passed by the appellate authority is without assigning any reason which is repugnant to Section 24-A of the General Clauses Act, 1897.

3. On the other hand, learned counsel for respondent-bank supported the impugned order dated 05.08.2011 by contending that impugned appellate order is not a judicial order but an executive order, therefore, assigning of any reason is not mandatory.

4. Arguments heard. Record perused.

5. It is now an established principle of law that even an administrative/executive order must be passed with reasons. It will be advantageous to reproduced the impugned appellate order dated 05.08.2011 as under:--

> "Reference is made to your Departmental Appeal dated 24.06.2009 against the decision of authority *vide* OM dated 06.06.2009. In this regard, your appeal has been considered by the EVP(HR)/Appellate Authority under E&D Regulations, 1975 but not acceded to, as the same has not been found on merit."

6. The bare perusal of the above order shows that same has been passed without assigning any reason. It will also be advantageous to reproduce Section 24-A of the General Clauses Act, 1897, which is as under:--

> "24-A. Exercise of power under enactments.--(1) Where, by or under any enactment, a power to make any order or give any direction in conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.
>
> (2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially."

7. The provision of Section 24-A of the Act ibid has made it obligatory on the functionaries to substantiate their conclusions with reasons. The public functionaries are duty bound to decide the controversies after application of independent mind with reasons. It is manifestly clear that impugned appellate order has been passed in a mechanical way without applying independent mind to the facts and circumstances of the case. The impugned appellate order does not reflect that what was the controversy which was decided by the appellate authority. Reference may be made to the case law reported as *"Government of Pakistan through Director-General, Ministry of Interior, Islamabad and others v. Farheen Rashid"* (2011 SCMR 1). Relevant portion of the judgment is reproduced herein below:

> "8. We have given our anxious considerations to the contentions of the learned counsel for the appellants and also heard the respondent. It is pertinent to mention here that the Inquiry Officer Ch. Zulfiqar Ali, Assistant Director Legal, FIA, had submitted report to the competent authority on 13-7-2006 which has already been mentioned herein above wherein it was recommended that criminal case be also registered against the respondent with the concerned police station in order to recover the stolen 8000 UAE Dirham of the complainant. There is no allegation qua theft of the aforesaid amount in the charge-sheet and show-cause notice. The competent authority dismissed the respondent on 28-7-2006 by countersigning the report of the Inquiry Officer as is evident from para. 3, of the dismissal order dated 28-7-2006. See *Ghulam Mohi-ud-Din's case* PLD 1964 SC 829. The learned Service Tribunal although had converted the major penalty of dismissal into minor penalty as mentioned above yet the Service Tribunal had also not examined the facts that the charge-sheet and show-cause notice issued by the appellant to the respondent were defective. After addition of Section 24-A in the General Clauses Act, it is the duty and obligation of the public functionaries to decide the cases of their subordinates after application of mind with cogent reasons within reasonable time as law laid down by this Court in *Messrs Airport Support Services's case* 1998 SCMR 2268 and *Aslam Warraich's case* 1991 SCMR 2330. It is the duty and obligation of the Federal Service Tribunal to decide the appeal of the respondent after application of mind with reasons as law laid down by this Court in *Gouranga Mohan Sikdar's case* PLD 1970 SC 158."

Further reference may be made to the case law reported as *"Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others"* (PLD 2010 Lahore 230). The relevant portion of the judgment is reproduce herein below:

"44. Additionally, it is clear from the comments, that the Ministry of Interior never applied its mind before placing the name of the petitioner on the ECL as the impugned order is a result of dictation from the Finance Division/State Bank of Pakistan. Discretion exercised under dictation, without reasons, based on irrelevant facts is not lawful exercise of discretion and therefore placing the name of the petitioner on the ECL in the present case shows that he has not been dealt with in accordance with law as provided in Articles 4 and 9 of the Constitution. Not to furnish reason for the decision violates the principle of fairness, procedural propriety and natural justice besides Section 24A of the General Clauses Act, 1897. The impugned Memorandum fails to meet the requirement of procedural due process."

8. Nutshell of the above discussion is that, this writ petition is allowed, impugned appellate order dated 05.08.2011 is hereby set-aside and the case is remanded to Executive Vice President, Human Rights Department, ZTBL, Head Office, Faisal Avenue, Islamabad/ Respondent No. 2, who shall decide the appeal of the petitioner afresh and shall pass a well-reasoned speaking order within a period of 30-days after the receipt of certified copy of this order after hearing the petitioner and all other concerned under intimation to the Deputy Registrar (Judicial) of this Court. No order as to cost.

(R.A.) Petition allowed

PLJ 2017 Lahore 206 (DB)

[Bahawalpur Bench, Bahawalpur]

***Present*: SHAHID MUBEEN AND HABIB ULLAH AMIR, JJ.**

MUHAMMAD DIN, etc.--Appellants

versus

RASHEED AHMAD, etc.--Respondents

ICA No. 171 of 2010, decided on 6.12.2016.

Law Reforms Ordinance, 1972--

----S. 3--Constitution of Pakistan, 1973, Art. 199--Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975, S. 3--Intra Court Appeal--Inheritance mutation--Daughter was excluded from legal heirs--Claim of real daughter was accepted--Challenge to--Revenue officer was not competent--Legal value of evidence recorded by notified officer--Validity--Recording of evidence were patently illegal being *coram non judice*,

therefore, not only order passed by him but also evidence recorded by him loses legal value--When very assumption of jurisdiction by notified officer was declared to be illegal and without lawful authority then whole proceedings including that of recording of evidence, which culminated in passing order by such officer, together with superstructure is liable to fall on ground--Order declaring as real daughter on basis of RL-II is neither justiciable nor sustainable as it was incumbent upon officer to hold a full-fledged inquiry by giving chance to both parties to produce their oral as well as documentary evidence to resolve controversy between parties. [Pp. 209 & 210] A, B & C PLD 1958 SC 104, *ref.*

Mr. Amir Aqeel Ansari, Advocate for Appellants.
Malik Mumtaz Akhtar, Addl.A.G. for Respondent.
Mr. Fida Hussain Rahat, Advocate for Respondents No. 1 to 7.
Date of hearing: 6.12.2016.

ORDER

The appellants have preferred this Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972, against judgment dated 28.09.2010 passed by learned Single Judge in Chambers in Writ Petition No. 2345 of 1994 whereby the writ petition filed by Respondents No. 1 to 5 has been allowed.

2. Succinctly, the facts giving rise to the institution of this Intra Court Appeal are that Noor Muhammad son of Mahkum Din was owner of agricultural land in India (Hindustan). After partition of the sub-continent, his claim was confirmed to the extent of 140 *kanals* 5 marks on 22.07.1957 but afterwards when it was found that the said land had already been allocated for Tomb of AMAR TASAR, same was cancelled by the Deputy Rehabilitation Commissioner, Bahawalpur *vide* order dated 31.12.1958 and in alternative land measuring 98 *kanals* 5 *marlas* in RL-II No. 25 dated 28.08.1959 was confirmed. After the death of Noor Muhammad, *Mst.* Kareem Bibi while claiming herself to be the daughter of Noor Muhammad got transferred the said inheritance in her favour. On complaint, Military Court sentenced to *Mst.* Kareem Bibi and her husband to get executed the mutation inheritance on the basis of fraud and misrepresentation in her favour while showing herself to be the daughter of Noor Muhammad and consequently the said allotment was cancelled. Said decision was set aside in appeal filed by *Mst.* Kareem Bibi and Respondents No. 1 to 5 were directed to approach the settlement office for the redressal of their grievance. In response to that, they challenged inheritance Mutation No. 2 sanctioned in favour of *Mst.*Kareem Bibi on 22.07.1957 through Civil Revision which was accepted on 21.06.1964

by the Additional Settlement Commissioner, Mutation No. 2 was cancelled and case was remanded to the Assistant Collector. On 08.09.1966 after inquiry Assistant Collector declared that Respondents No. 1 to 5 of the writ petition are the legal heirs of deceased Noor Muhammad and name of *Mst.* Kareem Bibi was excluded from his legal heirs. Feeling aggrieved, *Mst.* Kareem Bibi filed an appeal before the Collector which was accepted and the case was remanded to the Assistant Collector with direction to look into the matter as to whether *Mst.* Kareem Bibi is legal heir of Noor Muhammad or not according to the pedigree-table. Thereafter, the matter remained pending for a long time and no proceedings whatsoever took place. Then *Mst.* Kareem Bibi filed Writ Petition No. 51-R of 1973 in which this Court *vide* order dated 09.10.1977 declared all the orders passed after 29.12.1969 to be without lawful authority and of no legal effect and remanded the case to the Assistant Commissioner, Hasilpur who was duly Notified Officer under Section 3 of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975, for the decision of such cases. Thereafter, inquiry was conducted by the Assistant Commissioner, Hasilpur/Notified Officer and *vide* detailed order dated 26.07.1993 he declared that *Mst.* Kareem Bibi was not the daughter of Noor Muhammad deceased. Feeling aggrieved, *Mst.* Kareem Bibi filed Writ Petition No. 2347 of 1993 against the said order, which was accepted *vide* judgment dated 20.02.1994, the order dated 26.07.1993 was set aside and the case was remanded to the Assistant Commissioner Khairpur Tamewali for decision of the case within three months. Again the matter was re-opened before the Assistant Commissioner Khairpur Tamewali in which claim of *Mst.* Kareem Bibi was accepted *vide* order dated 26.09.1994 and she was declared as real daughter of Noor Muhammad deceased. Feeling aggrieved by the said order, Respondents No. 1 to 5 filed Writ Petition No. 2345 of 1994, which was allowed by the learned Single Judge in Chambers *vide* impugned judgment dated 28.09.2010 while setting aside the order dated 26.09.1994 and *Mst.* Kareem Bibi was declared as not the daughter of Noor Muhammad deceased. Hence this Intra Court Appeal.

3. Learned counsel for the appellants contends that the impugned judgment dated 28.09.2010 passed by the learned Single Judge in Chambers is not sustainable in the eye of law as it was passed on the basis of evidence recorded by the Assistant Commissioner/ Notified Officer of Hasilpur whose order was set aside by this Court *vide* judgment dated 20.02.1994 passed in Writ Petition No. 2347 of 1993, on the ground that he was not competent to do so, as he was not the Notified Officer/Assistant Commissioner Khairpur Tamewali under the settlement law, therefore, reliance upon the evidence recorded by the Assistant Commissioner/Notified Officer of Hasilpur by the learned Single Judge in Chambers is not legally justiciable. He further contends that the order dated 26.09.1994

passed by the Assistant Commissioner/Notified Officer of Khairpur Tamewali cannot be interfered with by this Court while exercising constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. On the other hand learned Additional Advocate General assisted by learned counsel for the respondents has supported the impugned judgment.

4. We have heard the arguments advanced by the learned counsel for the parties and perused the record with their able assistance.

5. It is an admitted fact that order dated 26.07.1993 passed by the Assistant Commissioner/Notified Officer of Hasilpur was set aside by the learned Single Judge in Chambers *vide* judgment dated 20.02.1994 passed in Writ Petition No. 2347 of 1993. The operative part of the said judgment is reproduced herein below:--

> "4. The learned A.A.G. finds himself unable to defend the order in question in view of the legal position and previous order of this Court. I, therefore, accept the petition and set aside the impugned order as illegal and without lawful authority and send back the case to the Assistant Commissioner, Khairpur Tamewali for decision of the case within three months."

When the order dated 26.07.1993 passed by the Assistant Commissioner/Notified Officer of Hasilpur was set aside by this Court *vide* order dated 20.02.1994 on the ground that Assistant Commissioner/Notified Officer of Hasilpur was not the notified officer under the Settlement Laws for the cases of Tehsil Khairpur Tamewali, hence, he was not competent to pass such order.

6. Now the question arises that what is the legal value of the evidence recorded by such an incompetent officer. The most important aspect of the case in hand is that the proceedings before the Notified Officer/Assistant Commissioner, Hasilpur, who has recoded the evidence of both the parties were incompetent and without jurisdiction. Since the Assistant Commissioner/Notified Officer of Hasilpur was not the competent/concerned Notified Officer/Assistant Commissioner, therefore, all proceedings conducted by him including that of recording of evidence were patently illegal being coram non judice, therefore, not only the order passed by him but also the evidence recorded by him loses legal value as the case was to be exclusively triable by the Assistant Commissioner/Notified Officer of Khairpur Tamewali.

7. This case can also be looked into from another angle i.e. when the very assumption of jurisdiction by the Assistant Commissioner/Notified Officer of Hasilpur was declared to be illegal and without lawful authority then the whole proceedings including that of recording of evidence, which culminated in passing order by such officer, together with superstructure is liable to fall on ground. In taking this view, reference can be made to case titled *Yousaf Ali vs. Muhammad Aslam Zia and 2 others* (PLD 1958 SC 104). While passing the impugned judgment dated 28.09.2010, the learned Single Judge in Chambers has heavily relied upon the evidence recorded by the Assistant Commissioner/Notified Officer of Hasilpur whose order was set aside by this Court, therefore, keeping in view the position explained above, reliance upon the evidence recorded by an incompetent officer is not justiciable.

8. It is pertinent to mention here that the Assistant Commissioner/Notified Officer of Khairpur Tamewali, while passing the order dated 26.09.1994 impugned in the writ petition, mainly relied upon RL-II No. 25 which throughout remained under challenge, therefore, the said order declaring *Mst.* Kareem Bibi as real daughter of Noor Muhammad on the basis of RL-II No. 25 is neither justiciable nor sustainable as it was incumbent upon the said officer to hold a full-fledged inquiry by giving chance to both the parties to produce their oral as well as documentary evidence to resolve the controversy between the parties.

9. For the foregoing reasons, this Intra Court Appeal is allowed. The impugned judgment dated 28.09.2010 passed by the learned Single Judge in Chambers and the order dated 26.09.1994 passed by the Assistant Commissioner/Notified Officer of Khairpur Tamewali are set aside. The case is remanded to the Assistant Commissioner/Notified Officer of Khairpur Tamewali with a direction to hold a full-fledged inquiry as to whether *Mst.* Kareem Bibi is real daughter of late Noor Muhammad or not by allowing the parties to produce their oral as well as documentary evidence. He shall conclude the proceedings positively within a period of six months after receipt of certified copy of this order. No order as to cost.

(R.A.) I.C.A. allowed

PLJ 2017 Lahore 210

[Bahawalpur Bench Bahawalpur]

***Present*: SHAHID MUBEEN, J.**

SHAH NAWAZ QURESHI--Petitioner

versus

ADDL. DISTRICT JUDGE, BAHAWALPUR, etc.--Respondents

W.P. No. 6867 of 2016, decided on 28.9.2016.

Constitution of Pakistan, 1973--

----Art. 199--Family Courts Act, (XXXV of 1964), S. 17--Constitutional petition--Right to produce evidence was closed--Suit for recovery of dower, decreed while suit for restitution of conjugal rights, dismissed--Concurrent in nature--Case was adjourned subject to payment of cost--Evidence was not produced deliberately and intentionally just to prolong proceedings--Provisions of CPC--Applicability--In absence of express provision in Family Courts Act, 1964, authorizing a Family Court to close evidence of party, there is no provision to effect that party's evidence would not be closed even if party failed to produce evidence without sufficient cause, despite having availed of several opportunities to do so--Family Court can close evidence of a party who had failed to adduce evidence without sufficient cause--Although provisions of CPC and QSO have not been made applicable to Family Courts Act, before Family Court by virtue of Section 17 of Family Courts Act, but general principles can be invoked for due administration of justice where no procedure is provided Act, 1964--High Court cannot upset findings of Courts below while exercising constitutional jurisdiction as a Court of Appeal.[Pp. 214 & 216] A, C & I

Family Courts Act, 1964 (XXXV of 1964)--

----Preamble--Family Courts have been established for purpose of expeditious settlement and disposal of family disputes relating to marriage and family affairs and for matters connected therewith. [P. 214] B

Family Courts Act, 1964 (XXXV of 1964)--

----Scope of--Advancement of justice and to avoid technicalities--Purpose of enacting Family Courts Act, is to frustrate technicalities for purpose of justice--It is settled principle of law that Family Court, while dealing with suit mentioned in Schedule of Family Courts Act, has to adopt procedure of his choice, in order to meet situation not visualized in Family Courts Act--It is also settled principle of law that Family Court has to regulate its own proceedings in

accordance with provisions of that Act and in doing so it has to proceed on premises that every procedure is permissible unless a clear prohibition is found in law. [P. 215] D, E & F

Family Courts Act, 1964 (XXXV of 1964)--

----Scope of--Civil Procedure Code, (V of 1908), Scope--Provisions of CPC--No provision for closing of evidence--Validity--As there does not exist any provision for closing of evidence, therefore, Family Court can adopt procedure provided in CPC, and can apply same to proceedings pending before him. [P. 215] G

Limitation Act, 1908 (IX of 1908)--

----S. 5--Delay in filing appeal--Application for review of order passed by Family Courts--Dismissed for non-prosecution--Appeal was barred by time--Validity--Alongwith appeal an application under Section 5 of Limitation Act, 1908, was filed on ground of ailment--However, no medical certificate, in support of application, was appended--Petitioner has miserably failed to explain each and every day's delay in filing appeal. [P. 216] H

Mr. Muhammad Imran Pasha, Advocate for Petitioner.
Mr. Shahid Sajjad Siddiqui, Advocate for Respondent No. 3.
Date of hearing: 28.9.2016.

ORDER

The petitioner through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has assailed the judgment and decree dated 26.11.2015 passed by the learned judge Family Court, Bahawalpur, and judgment and decree dated 26.04.2016 passed by the learned Additional District Judge, Bahawalpur.

2. Briefly the facts necessary for adjudication of this constitutional petition are that Respondent No. 3 filed a suit for recovery of dower against the petitioner. The suit was contested by the petitioner by filing written statement. The petitioner also filed a suit for restitution of conjugal rights against Respondent No. 3, which was resisted by her by filing written statement. Both the suits were consolidated. Pre-trial reconciliation proceedings were conducted but these were ended in smoke.

3. Out of the divergent pleadings of the parties, the following consolidated issues were framed by the learned trial Court:--

"1. Whether the plaintiff is entitled to get decree for recovery of dowry as prayed for ? OPP

2. Whether the suit is not maintainable and is liable to be dismissed ? OPD

3. Whether the defendant Shah Nawaz is entitled to get decree for restitution of conjugal rights as prayed for ? OPD

4. Relief."

After framing of issues, the parties were directed to produce their respective evidence. Respondent No. 3 produced the oral as well as documentary evidence whereas the petitioner did not produce his evidence and his right to produce evidence was closed on 21.10.2015 and thereafter he himself absented from the Court on 25.11.2015, consequently he was proceeded against *ex-parte*. After scanning the entire evidence available on record, the learned Judge Family Court, Bahawalpur, dismissed the suit of the petitioner for restitution of conjugal rights whereas the suit of Respondent No. 3 for recovery of dower was decreed *vide* impugned judgment and decree dated 26.11.2015. Feeling aggrieved, the petitioner preferred an appeal against the said judgment and decree, which was dismissed by the learned Additional District Judge, Bahawalpur, *vide* impugned judgment and decree dated 26.04.2016. Hence, this writ petition.

4. Learned counsel for the petitioner contends that order dated 21.10.2015 whereby the right of the petitioner to produce evidence was closed is not sustainable as there does not exist any provision in the West Pakistan Family Courts Act, 1964, to pass such like order. He further contends that the provisions of the Code of Civil Procedure, 1908, are not attracted and the same have been specifically excluded by virtue of Section 17 of the West Pakistan Family Courts Act, 1964. He further contends that the impugned judgments and decrees passed by the two Courts below are the result of misreading and non-reading of oral as well as documentary evidence available on the record.

5. On the other hand, learned counsel for Respondent No. 3 contends that the order dated 21.10.2015 whereby the right of the petitioner to produce evidence was closed was legally justiciable as on the last date of hearing i.e. 19.10.2015 the case was adjourned at the request of the learned counsel for the petitioner. He further contends that the impugned judgments and decrees passed by the two Courts below are concurrent in nature and this Court while exercising constitutional jurisdiction cannot upset the same, by taking a different view.

6. Arguments heard. Record perused.

7. In the case in hand the evidence of Respondent No. 3 was recorded on 10.07.2015 and the case was adjourned for 03.09.2015 for recording of evidence of the petitioner. On 03.09.2015, the evidence of the petitioner was not available and at the request of the learned counsel for the petitioner the case was adjourned for evidence of the petitioner for 29.09.2015. On 29.09.2015, once again the evidence of the petitioner was not in attendance and the case was adjourned at the request of the learned counsel for the petitioner subject to payment of cost of Rs. 100/- and the case was adjourned with last opportunity for 10.10.2015. On 10.10.2015, only one witness of the petitioner was present. However, the case was adjourned at the request of the petitioner on the ground that his counsel was not available. The case was adjourned for evidence of the petitioner for 19.10.2015. On the said date once again the evidence of the petitioner was not available and at the request of the learned counsel for the petitioner the case was adjourned for 21.10.2015 subject to payment of cost of Rs. 100/- and it was made clear that if the petitioner would not produce his evidence, the same would be closed. Once again on 21.10.2015 the evidence of the petitioner was not in attendance, therefore, his right to produce evidence was closed.

8. From the bare perusal of the aforesaid interim orders, it is manifestly clear that the petitioner did not produce his evidence deliberately and intentionally just to prolong the proceedings. On 19.10.2015, the case was adjourned at the request of the learned counsel for the petitioner and that too subject to payment of cost of Rs. 100/- and it was made clear that in case the petitioner would not produce his evidence the same would be closed. The learned Judge Family Court was justified in closing the right of evidence of the petitioner and there is no illegality in the order dated 21.10.2015.

9. It is pertinent to mention here that in the absence of express provision in West Pakistan Family Courts Act, 1964, authorizing a Family Court to close evidence of party, there is no provision to the effect that party's evidence would not be closed even if the said party failed to produce evidence without sufficient cause, despite having availed of several opportunities to do so. Family Court can close evidence of a party who failed to adduce evidence without sufficient cause. The petitioner was given many opportunities to adduce his evidence but despite such opportunities including last opportunity and adjournment on payment of cost, he neither adduced evidence nor paid cost, therefore, evidence of the petitioner has rightly been closed. Law requires that case should be heard and adjudicated upon its merits and parties should be granted reasonable opportunity to produce their evidence. If the parties are allowed to get adjourned the case for the purpose of recording of evidence on number of occasions without any sufficient cause, then aims and objects in promulgating the West Pakistan Family Courts Act, 1964, will be rendered futile. From the bare perusal of the

Preamble of West Pakistan Family Courts Act, 1964, it is manifestly clear that the Family Courts have been established for the purpose of expeditious settlement and disposal of family disputes relating to marriage and family affairs and for matters connected therewith. Uncalled for adjournments will frustrate the aims and objects of the West Pakistan Family Courts Act, 1964, for which the same has been enacted.

10. As far as argument of the learned counsel for the petitioner that the provisions of the Code of Civil Procedure, 1908, are not attracted and the same have been specifically excluded by virtue of Section 17 of the West Pakistan Family Courts Act, 1964, is concerned, although the provisions of Code of Civil Procedure and Qanun-e-Shahadat have not been made applicable to the West Pakistan Family Courts Act, 1964, before the Family Court by virtue of Section 17 of the West Pakistan Family Courts Act, 1964, but general principles thereunder can be invoked for due administration of justice where no procedure is provided in the West Pakistan Family Courts Act, 1964. Said provision of Section 17 is reproduced herein below:--

> **"S. 17. Provisions of Evidence Act and Code of Civil Procedure not to apply.--**
> (1) Save as otherwise expressly provided by or under this Act, the provisions of the {Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984)} and the Code of Civil Procedure, 1908 {except Sections 10 and 11} shall not apply to proceedings before any Family Court, {in respect of part I of Schedule}
>
> (2) Sections 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Courts."

It will not be out of place to mention here that the purpose of enacting Family Courts Act is to frustrate the technicalities for the purpose of justice between the parties in the shortest possible manner. All that the Family Courts Act has done is that it has changed the forum, altered the method of trial and empowered the Court to grant better remedies. The only purpose of enacting special law i.e. West Pakistan Family Courts Act, 1964, regarding family disputes is for advancement of justice and to avoid technicalities. It is settled principle of law that learned Judge Family Court, while dealing with the suit mentioned in Schedule of the West Pakistan Family Courts Act, 1964, has to adopt procedure of his choice, in order to meet the situation not visualized in the Family Courts Act. It is also settled principle of law that the learned Judge Family Court has to regulate its own proceedings in accordance with the provisions of that Act and in doing so it has to proceed on the premises that every procedure is permissible unless a clear prohibition is found in law. As there does not exist any provision for the closing of the evidence, therefore, the Judge Family Court can adopt the procedure provided in the Code of Civil Procedure, 1908, and can apply the same to

proceedings pending before him. In case titled *Faiz-ul-Hassan vs. Mst. Jan Sultan and 2 others* (2001 SCMR 1323), it has been held by the Hon'ble Supreme Court of Pakistan that where the husband participated in the proceedings but did not file written statement as directed, the Family Court is competent to strike off defence of the husband and pass the decree for recovery of dower amount. Further reference may be made to case titled *Dr. Asma Ali vs. Masood Sajjad and others* (PLD 2011 SC 221).

The relevant portion of the judgment is reproduced herein below:

> "The provisions of the Civil Procedure Code have been excluded by Section 17 of the Family Court Act, 1964, to proceedings under it. And it has been consistently held that such provisions are not stricto sensu applicable to the proceedings before the Family Court. However, as the Family Court Act is not an all-encompassing legislation and the principles of certain provisions of the Code of Civil Procedure have at times been invoked when necessary to give effect to the Family Court Act."

11. Against order dated 21.10.2015, the petitioner filed an application for review of the said order. This application was also dismissed for non-prosecution. From the judgment and decree dated 26.04.2016 passed by the learned lower appellate Court it appears that the appeal before the learned lower appellate Court was barred by time as against the judgment and decree dated 26.11.2015 passed by the learned Judge Family Court, the appeal was instituted on 28.01.2016. Alongwith the appeal an application under Section 5 of the Limitation Act, 1908, was filed on the ground of ailment. However, no medical certificate, in support of the application, was appended. It has also been observed by the learned lower appellate Court that the petitioner has miserably failed to explain each and every day's delay in filing the appeal.

12. The judgments and decrees of the two Courts below are concurrent in nature and this Court does not find any misreading or non-reading of oral as well as documentary evidence available on the record. Even otherwise, this Court cannot upset findings of the two Courts below while exercising constitutional jurisdiction as a Court of Appeal. Learned counsel for the petitioner has failed to point out any illegality and jurisdictional defect in the concurrent finding of facts recorded by the two Courts below.

13. Sequel to the above, this writ petition is devoid of any force, hence, dismissed with no order as to cost.

(R.A.) Petition dismissed.

PLJ 2017 Lahore 237

[Multan Bench Multan]

***Present*: SHAHID MUBEEN, J.**

MUSTAFA KAMAL--Petitioner

versus

MEPCO, etc.--Respondents

W.P. No. 2414 of 2016, decided on 7.4.2016.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Employee's son quota--Appointment in service employee's son quota in MEPCO--Appointment letter was not issued--Validity--Petitioner is a child of serving employee and MEPCO authorities have not issued any offer of appointment to children of serving employees--There were 50-seats vacant and those seats were filled amongst, children of employees died during service, children of deceased retired employees and children of retired employees and no child of serving employee has been issued offer of appointment--It is established principle of law that policy decision cannot be upset unless it is shown that same is contrary to fundamental rights of petitioner enshrined in Constitution or same is arbitrary--High Court does not find policy either contrary to fundamental rights of petitioner or suffers from arbitrariness. [Pp. 238 & 239] A & B

Malik Ali Muhammad Dhol, Advocate for Petitioner.
Ch. Saleem Akhtar Warraich, Advocate for Respondents.
Date of hearing: 7.4.2016.

ORDER

Through this writ petition, the petitioner has sought directions to respondents to appoint him as Meter Reader in the in-service Employee's Son Quota in MEPCO Multan.

2. Briefly stated the facts of the case are that the petitioner in response to proclamation issued by the respondents applied for the post of Meter Reader in in-service Employee's Son Quota. According to advertisement 198 posts were to be filled in on merits and 50 posts were to be filled on the basis of Employee's Son Quota. The petitioner also obtained 44 marks in NTS exam and Respondent No. 6 issued interview letter to the petitioner in Employee's Son Quota. The petitioner appeared in the interview and got full marks. The respondents did not appoint the petitioner in Employee's Son Quota and appointed the children of employees who died during service, died after retirement and retired

Employee's Son but they did not appoint any child of employees who are in service. Hence, this writ petition.

3. It is contended by learned counsel for the petitioner that the petitioner has not been appointed by the respondent authorities with *malafide* intention. Further submits that being son of serving employee he is entitled for appointment.

4. On the other hand, learned counsel for the respondent's department submits that there were 50-seats and those were filled amongst the (a) Children of employees died during service, (b) Children of deceased retired employees, (c) Children of retired employees and no child of serving employee has been issued offer of appointment.

5. Heard. Record perused.

6. It is an admitted fact that the petitioner is a child of serving employee and respondent authorities have not issued any offer of appointment to the children of serving employees. There were 50-seats vacant and those seats were filled amongst, Children of employees died during service, Children of deceased retired employees and Children of retired employees and no child of serving employee has been issued offer of appointment. The contention of the learned counsel for the respondents is supported by policy decision *vide* office order No. AD (E.II.A) 07781/PROPRIETYRIGHTS/Chairman/21812-22461 dated 08.04.2004 and no discrimination has been made for the petitioner. It is established principle of law that policy decision cannot upset unless it is shown that same is contrary to the fundamental rights of the petitioner enshrined in the Constitution of Islamic Republic of Pakistan, 1973 or the same is arbitrary. This Court does not find the policy either contrary to the fundamental rights of the petitioner or suffers from arbitrariness.

7. Sequel to the above, this writ petition has no force, hence, dismissed with no order as to cost.

(R.A.) Petition dismissed.

PLJ 2017 Lahore 263

[Bahawalpur Bench Bahawalpur]

***Present*: SHAHID MUBEEN, J.**

SHAHNAZ BIBI--Petitioner

versus

APPELLATE AUTHORITY, etc.--Respondents

W.P. No. 8191 of 2016, decided on 16.11.2016.

Punjab Local Government (Conduct of Elections) Rules, 2013--

----Rr. 12(8) & 14(7)--Constitution of Pakistan, 1973--Art. 199--Defect in nomination paper--Special seat of women--Rejection of nomination papers--Proposer had already proposed women candidate in same category--Challenge to--Proposer of petitioner has already proposed woman candidate in same category, nomination papers of petitioner will be deemed to be invalid and will be deemed to have not been filed--Nomination papers of petitioner were incapable to rectification and will be deemed to be null and void from beginning--Defect in nomination papers of petitioner is substantial in nature and does not allow R.O. to rectify same--Petitioner had failed to point out any illegality and jurisdictional defect in impugned orders passed by R.O. as well as appellate authority.

[P. 266] A & B PLD 2016 Lah. 101, *ref.*

Mr. Athar Bali Asim, Advocate for Petitioner.

M/s. Rao Nasir Mahmood and Mian Azhar Hussain Pirzada, Advocates for Respondents.

Mr. Imran Khan, Asstt. Returning Officer.

Date of hearing: 16.11.2016.

ORDER

Through instant writ petition, the petitioner has called into question the legality and validity of order dated 17.10.2016 passed by Returning Officer/Respondent No. 2 and order dated 21.10.2016 passed by Appellate Authority/Respondent No. 1.

2. Precisely, the facts of the case are that the petitioner submitted nomination papers for Special Seat of Women General Councillor in U.C. No. 44, Tiku Rampura Tehsil and District Bahawalnagar before Respondent No. 2 which were rejected on the ground that proposer of the petitioner has already proposed the woman candidate in same category and the nomination papers of the petitioner were received later on at Sr. No. 21 at about 01.15 p.m. *vide* impugned order dated 17.10.2016. Feeling aggrieved, the petitioner preferred an appeal before Respondent No. 1/Appellate Authority which also met with the same fate and was dismissed *vide* impugned order dated 21.10.2016. Hence, this writ petition.

3. Learned counsel for the petitioner submits that impugned order dated 17.10.2016 passed by the Returning Officer of U.C. No. 44 as well as impugned order dated 21.10.2016 passed by the Appellate Authority of Tehsil Bahawalnagar are against sub-rule (8) of Rule 12 of

the Punjab Local Government (Conduct of Elections) Rules, 2013. Further contends that under sub-rule (7) of Rule 14 of the Rules ibid, the Returning Officer has the power to rectify the defect forthwith.

4. On the other hand, learned counsel for the respondents supported the impugned orders passed by the Returning Officer as well as Appellate Authority by contending that provisions of sub-rule (8) of Rule 12 of the Rules ibid are mandatory in nature and has been applied by the Returning Officer correctly.

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

6. The nomination papers of the petitioner have been rejected by the Returning Officer while invoking the provisions of sub-rule (8) of Rule 12 of the Rules ibid, therefore, it will be advantageous to reproduce the said rule which is as under:

> *"(8) If any voter subscribes as a proposer or a seconder to more than one nomination papers in the same category of seats, all such nomination papers, except the one received first by the Returning Officer, shall be void."*

7. In this case, nomination papers of the petitioner have been rejected by the Returning Officer on the ground that her proposer has already proposed woman candidate in same category. In sub-rule (8) of Rule 12 of the Rules ibid the word 'void' is not without any significance. The word 'void' has not been defined in Punjab Local Government (Conduct of Elections) Rules, 2013 and Punjab Local Government Act, 2013, therefore, I would like to take the meaning of word 'void' from the Oxford Advance Learner's Dictionary (7th Edition) as under:—

> *"Void:- noun: a large empty space, adjective: complete lacking, verb: to state officially that is no longer valid.*
>
> In Chambers 21st Century Dictionary, its meaning is as under:
>
> *"Void: Not valid or legally binding"*
>
> In Black's Law Dictionary with Pronunciations (Sixth Edition), it reads as under:
>
> *"Void: Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. Hardison v. Gledhill, 72 Ga.App. 432, 33 S.E.2d 921, 924. An instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which thus has no force or effect so that nothing can cure it. In re Oliver, Bkrtcy. Minn, 38 B.R. 245, 248."*

8. The word 'void' came under discussion in recent judgment of the Hon'ble Supreme Court of Pakistan titled as *"Dr. Mobashir Hassan and others v. Federation of Pakistan and others"* (PLD 2010 Supreme Court 265). Relevant portion of the judgment is reproduced herein below:—

> *"Term "void" signifies something absolutely null, incapable of ratification or confirmation and, thus, having no legal effect whatsoever". Similarly, the word 'void ab initio' has been defined as "null from the beginning".*

9. It is established from the record that nomination papers of the petitioner have been received by the Returning Officer after receiving the nomination papers of *Mst.* Jeshan Bibi wife of Muhammad Iqbal at Sr. No. 20 at about 1:10 p.m. whereas nomination papers of the petitioner have been received later on at Sr. No. 21 at about 1:15 p.m, therefore, keeping in view the fact that the proposer of the petitioner has already proposed the woman candidate in same category, nomination papers of the petitioner will be deemed to be invalid and will be deemed to have not been filed. The nomination papers of the petitioner were incapable to rectification and will be deemed to be null and void from the beginning.

10. The other argument of learned counsel for the petitioner that the defect in the nomination papers could be remedied forthwith by the Returning Officer has been completely answered by a Full Bench of this Court in case titled as *"Barkhurdar v. Appellate Tribunal/Additional District and Sessions Judge and 3 others"* (PLD 2016 Lahore 101). The relevant portion of the judgment is reproduced herein below:

> "27. Defect of a substantial nature can also be gauged from the language of Rule 14(7) and the kinds of errors mentioned therein. The relevant part of which states: ".... including an error with regard to the name, serial number in the electoral roll or other particulars of the candidate or his proposed or seconder so as to bring them in conformity with the corresponding entries in the electoral rolls." Applying the established interpretative canon of noscitur a sociis i.e., associated words bear on one another's meaning, the nature of errors e.g. name and serial number, etc. are clerical and cosmetic. Similarly, applying the interpretative canon of ejusdem generis i.e., where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned, to explain "or other particulars "in Rule 14(7), the same cannot go beyond the kind of errors which precede it, which as explained above as merely procedural. Even otherwise, these errors or defects do not have any statutory underpinning like Rules 12(2) and 14(3)(b) of the Rules, which require a proposer and a seconder to be from the same constituency."

11. The defect in the nomination papers of the petitioner is substantial in nature and does not allow the Returning Officer to rectify the same.

12. Learned counsel for the petitioner has failed to point out any illegality and jurisdictional defect in the impugned orders passed by the Returning Officer as well as Appellate Authority.

13. Sequel to the above, this writ petition being devoid of any force is dismissed by upholding the impugned order dated 17.10.2016 passed by Returning Officer/Respondent No. 2 and order dated 21.10.2016 passed by Appellate Authority for Tehsil Bahawalnagar/ Respondent No. 1, with no order as to cost.

(R.A.) Petition dismissed.

2018 CLC 1761

[Lahore]

Before Shahid Mubeen, J

ANSAR ABBAS----Petitioner

Versus

JUDGE FAMILY COURT and others----Respondents

W.P. No.156035 of 2018, decided on 4th April, 2018.

Family Courts Act (XXXV of 1964)---

----S. 17-A---Suit for recovery of maintenance allowance of minors---Failure of the petitioner/father to pay interim maintenance allowance in compliance of Court's order---Effect---Family Court struck off the right of defense of father and decreed the maintenance allowance of minors as prayed for---Question was whether the provision of S.17-A of Family Courts Act, 1964 was mandatory or directory in nature---Petitioner/father contended that rate of maintenance allowance of minor was exorbitant in view of his financial status and that provision of S.17-A, Family Courts Act, 1964 was directory and not mandatory in nature---Validity---Held, mandatory direction was one which was couched in such language as to make violation of statute subject to penalty whether expressed or implied---Whenever relevant statute provided for imposition of penalty as consequence of its non-compliance, the statute was necessarily to be regarded as mandatory---Where no such penalty, however, was decipherable to be attached to the non-compliance, the enactment would be considered to be directory only, the substantial compliance with which was considered sufficient ---Similarly the use of word "shall" could be used merely to stress importance of such compliance---Record revealed that Family Court directed to pay interim maintenance allowance of minors but petitioner failed to comply the same for four months, so Family Court had rightly passed impugned order to the extent of striking off defense of the petitioner while applying the provision of S. 17-A of Family Courts Act, 1964---Respondent, however, had not mentioned the accurate and exact income of the petitioner and had only stated that petitioner had good financial status, while the petitioner while filing written statement had stated his monthly salary as Rs.15,000/- being army man---Monthly maintenance allowance of minors at the rate of Rs.5000/- appeared to be excessive in view of pleadings of the parties---Increase of maintenance allowance at the rate of 20% per annum was also excessive---High Court modified monthly maintenance allowance from Rs.5000/- to Rs.4000/- and annual increase from 20% to 10%---Constitutional petition was disposed accordingly.

Asmat Ullah Khan v. Federation of Pakistan through Secretary Establishment Division and another 2008 PLC (C.S.) 394; Equity Participation Fund v. Messrs Abbrasive Products Co. Limited and 4 others 2012 CLD 971; Mst. Ashifa Riaz Fatyana v. Mst. Nazia Raheel and 10 others 2011 CLC 48; Iftikhar Ahmad Shaikh v. Ch. Muhammad Din and 2 others PLD 1990 Lah. 461; Amir Bakhsh and others v. Allah Yar and others PLD 1974 SC 124 and Shahzad Yousaf and others v. Farzana Shahzad and others 2016 SCMR 2069 ref.

Muhammad Afzal Shad for Petitioner.

ORDER

SHAHID MUBEEN, J.---Through this constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioner has challenged the vires of order and decree dated 28.11.2017 passed by the learned Judge Family Court, Tandlianwala/respondent No.1.

2. Briefly stated the facts of this case are that respondent No.2 being wife and respondents Nos.3 to 5 being minor daughters of the petitioner instituted a suit against the petitioner for recovery of maintenance allowance, dower amount Rs.100,000/-, gold ornaments weighing 1-Tola 3-Masha, Rs.40,000/- as delivery expenses and dowry articles according to list Mark-A or in alternative its price Rs.4,66,500/-. The petitioner contested the suit by filing written statement. When the case was fixed for pre-trial reconciliation, the petitioner appeared before the learned Judge Family Court and got recorded his statement on oath that he has given divorce to respondent No.2 therefore, there is no chance of reconciliation. The learned Judge Family Court vide order dated 06.07.2017 fixed interim maintenance allowance of minor respondents Nos.3 to 5 at the rate of Rs.1500/- per head per month under section 17-A of West Pakistan Family Courts Act, 1964 and framed issues for the remaining claim. The petitioner failed to pay interim maintenance to the minors in compliance of order passed by the learned Judge Family Court. Therefore, the learned Judge Family Court vide impugned order dated 28.11.2017 dismissed the suit to the extent of maintenance allowance of respondent No.2 and decreed the suit to the extent of maintenance allowance of minor respondents Nos.3 to 5 at the rate of Rs.5000/- per head per month from the date of institution of suit till their legal entitlement with 20% annual increase per annum. Hence, this petition.

3. Notices were issued to respondents Nos.2 to 5 but despite personal service of respondent No.2 no one entered appearance on their behalf, hence, they are proceeded against ex parte.

4. Learned counsel for petitioner contends that the learned Judge Family Court has struck off the defence of the petitioner and decreed the suit to the extent of minor respondents in complete oblivion of section 17-A of the Family Courts Act, 1964. He further submits that fixation of maintenance allowance at the rate of Rs.5000/- per month per minor is exorbitant keeping in view the financial status of the petitioner. He lastly adds that annual increase at the rate of 20% is also excessive.

5. Heard. Record perused.

6. The impugned order and decree dated 28.11.2017 has been passed under section 17-A of the Family Courts Act, 1964, therefore, it will be advantageous to reproduce the same which is as under:-

> **"17-A. Suit for maintenance**.-(1) In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteenth day of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case."

From bare perusal of above Section of the Act ibid, it is clear that learned Judge Family Court has the power to fix interim maintenance allowance of a child on the first date of appearance of the defendant and in case defendant fails to pay interim maintenance by the date given the defence of the defendant shall be struck off and suit shall be decided on the averments contained in the plaint. The wording of afore-noted Section makes the same mandatory as in case of non-compliance of order passed by learned Judge Family Court qua interim monthly maintenance of a wife or a child the defence shall be struck off. Whether the provision is mandatory or directory has been subject matter before the Superior Courts of Pakistan and it has been held that mandatory direction is one which is couched in such language as to make the violation of a statute subject to a penalty whether express or implied. Whenever a statute provides for imposition of penalty as a consequence of its non-compliance the statute is necessarily to be regarded as mandatory. Where, however, no such penalty was decipherable to be attached to the non-compliance, the enactment would be considered to be directory only, the substantial compliance with which was considered sufficient. Reference may be made to case law reported as "Asmat Ullah Khan v. Federation of Pakistan through Secretary Establishment Division and another" (2008 PLC (C.S.) 394). It has been held in case law reported as "Equity Participation Fund v. Messrs Abbrasive Products Co. Limited and 4 others" (2012 CLD 971) that one of the

essential features of mandatory provisions is not merely the use of word "shall" which might be used merely to stress importance of compliance of particular requirement exercised or prescribed in the enactment. Where consequences of failure to comply with direction or requirement of a statue are not stated the direction is treated as directory and not mandatory. Further reliance is placed on case law reported as Mst. Ashifa Riaz Fatyana v. Mst. Nazia Raheel and 10 others (2011 CLC 48). Iftikhar Ahmad Shaikh v. Ch. Muhammad Din and 2 others (PLD 1990 Lahore 461) and Amir Bakhsh and others v. Allah Yar and others (PLD 1974 Supreme Court 124).

7. In this case order of interim maintenance was passed by the learned Judge Family Court on 06.07.2017 whereby the petitioner was directed to pay interim maintenance allowance to minor respondents Nos.3 to 5 at the rate of Rs.1500/- per month per head and the case was adjourned to 28.07.2017. On the said date interim maintenance was not paid and it was made clear that in case the interim maintenance is not paid the court shall proceed in accordance with section 17-A of the Family Courts Act, 1964 and the case was adjourned to 19.09.2017. On subsequent dates the petitioner did not pay the maintenance allowance as per order of the learned Judge Family Court which is also reflected from the impugned order dated 28.11.2017. The impugned order dated 28.11.2017 to the extent of striking off defence of the petitioner while applying the provision of section 17-A of the Family Courts Act, 1964 has been correctly applied by the learned Judge Family Court and does not call for any interference by this Court.

8. Respondents Nos.2 to 5 have not mentioned the accurate and exact income of the petitioner and have only stated that petitioner has good financial status, whereas the petitioner while filing written statement has stated that he is an Army man and his monthly salary is Rs.15000/-. Therefore, keeping in view the pleadings of the parties, the maintenance allowance at the rate of Rs.5000/- per month per minor prima-facie appears to be excessive and beyond the pleadings, therefore, the same is modified from Rs.5000/- to Rs.4000/- per month per minor. The increase of maintenance allowance at the rate of 20% per annum is also contrary to the judgment reported in Shahzad Yousaf and others v. Farzana Shahzad and others (2016 SCMR 2069). Therefore, the same is also modified from 20% to 10% per annum.

9. Sequel to the above, this petition is disposed of in terms of paragraph No.8 of this order. No order as to costs.

MQ/A-36/L Order accordingly.

2018 CLC 1955

[Lahore]

Before Shahid Mubeen and Shahid Karim, JJ

KHALID RASHID SHEIKH and others----Petitioners

Versus

JUDICIAL OFFICER, PUNJAB COOPERATIVE BOARD FOR LIQUIDATION and others----Respondents

W.P. No.86 of 2017, decided on 20th March, 2018.

(a) Punjab Undesirable Cooperative Societies (Dissolution) Act (I of 1939)---

----S. 7---Civil Procedure Code (V of 1908), O. I, R. 10---General Clauses Act (X of 1897), S. 20---Recovery suit---Impleadment of party---Order for holding separate trial---Review petition---Competence---Applicants moved Cooperative Judge for review of his order to hold a separate trial which was dismissed holding that he had no power to review his own order---Validity---Cooperative Judge had rightly dismissed the petition---Right of review was a substantive right and was always creation of relevant statute---If power of recalling the order with ultimate object of review was not available in the relevant statute then same could not be invoked---Power of review was not available to said Court on the basis of general principles or by virtue of S. 20, General Clauses Act, 1897---Applicants had failed to point out any provision of law in the Punjab Undesirable Cooperative Societies (Dissolution) Act, 1939 whereby power to review his own order was entrusted to said Court---No illegality or jurisdictional defect had been pointed out in the impugned order passed by the Cooperative Judge---Constitutional petition was dismissed in circumstances.

Muhammad Hanif v. Member, (S&R) Board of Revenue and 2 others 2010 CLC 990; Muzaffar Ali v. Muhammad Shafi PLD 1981 SC 94; Khan Muhammad and others v. Member, Board of Revenue and others PLD 2006 Lah. 615 and Muhammad Sharif Sindhu v. Punjab Cooperative Board for Liquidation through Secretary and 4 others 2011 CLC 178 rel.

(b) Review---

----Scope.

Right of review is a substantiate right and is always creation of relevant Statute and if the power of recalling with ultimate object of review is not available in the relevant statute the same cannot be invoked. A right of review like an appeal is a substantive right, it is not

available unless the statute confers that right upon the Court or the Tribunal, as the case may be. A power of review is not available to an Industrial Court on the basis of general principle or by virtue of section 20 of the General Clauses Act, 1897. The power of review is not a matter of mere procedure but it is a question of jurisdiction which cannot be exercised unless it has been expressly conferred upon a Tribunal.

No Court or Tribunal possesses inherent powers to review its decree or order, unless expressly conferred by statute.
Omar Alvi for Petitioner
Nadeem Fazil Ajaz for Respondent No.1.

ORDER

Through this Constitutional Petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioners have challenged the vires of judgment dated 04.11.2016 passed by the learned Cooperative Judge of this Court.
2. Unnecessary details apart, the facts relevant for disposal of this petition are that Punjab Cooperative Board for Liquidation (hereinafter referred to as PCBL) instituted a suit for recovery of an amount of Rs.59,655,811/- under section 7 of Punjab Undesirable Cooperative Societies (Dissolution) Act, 1993 before respondent No.2 wherein the present petitioners were not party. Later on petitioner No.1 was directed through notice dated 14.02.2003 to appear before respondent No.2. He appeared through his counsel and denied any liability. He also moved an application under section 151 read with Order I Rule 10 C.P.C. for striking off his name from the proceedings. The respondent PCBL moved an application dated 29.05.2012 for withdrawal of the case with permission to file a fresh one and also submitted an application for amendment of the pending suit to implead petitioner No.1 and many other persons in the array of defendants. At the time of arguments learned counsel for PCBL did not press both the said applications. The learned Judicial Officer PCBL vide order dated 21.04.2015 suo motu added 34 persons including the present petitioners in the array of defendants. The respondent PCBL filed amended suit for recovery of assessed amount on 03.06.2015 wherein the present petitioners were impleaded as defendants. The petitioners contested the suit by filing written statements. The learned Judicial Officer PCBL vide impugned order dated 16.07.2015 separated the trial of the case against the present petitioners and defendants Nos.35 to 47 in the suit. They also filed an application under section 151, C.P.C. praying for recalling of order dated 16.07.2015. The learned Judicial Officer vide impugned order dated 24.11.2015 dismissed the said application in limine. Feeling aggrieved of the said order, the petitioners filed Cooperative

Petition before the learned Cooperative Judge of this Court under section 11 of Punjab Undesirable Cooperative Societies (Dissolution) Act, 1993 praying for setting aside the orders dated 16.07.2015 and 04.11.2015 passed by the learned Judicial Officer, PCBL. The learned Cooperative Judge vide impugned judgment dated 04.11.2016 dismissed the said Cooperative Petition. Hence, this constitutional petition.

3. Learned counsel for petitioners contends that the impugned judgment passed by the learned Cooperative Judge is not sustainable in the eye of law as respondent No.1 has the power to review his own order.

4. On the other hand learned counsel for respondent No.1 supports the impugned judgment and submits that respondent No.1 has no authority to review his own order.

5. We have heard the arguments of learned counsel for the parties and have gone through the record.

6. The learned Cooperative Judge has rightly dismissed the Cooperative petition of the petitioners by holding that power of review is not available to respondent No.1. It will not be out of place to mention here that right of review is a substantive right and is always creation of relevant Statute and if the power of recalling with ultimate object of review is not available in the relevant statute the same cannot be invoked. A right of review like an appeal is a substantive right, it is not available unless the statute confers that right upon the Court or the Tribunal, as the case may be. A power of review is not available to an Industrial Court on the basis of general principle or by virtue of section 20 of the General Clauses Act, 1897. The power of review is not a matter of mere procedure but it is a question of jurisdiction which cannot be exercised unless it has been expressly conferred upon a Tribunal. While taking the above view, reliance is placed on cases reported as Muhammad Hanif v. Member, (S&R) Board of Revenue and 2 others (2010 CLC 990), Muzaffar Ali v. Muhammad Shafi (PLD 1981 Supreme Court 94) and Khan Muhammad and others v. Member, Board of Revenue and others (PLD 2006 Lahore 615). Right of review is a substantive right and not a matter of procedure. No Court or Tribunal possesses inherent powers to review its decree or order, unless expressly conferred by statute. Reliance in this regard is placed on a case reported as Muhammad Sharif Sindhu v. Punjab Cooperative Board for Liquidation through Secretary and 4 others (2011 CLC 178).

7. Learned counsel for petitioners has failed to point out any provision of law in the Punjab Undesirable Cooperative Societies (Dissolution) Act, 1993 whereby power of review is entrusted to Judicial Officer to review his own order. He has also failed to point out how separation bifurcation of trial will adversely affect their case.

8. Learned counsel for petitioners has failed to point out any illegality and jurisdictional defect in the impugned judgment passed by the learned Cooperative Judge which can be interfered by this Court in its constitutional jurisdiction.

9. Sequel to the above, this petition fails and is hereby dismissed. No order as to costs.

ZC/K-10/L Petition dismissed.

2018 PLC (C.S.) 574
[Lahore High Court]
Before Shahid Mubeen, J
ALI RAZA and 2 others
Versus
GOVERNMENT OF PAKISTAN through Secretary Ministry of Kashmir Affairs and 4 others

W.P. No. 58073 of 2017, decided on 7th March, 2018.

(a) Civil service---

----General Clauses Act (X of 1897), S.24-A---Regularisatiom of service---Vested right---Scope---Natural justice principles of---Applicability---Petitioners, impugned order whereby the letter which was issued to regularize service of petitioners was withdrawn by the Department---Validity---Order of withdrawal had been issued without hearing petitioners and therefore same was against the principles of natural justice---When petitioners' services were regularized by the Department, a vested right was accrued to them, therefore, before passing any order which was adverse to petitioners, they must be heard---Order in question had been issued without assigning any reason which was violative of S.24-A of General Clauses Act, 1897---Impugned order was set aside---Constitutional petition was allowed, accordingly.

Messrs Ahmed Clinic v. Government of Sindh and others 2003 CLC 1196 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Laches---Question of laches, determination of---Scope---Fundamental Right(s) could not be denied, infringed or curtailed on ground of laches and court could not dismiss a lis on ground of laches if doing so defeated

the cause of justice---Laches, per se, was not a bar on exercise of Constitutional jurisdiction of High Court and question of delay in filing of a Constitutional petition would have to be examined with reference to facts of each case---Question of laches was to be considered in the light of conduct of person invoking Constitutional jurisdiction and degree of negligence if any should be considered along with determining that if by grant of relief being sought, no injustice would be caused to opposite party----No Constitutional petition should be dismissed merely on ground of laches without examining dictates of justice.

Umar Baz Khan through Lhrs. v. Syed Jehanzeb and others PLD 2013 SC 268; Jawad Mir Muhammadi v. Haroon Mirza PLD 2007 SC 472 and Farzand Raza Naqvi and 5 others v. Muhammad Din through Legal Heirs and others 2004 SCMR 400 rel.
Sheraz Zaka for Petitioners.

Mian Tariq Ahmad, Deputy Attorney General.
Muhammad Rafiq Shad for Respondent No.2.

ORDER

SHAHID MUBEEN, J.--- Through this constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioners have challenged the vires of letter dated 13.01.2017 passed by the Ministry of Kashmir Affairs and Gilgit-Baltistan, Government of Pakistan, Islamabad.

2. Briefly stated the facts necessary for disposal of this petition are that the petitioners were appointed as Naib Qasid/Security Guards (BS-02) in the office of Administrator Jammu and Kashmir State Property and their services were regularized vide order dated 11.02.2016 issued by Section Officer (K-II), Ministry of Kashmir Affairs and Gilgit-Baltistan. Through the impugned letter dated 13.01.2017 Government of Pakistan, Ministry of Kashmir Affairs and Gilgit-Baltistan withdrew the letter dated 11.02.2016. Hence, this petition.

3. Learned counsel for petitioners contends that the impugned letter dated 13.01.2017 is in complete negation of principle of natural justice as the same has been passed without giving an opportunity of hearing to the petitioners.

4. On the other hand, learned Deputy Attorney General duly assisted by learned counsel for respondent No.2 submits that the writ petition suffers from laches as the impugned letter was issued on 13.01.2017 whereas the writ petition has been filed on 07.08.2017 after lapse of more than six months.

5. Heard. Record perused.

6. From the bare perusal of impugned letter dated 13.01.2017 it is manifestly clear that the same has been issued without hearing the petitioners. Therefore, the same is against the principle of natural justice. When the petitioners' services were regularized by the respondents/department then a vested right has been accrued to them that before passing any adverse order they must be heard. Even otherwise the impugned letter has been issued without assigning any reason which is also violative of Section 24 of General Clauses Act, 1897. Reliance in this regard is placed on a case reported as Messrs Ahmed Clinic v. Government of Sindh and others (2003 CLC 1196) wherein it has been held that where impugned actions are completely without jurisdiction, mala fide, unlawful and passed in flagrant disregard of the law and principle of natural justice, the same amount to denial of justice. Therefore, it is not necessary to avail alternate remedies in such matters and the aggrieved party can invoke the constitutional jurisdiction.

7. It is well settled principle of law fundamental right cannot be denied, infringed or curtailed on the ground of laches. No Court could dismiss a lis on the ground of laches if it defeated the cause of justice and thereby perpetuated an injustice. Reliance in this regard is placed on a case reported as Umar Baz Khan through Lhrs. v. Syed Jehanzeb and others (PLD 2013 Supreme Court 268). Laches per se is not a bar to the constitutional jurisdiction and question of delay in filing would have to be examined with reference to the facts of each case. Reliance in this regard is placed on a case reported as Jawad Mir Muhammadi v. Haroon Mirza (PLD 2007 Supreme Court 472). The question of lathes in the writ petition is always considered in the light of the conduct of the person invoking the Constitutional jurisdiction of this Court and the degree of his negligence if any and that if by grant of relief being sought him no injustice is caused to the opposite party, the constitution petition should not be dismissed merely on the ground of laches without examining the dictates of justice. Reliance in this regard is placed on a case reported as Farzand Raza Naqvi and 5 others v. Muhammad Din through Legal Heirs and others (2004 SCMR 400).

8. Sequel to the above, this writ petition is allowed, the impugned letter dated 13.01.2017 is hereby set aside and the case is remanded to the competent authority who issued the impugned letter dated 13.01.2017 to decide the matter afresh after affording an opportunity of hearing to petitioners strictly in accordance with law through a well reasoned speaking order as early as possible preferably within a period of two months after receipt of certified copy of this order. No order as to costs.

KMZ/A-24/L Petition allowed.

2018 YLR 1652
[Lahore]
Before Shahid Mubeen, J
KALSOOM AKHTAR and 2 others---Petitioners
Versus
SARDAR MUHAMMAD through L.Rs. and others---Respondents

C.R. No.2662 of 2014, decided on 9th February, 2018.

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

----O. XX, R. 13---Constitution of Pakistan, Art. 172 (1)---Administration suit---Ownerless property--- Escheat, doctrine of---Applicability---Both the parties could not prove that disputed Ihata was in the ownership of deceased---Record revealed that said Ihata was in the ownership of Federal Government---Man could tell a lie but a document could not---Suit property should vest with the Federal Government under the principle of Escheat---Findings recorded by the Courts below to the extent of disputed Ihata were reversed---Impugned judgments and decrees to the extent of findings on other issues would remain intact---Parties would be at liberty to file an application for allotment of said Ihata and if filed the same should be decided in accordance with law by the competent authority---Revision was disposed of accordingly.

Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others PLD 2003 SC 979; Nanney Khan through Attorney v. Muhammad Dawood Khan and another 2015 YLR 1652; Ghulam Rasool v. Abdul Rashid and others 2007 MLD 515; Ravi Dutt Kapur v. Deputy Commissioner/ Collector, Jhang and 9 others 1999 CLC 500 and Muhammad Sadiq v. Taj Muhammad and 2 others 1994 CLC 326 rel.

(b) Escheat, doctrine of---

----Meaning---"Escheat" signifies a reversion of property to the State in consequence of a want of any individual competent to inherit.

Black's Law Dictionary Legal Dictionary 2nd Edition rel.
Pervaiz Inayat Malik for Petitioners.
Mian Muhammad Aslam for Respondents Nos.3(i) to (x).

ORDER

SHAHID MUBEEN, J.---Respondents Nos. 1 and 2(i) to (vii) have already been proceeded against ex parte.

2. Through this civil revision filed under Section 115 of the Civil Procedure Code, 1908 the petitioners have assailed the judgment and decree dated 19.06.2014 passed by learned Additional District Judge, Faisalabad as well as judgment and decree dated 31.10.2011 passed by learned Civil Judge Class-III, Faisalabad.

3. Precisely, the facts of the case are that petitioners instituted a suit for administration of property against the respondents contending therein that deceased Faqir Muhammad is real brother of the petitioners who died leaving behind the agricultural land comprising of Khewat No.72/72 Khatooni Nos.113 to 115 Square No.11 Killa Nos.7/1, 8, 9/1, 14/1, 16 to 18, 23 to 25 total property measuring 82-kanals 10-marlas and a residential Ihata No.10 comprising of Khewat No.3 Khatooni No.18 measuring 10-marlas and immoveable property i.e. Tractor Fiat, two trolleys, one Thrasher, 500 mounds wheat and other household articles. It is further asserted that respondents murdered the above named Faqir Muhammad and petitioners are legal heirs of the said deceased to the extent of 2/3 share. The respondents contested the suit by filing written statement controverting the averments made in the plaint. Out of the divergent pleadings of the parties the learned trial court framed relevant issues. The parties produced their oral as well as documentary evidence to prove their respective contentions. The learned trial court vide judgment and decree dated 31.10.2011 partially decreed the suit of the petitioners. Being dissatisfied with the said judgment and decree, the petitioners preferred an appeal before learned Additional District Judge, Faisalabad who vide judgment and decree dated 19.06.2014 dismissed the same. Hence, this civil revision.

4. It is contended by learned counsel for the petitioners that disputed Ihata was in the ownership of late Faqir Muhammad, therefore, it should be distributed amongst his legal heirs; and that he presses this civil revision to the extent of disputed Ihata.

5. On the other hand, learned counsel for respondents supported the impugned judgments and decrees passed by the two courts below.

6. Arguments heard. Record perused.

7. I have gone through the documents appended with this civil revision and Exh.D/1 and Exh.D/2 which pertain to the disputed Ihata. In the plaint the claim of the petitioners is that Ihata was in the ownership of late Faqir Muhammad whereas this fact has been denied by respondent No.2/Bushra Bibi claiming that the said Ihata belongs to her father which was given to her by him and it was not in the ownership of late Faqir Muhammad. The petitioners could not place on record any documentary evidence which could suggest that disputed Ihata was in the ownership of late Faqir Muhammad. Similarly, Mst. Bushra Bibi/respondent No.2 could not prove that the said Ihata was owned and possessed by her father which was given to her by her father who was stated to be owner of said Ihata. From perusal of Exh.D/2, Jamabandi for the year 1978-79, it clearly reveals that as per entry in Column No.5 the said Ihata which comprises of Khewat No.3 Khatooni No.18 belongs to the Central Government. It is established principle of law that a man can tell a lie but a document cannot. Both the parties have failed to prove ownership of the disputed

Ihata/Exh.D/2 which was in the ownership of Central Government, therefore, this property shall vest with the Central Government under principle of escheat under Article 172(1) of the Constitution of the Islamic Republic of Pakistan, 1973, which reads as follows:-

> "172. (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government."

8. According of Black's Law Dictionary (Legal Dictionary 2nd Edition), "Escheat" signifies a reversion of property to the state in consequence of a want of any individual competent to inherit. The state is deemed to occupy the place and holds the rights of the feudal lord. To elaborate the concept of "Escheat" the reference can be made to the case law reported as "Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others" (PLD 2003 SC 979). Relevant portion of the judgment is reproduced herein below:--

> "This power cannot also be exercised if a third party as already stated had acquired a right out of the judgments impugned before the Court from which the withdrawal is sought. In the case in hand all the forums inclusive of the learned Single Judge of the Lahore High Court in the earlier round of litigation held that the proceedings under Article 172 of the Constitution for the escheatment of the disputed property be taken. A valuable right had accrued in favour of the Provincial Government under Constitutional mandate and the same could not have been frustrated by the withdrawal of the appeal."

Further reference may be made to case law reported as "Nanney Khan through Attorney v. Muhammad Dawood Khan and another" (2015 YLR 1652). Relevant portion of the judgment is reproduced herein below:--

> "In a situation like this, I am of the considered opinion that it is the duty of the Court that once it is found that none is available to claim ownership of immoveable property in his own right or by means of inheritance the property would be treated as an ownerless property. And once the Court is satisfied that the property is rendered ownerless, it would be escheated to the Government in terms of Article 172 of the Constitution of Pakistan, 1973. It is the duty of the State to protect all such properties of its citizens in terms of Article 24 of the Constitution of Islamic Republic of Pakistan, 1973 and of course the Court is the custodian of fundamental rights of the citizen under the Constitution. Even the State would be allowed to take possession of such property under Article 24 clause 3(d) of the Constitution of 1973 for a limited period to protect it for the benefit of its owner."

In another case reported as "Ghulam Rasool v. Abdul Rashid and others" (2007 MLD 515) it has been held as under:--

> "The petitioner has no locus standi to make this assertion. If at all Mst. Hasso died without leaving any legal heirs, her 1/4th share in the suit property will vest in the

Province by way of escheat. In such event, it will be the Province which will have a right to claim the share of Mst. Hasoo."

In the case titled as "Ravi Dutt Kapur v. Deputy Commissioner/Collector, Jhang and 9 others" (1999 CLC 500), it has been held as under:--

"9. The argument can only be accepted on the assumption that under the personal law of the deceased the property vested in the heirs straightway. Rana Muhammad Sarwar, Advocate did not cite any law to show this. Besides the case of the petitioner is based on the will allegedly executed by the widow of the original owner in favour of the petitioner. It is well established that the will has to be proved, taken out and implemented. For this elaborate procedure exists in law and no such procedure has been followed nor any right is shown to have been established on the basis of the so-called will. It has also not been shown that the widow could make a valid will. Under Article 172 of the Constitution, it is the "ownerless" 'property, which vested in the Provincial Government. Unless the petitioner takes out and gets the alleged will implemented according to the Laws of Pakistan, he cannot be said to be the "owner" of the disputed property. The arguments of Rana Muhammad Sarwar, Advocate as soon as there is an heir of the property cannot be escheated has no force, even if the petitioner is taken to be the heir of the original owner. As noted, under Article 172 of the Constitution it is the "ownerless" property, which vested in the Provincial Government and not "heirless" property. On the present record, it cannot be held that petitioner is in any manner the owner of the disputed property. The impugned orders, therefore, are valid although the learned Deputy Commissioner was not pointed out the provisions of Article 172 of the Constitution and he proceeded to take action keeping in view of the provisions of Land Administration Manual, para.8."

In the case titled "Muhammad Sadiq v. Taj Muhammad and 2 others" (1994 CLC 326), it has been held as under:--

"As a result, since neither of the parties lips any right or entitlement in the disputed property and no one else is known to this Court to have any right or entitlement therein, it stands escheated to the State under Article 172 of the Constitution of Islamic Republic of Pakistan, 1973.

9. The findings of the two courts below to the extent of disputed Ihata are hereby reversed.

10. In view of what has been discussed above, this civil revision is disposed of in the terms of Paragraph No.7 of this order. The judgments and decrees of the two courts below to the extent of findings on other issues shall remain intact/upheld. However, the parties are at liberty to file an application for allotment of said Ihata and if such an application is filed the same shall be decided in accordance with law by the competent authority. No order as to cost.

ZC/K-9/L Order accordingly.

2019 CLC 1380

[Lahore]

Before Shahid Mubeen, J

MUHAMMAD RIAZ----Petitioner

Versus

FIDA HUSSAIN SHAH----Respondent

C.R. No. 2325 of 2011, decided on 22nd January, 2019.

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

----Ss. 53 & 45---Suit for declaration---Wrong entries in revenue record---Execution of decree passed by civil court---Entries to be made in revenue record duly supported by a decree---Scope---Plaintiff filed suit for declaration wherein he asserted that he had earlier filed a suit for recovery of possession through pre-emption which was decreed in his favour---Plaintiff had submitted zar-e-soaim, took over the possession and defendant had withdrawn the amount---Plaintiff later on found that his name was not entered in the revenue record---Trial Court dismissed the suit and Appellate Court, on appeal, decreed the suit---Plea of defendant was that decree passed in pre-emption suit could only be executed by filing execution petition and not by filing suit for declaration---Validity---After making payment, the property in dispute absolutely vested with the plaintiff---Plaintiff was in possession of property therefore, there was no reason for him to file execution petition---Revenue authorities were under obligation to sanction mutation on the basis of decree passed by Civil Court and could not refuse mutation on the ground that decree had not been put into execution within prescribed period of limitation and had become ineffective---Revision being devoid of force was dismissed.

Ali Ahmad and another v. Muhammad Fazal and another PLD 1973 Lah. 207; Jumma and 8 others v. Mst. Zainab Khatoon 1996 CLC 686 and Ali Ahmad and another v. Muhammad Fazal and another 1972 SCMR 322 ref.

Shahra and others v. Member, Board of Revenue, Punjab and others 2004 SCMR 117 fol.

(b) Punjab Land Revenue Act (XVII of 1967)---

----S. 45---Entries to be made in revenue record which are supported by a decree---Scope---Revenue authorities were under obligation to sanction mutation on the basis of decree

passed by Civil Court and could not refuse mutation on the ground that decree had not been put into execution within prescribed period of limitation and had become ineffective.

Shahra and others v. Member, Board of Revenue, Punjab and others 2004 SCMR 117 and Ali Ahmad and another v. Muhammad Fazal and another 1972 SCMR 322 ref.
Malik Amjad Pervaiz for Petitioner.
Hafeez ur Rehman Mirza for Respondent.

ORDER

SHAHID MUBEEN, J.----Through this civil revision filed under Section 115 of the Civil Procedure Code, 1908 the petitioner questions the judgment and decree dated 27.05.2011 passed by learned Additional District Judge, Jhang.

2. Brief facts giving rise to the institution of this revision petition are that the petitioner purchased suit property measuring 10 Kanal bearing Khata No.24 situated at village Basti Shah Shakoor, District Jhang fully mentioned in para No.1 of the plaint from Zulfiqar Ali Shah through mutation No.1891 dated 28.01.2000. Respondent filed a suit for recovery of possession through pre-emption against the petitioner, which was decreed in his favour by learned trial court vide judgment and decree dated 10.06.2005 and he submitted Zar-e-Soaim in the government treasury and took over the possession and petitioner withdrew the amount. Respondent gave copy of decree to Patwari and subsequently he found that his name was not entered in the revenue record and he asked the petitioner to get entered his name in revenue record but he refused. Later on, the respondent instituted a suit for declaration along with consequential relief before the learned trial court, Jhang which was contested by the petitioner by filing written statement. Out of the divergent pleadings of the parties the learned trial court framed relevant issues. The parties produced their oral as well as documentary evidence to prove their respective contentions. The learned trial court after recording the evidence of both the parties vide judgment and decree dated 30.09.2010 dismissed the suit. Aggrieved thereof, the respondent preferred an appeal before learned Additional District Judge, Jhang who vide judgment and decree dated 27.05.2011 accepted the same. Hence, this civil revision.

3. It is contended by learned counsel for the petitioner that judgment and decree passed on 10.06.2005 in preemption suit can only be executed by filing execution petition and not by filing suit for declaration as prayed in the plaint.

4. On the other hand, learned counsel for respondent submits that revenue authorities have to implement the judgment and decree as it is without there being any filing of execution petition before the civil court.

5. Arguments heard. Record perused.

6. It is an admitted fact between the parties that respondent instituted a suit for possession through preemption against the petitioner which was decreed on 10.06.2005 on the statements of the parties. The relevant extracts of the statements of the parties and orders are reproduced herein below:-

" کونسل فریقین حاضر۔ فریقین اصالتاً حاضر۔

مدعی اپنا بیان قلمبند کرانا چاہتا ہے۔ بیان قلمبند ہووے۔

بیان مکرر مدعا علیہ اپنا بیان قلمبند کرانا چاہتا ہے۔ بیان قلمبند ہووے۔

بیان ازاں محمد ریاض ولد احمد بخش مدعا علیہ برحلف۔

بیان کیا کہ مابین فریقین راضی نامہ ہو گیا ہے۔ دعوی مدعی بالا ادائیگی مبلغ -/219100 روپے ڈگری فرمایا جاوے۔ مبلغ -/66667 روپے زرِ ثمن مد خلہ عدالت میں نکلوالوں گا، بقیہ رقم مبلغ -/152433 روپے روبرو عدالت میں نے مدعی سے وصول پالی ہے۔ مدعی کا دعوی ڈگری کیا جاوے۔

سنکر درست تسلیم کیا۔

"مدعی بھی اپنا بیان قلمبند کرانا چاہتا ہے۔ بیان قلمبند ہووے۔

بیان ازاں فدا حسین شاہ ولد کرم شاہ مدعی برحلف۔

بیان کیا کہ مدعا علیہ کا بیان سن لیا ہے۔ جو درست تسلیم ہے۔ مدعا علیہ زرِ ثمن کی رقم نکلوانے کا حقدار ہوگا۔ میرا دعوی ڈگری فرمایا جاوے۔

سنکر درست تسلیم کیا۔

" حکم۔ بروئے بیانات فریقین دعوی مدعی بلعوض مبلغ -/219100 روپے ڈگری کیا جاتا ہے۔ مدعا علیہ رقم زرِ ثمن مبلغ -/66667 روپے نکلوانے کا حقدار ہوگا۔ خرچہ مقدمہ بذمہ فریقین رہے گا۔ مسل بعد اس ترتیب و تکمیل داخل دفتر ہووے۔

سنایا گیا۔

The above noted statement and judgment and decree has been produced as Exh.P/1, Exh.P/1/2 and Exh.P/2.

7. It is well settled principle of law that after making payment the property in dispute which is subject matter of pre emption absolutely vests with the respondent/decree holder which is based on compromise between the parties as a result of which petitioner has received the amount before the court by admitting the same in his statement. In taking the above view reliance is placed on case laws reported as "Shahra and others v. Member, Board of Revenue, Punjab and others" (2004 SCMR 117), "Ali Ahmad and another v. Muhammad Fazal and another" (PLD 1973 Lahore 207) and "Jumma and 8 others v. Mst. Zainab Khatoon" (1996 CLC 686).

8. From the evidence of parties more particularly DW-3 namely Amir Riaz who is son of the petitioner it is evident that the possession of the disputed property is with the respondent. DW-3 deposed in his cross examination that it is correct that respondent is in possession of the disputed property from the date of decree. As the respondent is in possession of the suit property, therefore, there is no occasion for him to file an execution petition as Executing Court generally in pre-emption suits are involved where the judgment debtor fails to deliver the possession which is required to be got delivered by the Executing Court in accordance with law. In taking the above view, reliance is placed on case law reported as "Shahra and others v. Member, Board of Revenue, Punjab and others" (2004 SCMR 117). Relevant portion of the judgment is reproduced herein below:-

> "6. The Executing Court in such matters would be involved in case the judgment-debtor fails to deliver possession of the land which is required to be delivered by the Executing Court by issuance of warrant of possession, therefore, there was no requirement of law that before sanction of mutation on the basis of pre-emption decree, the Revenue Court should have required the petitioners to obtain order from the Executing Court."

9. Further reliance is placed on case law reported as "Ali Ahmad and another v. Muhammad Fazal and another" (1972 SCMR 322) and "Shahra and others v. Member, Board of Revenue, Punjab and others" (2004 SCMR 117), wherein it has been held that revenue authorities are under obligation to sanction mutation on basis of decree passed by civil court and cannot refuse mutation on ground that decree had not been put into execution within prescribed period of limitation and therefore, had become ineffective.

10. The petitioner is estopped by his conduct to file present revision petition as he has received the amount as stated in Paragraph No.6 of this judgment and preemption decree was passed with his consent.

11. Learned counsel for the petitioner has failed to point out any illegality and jurisdictional defect in the impugned judgment and decree passed by the learned court below.

12. Sequel to above, this civil revision being devoid of any force is dismissed with no order as to costs.

SA/M-35/L Revision dismissed.

2019 MLD 537

[Lahore]

Before Shahid Mubeen, J

MUHAMMAD IQBAL---Petitioner

Versus

SAJID HUSSAIN BHATTI and others---Respondents

C.R. No.231 of 2014, decided on 12th November, 2018.

Transfer of Property Act (IV of 1882)---

----S. 52---Civil Procedure Code (V of 1908) S. 12(2)---Setting aside of decree---Plea of fraud, or misrepresentation---Immoveable property purchased during pendency of litigation relating ownership of the same---Locus standi of such purchaser to file application under S. 12(2), C.P.C. for setting aside of decree---Application of S. 52 of the Transfer of Property Act, 1882---Scope---Plaintiff's suit for declaration whereby he impugned cancellation of his plot by the Development Authority was decreed in plaintiff's favour, whereafter upon application of respondent under S. 12(2), C.P.C., said decree was set aside inter alia, on the ground that respondent was purchaser of said property---Validity---Under S. 52 of the Transfer of Property Act, 1882 if property was purchased during pendency of litigation , then such purchaser of property had no locus standi to challenge the decree and judgment by filing an application under S. 12(2), C.P.C.---Impugned order was set aside, in circumstances---Revision was allowed, accordingly.

Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905 and Muhammad Mubeen v. Messrs Long Life Builders and others PLD 2006 Kar. 278 rel.

Ijaz Ahmad Khan for Petitioner.

Ch. Tanveer Akhtar for Respondent No.1.

Mian Tahir Maqsood for Respondents-LDA.

Respondents Nos. 4 and 5 have been proceeded against ex parte vide orders dated 23.02.2017 and 16.02.2018.

ORDER

SHAHID MUBEEN, J.---Through this civil revision under Section 115 of Code of Civil Procedure, 1908, the petitioner has called in question the validity and legality of order dated 14.10.2013 passed by learned Additional District Judge, Lahore.

2. Precisely, the facts of the case as narrated in the civil revision are that respondent No.5/Mst. Sarfraz Begum purchased land measuring 3 kanal 14 marlas comprising Khasra Nos.179/3 and 179/4 Min from Hamid Hussain and Sher Iqbal Haider Zaidi vide registered sale deed No.17807 dated 01.10.1979. She applied for exemption to respondents Nos.2 and 3/LDA and plot No.13-D/1 measuring 1 kanal was allocated and in this respect a letter No.JT/AP-1155/8181 dated 11.07.1988 was issued. After payment of dues, respondents Nos.2 and 3/LDA exempted the said plot situated at M.A. Johar Town, Lahore vide letter No.JT/AP-1155/9221 dated 03.08.1988 in favour of respondent No.5 and possession of the said plot was also handed over to her vide letter No.JT/AP-1155/9407 dated 08.08.1988. Respondent No.5 sold the above said plot to Tahir Mahmood Saeed/respondent No.4 and respondents Nos.2 and 3/LDA transferred the plot in his name vide letter No.JT/AP-1155/3952 dated 25.06.1989. The petitioner purchased the said plot from respondent No.4 and the same was also transferred in his name in LDA record vide letter No.JT/AP-1155/87 dated 08.01.1990 and he took over the possession of the plot in question. Later on, LDA/respondents Nos.2 and 3 cancelled the exemption and possession of said plot vide letter No.JT/APPELLANT-1155/1218 dated 28.02.2000 without hearing the petitioner. On coming to know about the cancellation of the plot, the petitioner approached respondents Nos.2 and 3 for restoration of the plot in question. On refusal, he instituted a suit for declaration with permanent injunction against respondents Nos.2 and 3 and others before the learned Civil Judge, Lahore who vide judgment and decree dated 31.05.2010 decreed the suit. Respondents Nos.2 and 3 preferred an appeal before learned Additional District Judge, Lahore which was dismissed vide judgment and decree dated 20.01.2011. Respondent No.1 filed an application under Section 12(2), C.P.C. before learned Additional District Judge, Lahore who vide impugned order dated 14.10.2013 accepted the same. Hence, this civil revision.

3. Learned counsel for the petitioner contends that the petitioner is bona fide purchaser of plot bearing No.13-D/1, M.A. Johar Town Scheme, Lahore which was

transferred in his name on 08.01.1990 and possession was also delivered to him; that after withdrawal of exemption and possession of said plot of the petitioner by LDA, the plot in dispute was transferred to Syed Muhammad Ilyas in exchange of plot No.401-D M.A. Johar Town Scheme, Lahore by LDA on 10.03.2008 who further transferred it to respondent No.1 (Sajid Hussain Bhatti/respondent No.1) vide letter No.JT/AP-1055-1A44/3711 dated 12.04.2008 issued by LDA and that too during pendency of the suit which was instituted by the petitioner on 13.02.2006 and decreed on 31.05.2010 passed by learned Civil Judge, Lahore, therefore, respondent No.1 has no locus standi to maintain his application under Section 12(2), C.P.C as principle of lis pendens enshrined in Section 52 of the Transfer of Property Act, 1882 is fully attracted.

4. On the other hand, learned counsel for respondent No.1 has supported the impugned order.

5. Arguments heard. Record perused.

6. It is an admitted fact that petitioner instituted a suit against respondents Nos.2 and 3 (LDA) and respondent No.5 (private respondent) on 13.02.2006. The suit was vehemently contested by LDA before learned trial court and by filing appeal, therefore, said department was a party to the litigation and was not in a position to transfer the plot in dispute either to Syed Muhammad Ilyas or Sajid Hussain Bhatti/ respondent No.1. The suit was decreed on 31.05.2010. The plot in dispute was transferred to Syed Muhammad Ilyas vide letter No. JT/AP/ 1055+1844/2377 dated 10.03.2008 by LDA who subsequently transferred it to respondent No.1 vide letter No.JT/ AP/1055+1844/ 3711 dated 12.04.2008 which letters have been issued in their favour during pendency of the litigation. In taking the above view, reliance is placed on case law reported as "Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others" (PLD 2011 Supreme Court 905), in which learned Apex Court after discussing the principle laid down in Section 52 of the Transfer of Property Act, 1882 held that if the property is purchased during the pendency of litigation then purchaser has no locus standi to challenge the judgment and decree by filing an application under Section 12(2), C.P.C. Relevant portion of the judgment is reproduced herein below:--

"9. Now considering the instant case in the light of the principles mentioned above, it is clearly spelt out from the record that the appellants have purchased the property during the pendency of the suit and Yaqoob son of Ishaq was a party to the suit who was duly implead as a defendant on 14-2-1980 and had sold the property to Yaqoob son of Khuda Bakhsh on 2.4.1980 from whom the appellants via Jamshed acquired their title subsequently on 12-10-1984. In this context, it

may be elucidated that Khalid had sold the property to Yaqoob son of Ishaq prior to the institution of the suit, therefore, if the later was not impleaded as a party, and had made any transfer even during the pendency of the suit, such alienation would not have attracted lis pendens as being not a party thereto, but when the afore-named was arrayed as a defendant on 14-2-1980, from that point of time he shall for the purposes of section 52 ibid be the party to the suit, and thus for all considerations thereof was the predecessor in interest of the appellants, notwithstanding the fact that Yaqoob son of Khuda Bakhsh, who himself had purchased the property from him during the pendency of the suit was made a party to the suit or not. It is in this scenario that lis pendens shall be duly attracted and the appellants, shall have no locus standi to file application under section 12(2), C.P.C. challenging the decree on account of any lapse in the impleadment of the defendants, and thus there was no question for the recording of the evidence on this issue. In any case, as mentioned above, the appellants would not acquire any independent right to challenge the said decree even on the score of being the bona fide purchaser, because the provisions of section 52 ibid are not subservient to section 41 of the Transfer of Property Act or section 27(b) of the Specific Relief Act or the general equitable concept of Bona fide purchaser, rather the section and the rule of lis pendens is an exception to the above provisions/concept. And the appellants could only sustain in their claim to challenge the decree on the basis of the three conditions of section 52 mentioned above, but they have failed to make out a case within the purview thereof. Before parting with the subject, it may be held that plea on which the leave was granted in the case vide order dated 18-5-2007, in view of the proposition resolved through this judgment is considered to be irrelevant."

Further reliance is placed on case law reported as "Muhammad Mubeen v. Messrs Long Life Builders and others" (PLD 2006 Karachi 278). In this case, Abdul Hameed instituted a suit for specific performance against Messrs Long Life Builders and his partners namely Fayyaz Ahmed, Ch. Zulfiqar Ali Syed Ahmad, Muhammad Aleemuz Zaman including that of Mrs. Nayar Sultana Sylani in the year 1993 which was decreed on 02.12.1998 in favour of Abdul Hameed by cancelling lease deed dated 14.10.1992 executed in favour of Mrs. Nayar Sultana Sylani. When Abdul Hameed filed execution petition for the decree, then one Muhammad Mubeen filed an application under Section 12(2), C.P.C. that he has purchased the Bungalow in dispute from Mrs. Nayar Sultana Sylani in 1994. The learned Judge in the afore-noted facts and circumstances of the case while applying provision enshrined in Section 52 of the Transfer of Property Act, 1882 held as under:--

"Under section 52 of the Transfer of Property Act, no party to the suit can alienate the disputed property so as to affect his opponent. A party who has obtained decree in his favour is entitled to execute the decree not only against the person against whom decree was passed but also against person who derived title to the disputed property during the pendency of the suit. The change of title or transfer of possession during the pendency of the suit from the judgment-debtor to a third party is to be treated only symbolical title and possession, and there is no reason why the Decree Holder be not allowed to proceed also against the third party who is in actual possession of the suit property.

When a party to a suit sells disputed property to third party during pendency of the suit and ultimately he fails in establishing his title to it, the purchaser of such property cannot even seek protection of a bona fide purchaser in order to deprive the decree-holder the fruits of the decree. The third party in whose favour title is transferred during the pendency of suit by a judgment-debtor is to be regarded only a representative of the judgment-debtor and the act of selling the property cannot be allowed to defeat the claim of the decree-holders merely because the property changed hands during pendency of the suit. This is so because the rule of lis pendens is applicable also to the third party. In such a case, he is not entitled to defend the suit independently from the judgment-debtor through whom he claimed ownership rights during the pendency of the suit. The judgment and decree passed against the judgment-debtor shall also be binding on the purchaser in the same manner and to the same extent as it was binding on the judgment-debtor."

7. In view of what has been discussed above, this civil revision is allowed and the impugned order dated 14.10.2013 passed by learned Additional District Judge, Lahore is set aside with no order as to costs.

KMZ/M-13/L Revision allowed.

Section 17 (8) of the IRRO was unavoidable or beyond their control.

10. In the result, there is no merit in this petition and it is, accordingly dismissed in limine. There shall be no order as to costs.

ZC/76/Isl. Petition dismissed.

2019 Y L R 2601.

[Lahore]

Before Shahid Mubeen, J

BASHARAT ALI---Appellant

versus

RIAZ NOON---Respondent

R.F.A. No. 207947 of 2018, heard on 8th May, 2019.

Civil Procedure Code (V of 1908)---

----O. XXXVII, R. 2---Limitation Act (IX of 1908), Art. 64-A---Summary suit on the basis of cheque---Limitation---Trial Court dismissed suit being time barred---Validity---Summary suit could be filed within a period of three years from the date when the debt became payable---Date on which last cheque was dishonoured should be the date when the debt became payable---Present suit was instituted after expiry of limitation---No illegality or material irregularity had been pointed out in the impugned judgment and decree passed by the Trial Court---Appeal was dismissed in circumstances. [pp. 2602, 2603] A, B & C

Najma Sugar Mills Ltd. v. Mega Trading Company through Chief Executive 2008 MLD 114 and Muhammad Farooq and others v. Abbas Lakadwala and others 2003 CLC 1879 **rel**.

Hafiz Jamil Ahmad Naqeebi for Appellant.

Ch. Nawazish Ali Basra for Respondent.

Zafar Rahim Sukhera, AAG on Court's call.

Date of hearing: 8th May, 2019.

JUDGMENT

SHAHID MUBEEN, J.---Through this Regular First Appeal under Section 96 of C.P.C. the appellant has challenged the legality and validity of impugned judgment and decree dated 24.01.2018 passed by learned Additional District Judge, Pasrur whereby the suit of recovery filed by the appellant was dismissed being time barred.

2. Unnecessary details apart, the facts relevant for disposal of this appeal are that the appellant instituted a suit for recovery of Rs.20,26,000/- under Order XXXVII, Rule 2, C.P.C. against the respondent contending therein that respondent issued cheques in the name of appellant bearing No.3185045 dated 14.11.2012 amounting to Rs.9,13,000/- Cheque No.3185044 dated 04.07.2012 amounting to Rs.9,13,000/-, cheque No.3185041 dated 02.02.2012 amounting to Rs.1,00,000/- and cheque No.3185042 dated 22.02.2012 amounting to Rs.1,00,000/-; that having relation with the appellant the respondent borrowed Rs.23,26,000/- for his business and when he was asked for return of this amount he issued cheques to the appellant; that Rs.2,00,000/- were paid to the appellant

and one cheque amounting to Rs.1,00,000/- was lost and this suit is only to the extent of recovery of Rs.20,26,000/-; that he presented the said cheques before the bank for encashment which were dishonoured issuing memo slips due to insufficient funds in the account of respondent. On failure to return the said amount case FIR No.266/2012 under Section 489-F, P.P.C., Police Station Sabz Peer, District Sialkot was got registered against the respondent in which he has been found guilty. The respondent appeared before the court and submitted application for leave to defend the suit which was admitted subject to submission of surety amount and written statement. The issues were framed and subsequently respondent has not submitted security and written statement was submitted without compulsory requirements of submission of security and on 21.06.2017 ex parte proceedings were initiated against him and vide impugned judgment and decree dated 24.01.2018 suit was dismissed being barred by time. Hence, this appeal.

3. It is contended by learned counsel for the appellant that suit of the appellant was well within time as the respondent has refused to adhere to the genuine request of the appellant prior to 05-days from the institution of the suit.

4. On the other hand, learned counsel for the respondent has supported the impugned judgment and decree of the court below.

5. Heard. Record perused.

6. The Article which is applicable, in case suit is instituted under Order XXXVII, C.P.C. is Article 64-A of the Limitation Act, 1908 which reads as under:-

Description of suit	Period of limitation	Time from which period begins to run
64A. Under Order XXXVII of the Code of Civil Procedure	Three years	When the debt become payable

Its bare perusal manifestly reveals that suit under Order XXXVII of the Code of Civil Procedure be filed within a period of three years from the date when the debt becomes payable. In the light of afore-noted Article it is to be seen that when the period of limitation would begin to run in this case. Admittedly, the disputed cheque Exh.P/4 bearing No.3185045 dated 14.11.2012 was dishonoured on 03.12.2012 whereas other cheques were dishonoured on 01.03.2012 and 18.07.2012. The date of dishonouring of cheque is 03.12.2012 and it is the date on which the last cheque was dishonoured which could be considered to be the date when the debt was payable as per Article 64-A of Limitation Act, 1908 within three years whereas suit was instituted on 20.09.2016 i.e. after expiry of limitation i.e. 10 months and 17 days. In taking the above view reliance is placed on case laws reported as "*Najma Sugar Mills Ltd. v. Mega Trading Company through Chief Executive*" (2008 MLD 114) (D.B.) and "*Muhammad Farooq and others v. Abbas Lakadwala and others*" (2003 CLC 1879) wherein the date of notice of dishonor was considered to be the date when the debt becomes payable. A

7. Learned counsel for the appellant has failed to point out any illegality and material irregularity in the impugned judgment and decree of the court below. B

8. Sequel to the above, this Regular First Appeal has no merits, hence, **dismissed** with no order as to costs. C

ZC/B-10/L Appeal dismissed.

PLJ 2019 Lahore (Note) 50

[Multan Bench, Multan]

Present: **SHAHID MUBEEN, J.**

Syed **MUHAMMAD SALEEM SHAH BUKHARI--Petitioner**

versus

MANAGING DIRECTOR (ADMIN) WAPDA, LAHORE and another--Respondents

W.P. No. 130688 of 2018, decided on 28.2.2018.

Constitution of Pakistan, 1973--

----Art. 199--Application for appearance in examination--Allowed--Result was withheld--Departmental Promotion as Executive Engineer--Challenge to--When petitioner has appeared in Departmental Promotion Examination then it is incumbent upon respondents/department to announce result of petitioner--It is not fault of petitioner but that is of parent department of petitioner or respondents/department for which petitioner cannot be penalized--Learned counsel for respondents has failed to place on record any rule or regulation showing that in such a situation they can withhold petitioner's result--Respondents are directed to announce petitioner's result--Petition was allowed. [Para 6 & 7] A & B

Mr. Younas Khan Naul, Advocate for Petitioner.

Ch. Sajjad Ahmad Sanghera, Advocate for Respondents.

Date of hearing: 28.2.2018.

ORDER

By virtue of instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioner has challenged the *vires* of order No. GM(Trg.)/D/Exams/2134/617-19 dated 25.08.2017 passed by Respondent No. 1.

2. Briefly stated the facts necessary for disposal of this petition are that the petitioner is performing his duties as Executive Engineer, Grade-18. *Vide* Notification dated 26.01.2017 departmental promotion examination was scheduled to be held from 20.03.2017 to 23.03.2017 and last date for submission of application forms was fixed as 13.02.2017. Roll Number slip was issued in favour of the petitioner *vide* letter No. GM(Trg.)/Dir (Exams)/02020/598 dated 02.03.2017 and the petitioner was allowed to appear in the said examination. He appeared in the said examination but his result was withheld. Hence, this petition.

3. Learned counsel for petitioner submits that the petitioner was granted permission to appear in Departmental Promotion Examination *vide* letter dated 12.04.2017 whereby it was informed that petitioner was eligible for appearing in Departmental Promotion Examination. Therefore, the petitioner is entitled that his result should be announced.

4. Conversely, learned counsel for respondents submits that the petitioner has concealed the date of his promotion as XEN in BS-18 which is 21.03.2014 and in this way necessary period of three years for promotion is not completed on 14.03.2017 according to the revised schedule for Departmental Promotion Examination.

5. Heard. Record perused.

6. When confronted to learned counsel for respondents that whether any disciplinary proceedings were initiated against the delinquent officers/officials who allowed the petitioner to appear in the said examination, his answer was in negative. When the petitioner has appeared in the Departmental Promotion Examination then it is incumbent upon the respondents/department to announce the result of the petitioner. It is not the fault of the petitioner but that is of the parent department of the petitioner or the respondents/department for which the petitioner cannot be penalized. Learned counsel for respondents has failed to place on record any rule or regulation showing that in such a situation they can withhold the petitioner's result.

7. Sequel to the above, this petition is allowed, the impugned Order No. GM(Trg.)/D/Exams/2134/617-19 dated 25.08.2017 passed by Respondent No. 1 is declared to be without lawful authority and of no legal effect and is hereby set aside. The respondents are directed to announce the petitioner's result. No order as to costs.

(M.M.R.) Petition allowed.

PLJ 2019 Lahore (Note) 89

[Multan Bench Multan]

***Present*: SHAHID MUBEEN, J.**

MUHAMMAD ARIF SAEED--Petitioner

versus

CEO MEPCO, etc.--Respondents

W.P. No. 11948 of 2017, decided on 4.6.2018.

Constitution of Pakistan, 1973--

----Art. 199--Appointment as Junior Engineer--Passing of N.T.S.--Obtaining of lesser marks in interview--Issuance of merit list--Prerogative of Recruitment Committee--Challenge to--Petitioners possess required qualification for advertised posts and they passed NTS test but they were not appointed as they obtained lesser marks in interview as compared to private respondents--Petitioners do not have any vested right to be appointed on a post, rather it is sole prerogative of recruitment committee to, appoint any person--Petition was dismissed. [Para 7] A & B 2015 SCMR 112, *ref.*

M/s. Mian Muhammad Mushahid Asghar, *Muhammad Amir Khan Bhutta*, *Muhammad Ghaiz-ul-Haq Sheikh*, *Makhdoom Mushtaq Hussain Shah and Muhammad Ashraf Sindhu*, Advocates for Petitioners.

Ch. Saleem Akhtar Warraich, Advocate for Respondents.
Rao Muhammad Iqbal, Legal Advisor-MEPCO and *Malik Muhammad Hussain*, Advocate for Respondents.

Date of hearing: 4.6.2018.

ORDER

By way of this single order, I intend to dispose of this writ petition as well as writ petitions bearing No. 11959 of 2017, 11972 of 2017 and 12174 of 2017 as the same question of law and facts are involved in these writ petitions.

2. Through this writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners have sought direction to respondents to issue appointment letters to them for the post of Junior Engineer/SDO in MEPCO as they have

been declared successful candidates in interview and NTS Examination while securing higher marks than Respondents No. 3 to 30.

3. Precisely, the facts of the case as narrated in the writ petition are that in response to an advertisement the petitioners applied for the post of Junior Engineers/SDO in MEPCO and after due process they were interviewed and declared successful candidates but the respondents issued final merit list by depriving them from their legal right of recruitment. Hence, this writ petition.

4. Learned counsel for the petitioners contends that after fulfilling the eligibility criteria the petitioners passed the NTS test securing high marks, however, with *mala fide* intention they were given less marks in interview which is not sustainable in the eye of law.

5. On the other hand, learned counsel for the respondents while replying .upon case law reported as *Arshad Ali Tabassum vs. The Registrar, Lahore High Court, Lahore* (2015 SCMR 112) contends that this Court cannot substitute opinion of the interview committee.

6. Arguments heard. Record perused.

7. Admittedly the petitioners possess the required qualification for the advertised posts and they passed NTS test but they were not appointed as they obtained lesser marks in the interview as compared to private respondents. It is now well settled-law as has been held in case law reported as *"Arshad Ali Tabassum v. The Registrar, Lahore High Court, Lahore"* (2015 SCMR 112) that this Court cannot substitute opinion of the interview committee on a bald allegation made by an unsuccessful candidate. Relevant portion of the judgment is reproduced herein below:--

> *"7. As far as the contention of the petitioner that he was not recommended for appointment by the committee due to the malice on the part of the members of the Interview Committee for the reason that his services were terminated as Civil Judge on the charge of misconduct, is concerned, suffice it to observe that according to the established principle of law this Court cannot substitute opinion of the Interview Committee on the hold allegation after losing the chance in the interview. Reference is made to the case of Asif Mahmood Chughtai, Advocate and 17 others v. Government of Punjab through Chief Secretary and others (2000 SCMR 966). Dr. Mir Alam Jan v. Dr. Muhammad Shahzad and others (2008 SCMR 960) and Muhammad Ashraf Sangri v. Federation of Pakistan and others (2014 SCMR 157). In such circumstances, the petitioner could not establish any malice on the part of the Interview Committee. There is also no measuring apparatus with this Court to determine that the*

petitioner was deferred in the interview by the Interview Committee only for the sole reason of his misconduct as Civil Judge. It is presumed that the Interview' Committee must have given the petitioner marks after judging his ability without being influenced by the earlier misconduct of the petitioner as the Interview Committee was not acting as Disciplinary Committee dealing with the misconduct of the petitioner. Since the petitioner could not fulfil the requisite criteria for the post of Additional District and Sessions Judge, therefore, he was not recommended for appointment by the Selection Committee, thus, no illegality has been committed by the respondent while acting on the recommendations of the Examination Committee warranting interference by this Court in its constitutional jurisdiction."

The petitioners do not have any vested right to be appointed on a post, rather it is sole prerogative of the .recruitment committee to appoint any person.

8. Sequel to the above, this writ petition being devoid of any force is dismissed. No order as to cost.

(Y.A.) Petition dismissed.