# PROFILE

**Hon'ble Mr. Justice Shahid Waheed** was born on December 25, 1966, in an erudite family imbued with moral and ethical values. His illustrious father, late Mr. Justice Abdul Waheed, was profoundly revered as a renowned jurist whose professional excellence, legal acumen, firm disposition, and consistent performance as Judicial Officer and vibrant member of the District Judiciary were so widely recognized as to elevate to grace the Bench of the Lahore High Court, Lahore where he authored several land-mark judgments. After completing graduation from Government College, Lahore in 1986 he did LL.B. from the University of Punjab in 1989. Other accomplishments include Post Graduate Diploma in International Affairs and International Trade Laws (WTO).

He completed his apprenticeship under the supervision of renowned civil lawyer Mr. Ameer Alam Khan, Advocate, who later became Judge of the Lahore High Court, Lahore. On 27th May 1990 was enrolled as an Advocate with the Punjab Bar Council. After obtaining a licence to practice in the High Court in 1992, he became an Associate of Ch. Ijaz Ahmad, Advocate, and a luminary in the legal profession who rose to the echelons of Judge of the Supreme Court of Pakistan. In 2003, he got the licence to practice in the Supreme Court of Pakistan.

During his legal practice, he handled numerous cases of varying nature encompassing civil, criminal, taxation, corporate, trade-mark, revenue, labour, service, arbitration, and constitutional jurisdiction and assisted the Superior Courts of the country in the interpretation of different laws and settling principles of jurisprudence. A large number of these cases was later on reported in various Law Journals of the country. He also dealt with arbitration matters as a practicing lawyer and also acted as an arbitrator particularly matters relating to large public sector organizations such as WAPDA.

He had been a Legal Advisor to the Collectorate of Customs, Sales Tax & Central Excise, Inter Boards Committee of Chairmen (IBCC), all the Boards of Intermediate and Secondary Education of Punjab, University of the Punjab, University of Education, Punjab Board of Technical Education, Red Crescent Society, Punjab and many multinational and local companies, firms and educational institutions

Besides legal advisor, he had also been a Standing Counsel of WAPDA, NTDC, House Building Finance Corporation (HBFC), MCB Bank Limited, United Bank Limited (UBL), National Bank of Pakistan (NBP) and Agricultural Development Bank of Pakistan (ADBP).

Holds life membership of District Bar Association, Lahore, Lahore High Court Bar Association, Tax Bar Association and Supreme Court Bar Association.

He has a keen interest in education and was a visiting faculty in institutions such as Punjab College of Law and Himayat-e-Islam Law College.

He was elevated as Judge of the Lahore High Court on March 27, 2012.

Being Member of Administration Committee of Lahore High Court, Lahore his supervisory role encompasses the following:

- Member of Land Acquisition Committee with the purpose of land acquisition for the subordinate judiciary for construction of courts and residences of judicial officers.
- President of Rule Committee (CPC) for amendments in First Schedule of Civil Procedure Code, 1908.
- Member of Rules Committee (High Court Rules & Orders) for amendments in High Court Rules & Orders.
- Member B & F Committee-II (District Judiciary).
- Administrative Judge of Intellectual Property Tribunal.
- Chairman of Punjab Subordinate Judiciary Service Tribunal.
- Member of Committee for implementation of matter mentioned in Part-C of Chapter 3, Rules & Order of Lahore High Court, Volume V.
- Member of Punjab Subordinate Judiciary Service Tribunal.
- Chairman Enrolment Committee of Punjab Bar Council.
- Member of Recruitment Recommendation Committee for Lahore High Court and District Judiciary.
- Member of Examination Committee for Recruitment of District Judiciary and Lahore High Court Establishment.
- Member of Departmental Examination Committee for Lahore High Court Establishment and District Judiciary.

- Inspection Judge of various districts such as District Bhakkar, Sialkot, Jhang, Vehari, Gujrat, and Sargodha.
- Liaison Judge for honorable former judges of High Court.
- Member of Syndicate University of the Punjab.
- Member of Syndicate and Selection Board of University of Education, Lahore.
- Member of Board of Trustees and Syndicate of LUMS University, Lahore.

Other supervisory administrative tasks include Monitoring/Administrative Judge of the Punjab Livestock Tribunal, Punjab Revenue Appellate Tribunal, Lahore Development Authority (LDA) Tribunal, Labour Courts, Family Courts, Official Receivers, LHC Research Centre.

Being a member of the Examination Committee, Lahore High Court (LHC), he issued a white paper and introduced comprehensive reforms to evolve an effective and transparent mechanism for conducting departmental examination and recruitment of Judicial Officers in Punjab.

Spearheads the Recruitment Committee of the High Court. Under his supervision and guidance, Lahore High Court Research Centre (LHCRC) on fortnightly basis issues the 'Case Law Bulletin' containing *ratio decidendi* of the latest judgments of the Superior Courts of Pakistan, as well as those from the foreign jurisdiction.

Attended a large number of law conferences/seminars in Pakistan. He also led the delegation of judges of Pakistan visiting the USA to attend USPTO Global Intellectual Property Academy and exchanged views on the Protection of Intellectual Property Rights.

Has been rendering assistance in drafting different Acts/Ordinances and Rules.

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Government of Pakistan
Ministry of Law, Justice and Parliamentary Affairs
*****

Islamabad, the 26th March, 2012

## NOTIFICATION

No.F.5(1)/2012-A.II.- In exercise of the powers conferred by Article 197 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following persons as Additional Judges of the Lahore High Court for a period of one year with effect from the date they make oath of their office:-

1. Mr. Abdul Sami Khan
2. Mr. Ibad-ur-Rehman Lodhi
3. Mr. Shujaat Ali Khan
4. Mrs. Ayesha A. Malik
5. Shaikh Shahid Waheed

**(IRFAN QADIR)**
**SECRETARY**

**The Manager,**
**Printing Corporation of Pakistan Press,**
**Islamabad- for favour of publication in**
**the Gazette of Pakistan, Extraordinary, Part-III**

No.F.5(1)/2012-AII

Islamabad the 26th March, 2012

Copy to:-

1. Secretary General to the President, President's Secretariat, Islamabad.
2. Principal Secretary to the Prime Minister, Prime Minister's Secretariat, Islamabad.
3. Secretary, Parliamentary Committee Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Principal Secretary to Governor Punjab, Lahore.
6. Chief Secretary, Government of Punjab, Lahore.
7. Attorney General for Pakistan, Islamabad.
8. Registrar, Supreme Court of Pakistan, Supreme Court Building, Islamabad
9. Registrar, Lahore High Court, Lahore (with one spare copy each for the Hon'ble Judges).
10. The Accountant General Punjab, Lahore.
11. P.S. to Secretary, Law, Justice & P.A Division, Islamabad.
12. Record.

**(Sarfraz Ahmed)**
**Section Officer**

**OATH OF ADDITIONAL JUDGE,**
**LAHORE HIGH COURT, LAHORE**

***(In the name of Allah, the most Beneficent, the most Merciful)***

***I, Shaikh Shahid Waheed,*** *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

***That****, as Additional Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:*

***That*** *I will abide by the code of conduct issued by the Supreme Judicial Council:*

***That*** *I will not allow my personal interest to influence my official conduct or my official decisions:*

***That*** *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:*

***And that****, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

*(May Allah Almighty help and guide me (A'meen)*

**ADDITIONAL JUDGE**

*OATH made before me, this* 27th *day of March, 2012.*

**CHIEF JUSTICE**

**TO BE PUBLISHED IN THE GAZETTE OF PAKISTAN PART-III**

Government of Pakistan
Law and Justice Division
*****

Islamabad, the 25th March, 2013

**NOTIFICATION**

No.F.5(1)/2012-A.II.- In exercise of the powers conferred by Article 197 of the Constitution of Islamic Republic of Pakistan, the President is pleased to extend the tenure of the office of following Additional Judges of Lahore High Court for a period of six months with effect from the date their present term expire:-

1. Mr. Justice Abdul Sami Khan
2. Mr. Justice Ibad-ur- Rehman Lodhi
3. Mr. Justice Shujaat Ali Khan
4. Mrs. Justice Ayesha A. Malik
5. Mr. Justice Shaikh Shahid Waheed
6. Mr. Justice Ali Baqir Najfi

**Sohail Qadeer Siddiqui**
**Sr. Joint Secretary (Admn)**

**The Manager,**
**Printing Corporation of Pakistan Press,**
**Islamabad.**

No.F.5(1)/2012-AII

Islamabad the 25th March, 2013

Copy to:-

1. Secretary General to the President, President's Secretariat, Islamabad.
2. Principal Secretary to the Prime Minister, Prime Minister's Secretariat, Islamabad.
3. Secretary, Parliamentary Committee Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Principal Secretary to Governor Punjab, Lahore.
6. Chief Secretary, Government of Punjab, Lahore.
7. Attorney General for Pakistan, Islamabad.
8. Registrar, Supreme Court of Pakistan, Islamabad.
9. Registrar, Lahore High Court, Lahore (with one each spare copy for the Hon'ble Judges).
10. The Accountant General Punjab, Lahore.
11. Sr. P.S. to Secretary, Law and Justice Division, Islamabad.
12. Record.

**(Mir Balach Khan)**
**Section Officer**

**TO BE PUBLISHED IN THE GAZETTE OF PAKISTAN PART-III**

Government of Pakistan
Law, Justice and Human Rights Division
*****

Islamabad, the 18th September, 2013

**NOTIFICATION**

No.F.5(1)/2012-A.II.- In exercise of the powers conferred by Article 193 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following Additional Judges of the Lahore High Court to be the Judges of the said Court with effect from the date they make oath of their offices:-

1. Mr. Justice Abdul Sami Khan
2. Mr. Justice Ibad-ur-Rehman Lodhi
3. Mr. Justice Shujaat Ali Khan
4. Justice Mrs. Ayesha A. Malik
5. Mr. Justice Shaikh Shahid Waheed
6. Mr. Justice Ali Baqir Najfi

**JUSTICE (R)**
**(MUHAMMAD RAZA KHAN)**
**SECRETARY**

**The Manager,**
**Printing Corporation of Pakistan Press,**
**Islamabad.**

No.F.5(1)/2012-AII

Islamabad the 18th September, 2013

Copy to:-

1. Secretary to the President, President's Secretariat, Islamabad.
2. Secretary to the Prime Minister, Prime Minister's Office, Islamabad.
3. Secretary, Parliamentary Committee Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Principal Secretary to Governor Punjab, Lahore.
6. Chief Secretary, Government of Punjab, Lahore.
7. Attorney General for Pakistan, Islamabad.
8. Registrar, Supreme Court of Pakistan, Supreme Court Building, Islamabad
9. Registrar, Lahore High Court, Lahore (with one spare copy for the each Hon'ble Judge).
10. The Accountant General Punjab, Lahore.
11. Sr. P.S. to Secretary, Law, Justice and H.R Division, Islamabad.
12. Record.

**(Muhammad Mushtaq)**
Section Officer

**OATH OF JUDGE,**
**LAHORE HIGH COURT, LAHORE**

***(In the name of Allah, the most Beneficent, the most Merciful)***

***I, Shahid Waheed,*** *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

***That****, as Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:*

***That*** *I will abide by the code of conduct issued by the Supreme Judicial Council:*

***That*** *I will not allow my personal interest to influence my official conduct or my official decisions:*

***That*** *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:*

***And that****, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

*(May Allah Almighty help and guide me (A'meen)*

**JUDGE**

*OATH made before me, this* 20th *day of September, 2013.*

**CHIEF JUSTICE**

**LAHORE HIGH COURT, LAHORE.**

**CIRCULAR**

*It is to inform to all concerned that in future the correct/complete name of Hon'ble Mr. Justice Shaikh Shahid Waheed shall be written as under:-*

***"Mr. Justice Shahid Waheed".***

**SYED ALI AKBAR SHAH)**
**ADDITIONAL REGISTRAR (ESTT)**
**FOR REGISTRAR**

*Endst. No. 3045 Gaz-1.* *Dated Lahore the 05-04-2012.*

*Copy forwarded for information and necessary action to:-*

1. *The Additional Registrars, Lahore High Court, Bahawalpur, Multan and Rawalpindi Benches.*
2. *The Staff Officer/Private Secretary to Hon'ble Chief Justice, Lahore High Court, Lahore.*
3. *The Private Secretary to Hon'ble Mr. Justice Shahid Waheed, Lahore High Court, Lahore.*
4. *The Staff Officer to the learned Registrar, Lahore High Court, Lahore.*
5. *All the Private Secretaries to the Hon'ble Judges, Lahore High Court, Lahore.*
6. *The Assistant Registrar, General Branch, for placement in personal file of his lordship.*
7. *All the Gazetted Officers, Lahore High Court, Lahore.*
8. *Office Record.*

**ADDITIONAL REGISTRAR (ESTT)**

LAHORE HIGH COURT
JUDGE

**PLJ 2012 Lahore 442**
**Present: Shahid Waheed, J.**
**GHULAM SARWAR--Petitioner**
**versus**
**RUKHSANA KAUSAR, etc.--Respondents**

C.R. No. 3941 of 2010, decided on 30.3.2012.

**Punjab Pre-emption Act, 1991 (IX of 1991)--**

----S. 13(3)--Transfer of Property Act, (IV of 1882), S. 52--Suit was not maintainable due to exchange of land vide mutation--Failed to establish superior right of pre-emption--Question of--Whether pre-emption suit was maintenable due to transfer of suit property--Issuance of notice of talb-e-ishhad--Property was exchanged through mutation--Validity--Talb-i-muwathibat or talb-i-ishhad does not eclips the rights of vendee or subsequent owner for further transfer of ownership of an immovable property whereas talb-i-khusumat or pre-emption suit prohibits vendee from transferring property in view of doctrine of lis pendens provided in S. 52 of T.P.A.--Petition was dismissed. [P. 445] A
PLJ 2004 SC 653 & 2004 SCMR 1270, ref.

**Punjab Pre-emption of Act, 1991 (IX of 1991)--**

----S. 13(2)--Cause of action for making talbs--Right of pre-emption--When fact of sale comes within knowledge of pre-emptor through any service he can exercise right of pre-emption--Cause of action for making talbs accrues when pre-emptor comes to know about sale of immovable property. [P. 446] B

**Punjab Pre-emption of Act, 1991 (IX of 1991)--**

----S. 2(d)--Sale--Sale does not include exchange of agriculture land--Validity--At time of institution of suit the vendees by way of exchange mutation had divested of all rights in suit property and they were not owner of property--Suit was not maintainable because exchange was a device permissible as legitimate ground to avoid pre-emption. [Pp. 446 & 447] C

**Revisional Jurisdiction--**

----Question of law and facts if was found suffering from misreading or non-reading of evidence or based on no evidence or inadmissible evidence--High Court in exercise of revisional jurisdiction should correct error committed by subordinate Court but in absence of any defect of misreading or non-reading of evidence in

concurrent findings on such question, interference of High Court in civil revision would amount to improper exercise of revisional jurisdiction. [P. 446] D

**Re-examination and Re-appraisal of evidence--**

----Not permissible in revisional jurisdiction--If conclusion drawn by subordinate Courts on question of fact was erroneous--Record did not show any misreading or non-reading of evidence brought on record and therefore, conclusion of Courts below did not warrant any interference by High Court in its revisional jurisdiction. [P. 447] E

Mr. Taki Ahmad Khan, Advocate for Petitioner.
Date of hearing: 30.3.2012.

**JUDGMENT**

This civil revision is directed against the judgment and decree dated 12.8.2010 passed by the learned Additional District Judge, Shakargarh, dismissing the civil appeal and maintaining the judgment and decree dated 30.6.2009 of the learned trial Court whereby the plaintiff-pre-emptor's suit for possession through pre-emption was dismissed.

2. Brief facts of the case are that the land measuring 15 kanals in Khasra Nos. 1237, 1238, 1244 and 1245, Khatuni Nos.30/31 and 355/406 situated in Mouza Baramanga. Tehsil Shakargarh. District Narowal was owned by Muzammal Khan, who vide Mutation No. 1651 attested on 21.4.03 (Ex.P13) sold the land to Rukhsana Kausar (Respondent No. 1) and Naheed Bibi (Respondents No. 2) for a consideration of Rs.3,00,000/-. Subsequently, Respondents Nos. 1 and 2 exchanged the above said land through Mutation No. 1690 attested on 16.5.2003 (Ex. P.14) with Abdul Majeed, (Respondent No. 3). As per contents of the plaint the plaintiff came to know about the sale i.e Mutation No. 1651 (Ex.P13) on 11.5.2003 at 9.a.m in his Baithak from Muhammad Aslam son of Ramzan Ali (PW-2), in the presence of Abdul Saeed son of Sultan Ali (PW-3) and Ghulam Haider son of Taj Din and the plaintiff in the same meeting declared his intention to exercise the right of pre-emption through Talb-i-Muwathibat. Subsequently on 24.5.2003 the plaintiff issued notice of Talb-e-Ishhad through registered post acknowledgment due attested by Muhammad Aslam (PW-2) and Abdul Saeed (PW-3) and finally on 16.8.2003 the petitioner instituted a suit for possession through pre-emption against the respondent before the learned trail Court The defendants contested the suit and on 2.10.2003 filed joint written statement taking preliminary objections, inter alia, regarding maintainability of the suit due to exchange of suit property vide Mutation No. 1690(Ex.P14).

3. The learned trial Court out of the divergent pleadings of the parties framed following issues:--

1. Whether the plaintiff has superior right to purchase the suit property qua the defendants? OP P.

2. Whether the plaintiff has fulfilled the requirement of Talbs as per law of land? OPP.

3. Whether the sale price Rs.3,00,000/- is ostensible and has not been paid actually and the defendant purchased the suit land against a consideration of Rs.2,00,000/-? OPP.

4. Whether the plaintiff has no cause of action ?OPD.

5. Whether the plaintiff is estopped to bring this suit by way of his conduct? OPD

6. Whether the pre-emption suit is not lain against the suit land due to transfer of suit land in favour of the defendant No. 3 OPD.

7. Whether the defendants, in case of decretal of suit, are entitled to recover of expenses of sale alongwith the consideration amount of Rs. 3,00,000/-? OPD

8. Relief.

4. Parties to the suit produced oral as well as documentary evidence before the learned trial Court. The petitioner/plaintiff Ghulam Sarwar himself appeared as PW-1. Muhammad Aslam as PW-2, Abdul Saeed as PW-3, Muhammad Afzal Patwari as PW-4, Syed Mubarak Ali as PW-5, Muhammad Arshad Postal Clerk as PW-6 and Muhammad Sadiq Postman as P W-7. The petitioner also tendered in evidence Notice Talb-e-Ishhad (Exh. P1. P2, P3) Shajra Killa Bandi (Ex.P4), Sale of one year 2001/02 (Exh.P5). Postal Receipts (Ex.P6, P7, P8), copy of Record of Rights for the year 2000-01 (Ex. P9), copy of Record of Rights for the year 2004/05 (Exh.P10, P11, P12), copy of Mutation No. 1651 dated 21.04.2003 (Ex.P13) and copy of Mutation No. 1690 (Ex.P14) and closed his case. In rebuttal Respondent/Defendant No. 3 Abdul Majeed appeared as DW-1. The respondents/defendants also tendered in evidence the attested copy of Mutation No. 1651 dated 21.04.2003 (Ex.D1), attested copy of Mutation No. 1690 dated 12.05.2003 (Ex.D2), Aks Shajra Killa Bandi (Ex.D3) and copy of Record of Rights for the year 2000/01 (Ex.D4) and closed his case.

5. The learned trial Court dismissed the suit vide judgment and decree dated 30.6.2009 for the reasons that the plaintiff had failed to establish his superior right

of pre-emption; and, also failed to prove Talbs under Section 13 (3) of the Punjab Pre-emption Act, 1991. The plaintiff filed an appeal before the Additional District Judge Shakargarh, who while maintaining the findings on material issues i.e Issue Nos. 1 and 2 came to the conclusion that the suit was not maintainable due to exchange of land vide Mutation No. 1690 (Ex. P14). Feeling aggrieved by the concurrent findings of the learned Courts below the plaintiff has moved the instant revision.

6. Learned counsel for the petitioner in support of his revision has contended that notwithstanding exchange Mutation No. 1690 (Bx.P14) the plaintiff having superior right could maintain a suit on the strength of Section 32 of the Punjab Pre-emption Act read with Para-221 of D.F. Mulla's Mahomedan Law.

7. I have heard learned counsel for the petitioner and perused the record with his assistance. The pivotal issue in the case is Issue No. 6, that is, as to whether pre-emption suit was maintainable due to transfer of suit property in favour of Defendant No. 3. The plaintiff in his plaint, particularly paras 4 & 5 has categorically stated that before the issuance of notice of Talb-e-lshhad dated 24.5.2003 (Ex.P1, P2, P3) the Defendant Nos. 1 and 2 had exchanged the suit property with Defendant No. 3 through Mutation No. 1690 (Ex. P14) which was attested on 16.5.2003. In my considered view Talb-i-Muwathibat or Talb-i-Ishhad does not eclipse the rights of vendee or subsequent owner for further transfer of the ownership of an immovable properly whereas Talb-i-Khusumat or pre-emption suit prohibits vendee from transferring property in view of the doctrine of lis pendens provided in Section 52 of the Transfer of Property Act, 1882. In this regard I find fortification from the judgment rendered by Hon'ble Supreme Court of Pakistan in a case titled Abdul Yameen Khan v. Ashrat Ali Khan and others (PLJ 2004 SC 653= 2004 SCMR 1270) and relevant extract thereof reads as under:--

"From the case-law on the subject in general and from that cited at the bar, in particular, one feels no difficulty in arriving at the conclusion, that once a pre-emption suit stands instituted, a vendee is prohibited from entering into sale or resale of the disputed property. It is obvious because the lis is pending adjudication. Even otherwise, it is a matter of common sense that the provisions of Section 52 of the Transfer of Property Act would get attracted only and only when the lis is pending. Contrary to that, in the instant case, the pre-emptor had not then instituted the pre-emption suit on 5.10.2000 when the vendee Abdul Subhan had already sold the property to Ashraf Ali Khan on 29.9.2000 vide Mutation No. 639. How by any stretch of imagination or interpretation this further sale can brought within the four corners of the principle of lis pendens. The learned High Court has, therefore, rightly held that it was a new transaction altogether and the pre-emptor, if at all interested in pre-empting the sale, should have filed a suit against the latest sale and not against the previous one. If the principle of lis pendense is wrongly applied to the sales taking place prior to the institution of suit then every purchaser shall be

made bound to wait for a pre-emption suit and refrain from exercising his proprietary rights over the property purchased. The right of pre-emption by such interpretation, cannot be so over stretched and so blow out of proportions."

The above said principle was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Din Muhammad v. Abrar Hussain and another (PLD 2009 SC 93) wherein it has been held as follows:--

"Moreover according to the case of Abdul Yameen Khan v. Ashrat Ali Khan 2004 SCMR 1270, further sale in favour of Abrar Hussain (Respondent No. 1) prior to the institution of pre-emption suit could not be brought within four corners of the principle of lis pendens and since a further sale transaction had already taken place, it was the vendee of that further transaction against whom suit for pre-emption should have been filed. Thus institution of pre-emption suit against a person who was no more vested with title would be nothing but an exercise in futility".

8. In view of above stated principle of law laid down by the Hon'ble Supreme Court of Pakistan the plaintiff suit for possession through pre-emption was not maintainable as before the institution of the suit the vendees i.e Respondent Nos. 1 and 2 had already exchanged the agricultural suit property with Respondent No. 3 vide Mutation No. 1690 (Ex. P14) and thereby ceased to be the owner of the suit property.

9. There is yet another angle to address this issue. Section 13 (2) of the Punjab Pre-emption Act, 1991 provides that when the fact of sale comes within the knowledge of pre-emptor through any source he can exercise his right of pre-emption. In other words cause of action for making talbs within the contemplation of Section 13 of the Punjab Pre-emption Act, 1991 accrues when pre-emptor comes to know about the sale of immovable property. The word "sale" has been defined in Section 2(d) of the Punjab Pre-emption Act, 1991 and as per definition the sale does not include exchange of agriculture land. Admittedly at the time of institution of suit the vendees by way of exchange Mutation No. 1690 (Ex. P14) had divested themselves of all the rights in the suit property and they were not owner of the property. Hence, the contention of the learned counsel for the petitioner has no force and it is held that suit of the plaintiff was not maintainable because exchange is a device permissible as legitimate ground to avoid pre-emption.

10. There is no need to discuss other issues as the Hon'ble Supreme Court of Pakistan in the case of Muhammad Feroze and others v. Muhammad Jamaat Ali (2006 SCMR 1304) and Abdul Mateen and others v. Mst. Mustakhia (2006 SCMR 50) has laid down a principle that the concurrent finding on a question of fact or mixed question of law and facts, if is found suffering from misreading or non-reading of evidence or based on no evidence or inadmissible evidence, the High Court in exercise of the revisional jurisdiction should correct the error committed by

the subordinate Courts but in absence of any defect of misreading or non-reading of evidence in the concurrent finding of two Courts on such question, the interference of the High Court in the civil revision would amount to improper exercise of revisional jurisdiction. Moreover, re-examination and reappraisal of evidence is not permissible in revisional jurisdiction even if conclusion drawn by the subordinate Courts on a question of fact was erroneous. The revisional power of High Court is exercised for correcting an error committed by the subordinate Courts in exercise of their jurisdiction and mere erroneous decision would not call for interference unless it is established that the decision was based on no evidence or the evidence relied upon was inadmissible or the decision was perverse so as to cause grave injustice. In instant ease, the perusal of record does not show any misreading or non-reading of evidence brought on record by the parties and, therefore, the conclusion of the Courts below does not warrant any interference by this Court in its revisional jurisdiction.
In view of above, the instant petition being without merit is dismissed in limine.

(R.A.) Petition dismissed

**PLJ 2012 Lahore 475**
**Present: Shahid Waheed, J.**
**SARFRAZ AHMED--Petitioner**
**versus**
**IFTIKHAR AHMAD--Respondent**

C.R.No. 3460 of 2010, decided on 17.4.2012.

**Punjab Pre-emption Act, 1991 (IX of 1991)--**

----S. 13(3)--Qanun-e-Shahadat Order, (10 of 1984), Art. 79--Transfer of Property Act, 1882, S. 3--Attesting witness of--notice of talab-e-ishhad--Notice of talb-e-ishhad should be attested by two truthful witnesses--Question of--Whether statement of prosecution witness can be declared as attesting witness of talb-e-ishhad--Validity--Attesting witness in terms of Art. 79 of Q.S.O r/w S. 3 of T.P.A. is a person who had witnessed execution of an instrument by executant and signed the instrument for the purpose of attesting signature of executant. [P. 479] A
2005 MLD 1954, ref.

**Qanun-e-Shahadat Order, 1984 (10 of 1984)--**

----Art. 79--Attestation and execution--Different acts--Attesting witness is one who not only writes or sees a document being executed and appends his name at end of document--Validity--Attestation in relation to instrument means attested by two or more witnesses each of whom has seen executant, sign or affix his mark to instrument or has been other person sign the instrument in presence and by direction of executant or has received from executant a personal acknowledgement of his signature or mark or signatures of other persons and each of whom has signed instrument in presence of executant. [P. 479] B

2008 SCMR 1639, A.I.R. 1918 (PC) 3, ref.

**Punjab Pre-emption Act, 1991 (IX of 1991)--**

----S. 13(3)--Superior right of pre-emption--Thumb mark was affixed on blank paper and notice was written in his absence--Validity--Talb-e-ishhad is not proved on record as notice of talb-e-ishhad has not been attested by two truthful witness--Petitioner had failed to prove his superior right of pre-emption and has failed to fulfill requirement of S. 13 of Punjab Pre-emption Act, qua talbs and, therefore, no case has been made out for interference in concurrent findings of Courts below--Revision was dismissed. [P. 480] C & D

Mr. Mushtaq Ahmad Mohal, Advocate for Petitioner. Date of hearing: 17.4.2012.

## JUDGMENT

Challenge in this civil revision is to the judgment and decree dated 7.7.2010 passed by the learned Additional District Judge, Phalia District Mandi Baha-ud-Din, who affirmed the judgment and decree dated 26.01.2010 passed by the learned Civil Judge, Phalia whereby the petitioner's suit for possession through pre-emption was dismissed.

2. Briefly, the facts of the case are that Sarfraz Ahmad, petitioner/plaintiff instituted a suit for possession through pre-emption against Iftikhar Ahmad, respondent/defendant, claiming therein that the suit land measuring 15 kanals bearing Khewat No. 74, Khatuni No. 81, as per record of rights 2001-02 of Mouza Sahnpal, Tehsil Phalia, District Mandi Baha-ud-Din, was secretly sold out by Mst. Rasulan to the respondent vide Mutation No. 661 dated 2.12.2004 (Ex. P1) on fictitious price of Rs.300,000/- instead of actual consideration of Rs.250,000/-. As per contents of the plaint, the petitioner came to know about the sale on 8.12.2004 at his Fish Farm at 4.00 p.m., through Muhammad Riaz (PW-3) in the presence of Muhammad Shafi (PW-2) and he immediately declared his intention to exercise his right of pre-emption and, thereafter, on 14.12.2004 notice of Talab-e-Ishhad (Ex. P1) was dispatched under registered cover acknowledgement due to the vendee/respondent. In response to the summons issued by the learned trial Court the respondent/defendant appeared before the Court and contested the suit by filing his written statement.

3. Learned trial Court reduced the controversy into following issues:--

1. Whether the plaintiff has superior right of pre-emption qua the defendant? OPP

2. Whether the plaintiff fulfilled the requirements of Talabs in accordance with law? OPP

3. Whether the actual sale price of the Suit land was fixed Rs. 250000/- but in order to defeat his right of pre-emption Rs. 3,00,000/- were wrongly entered in the mutation? OPP

4. If the above issue is not proved in affirmative then what was the market value of the suit land at the time of its sale? OP Parties.

5. Whether the plaintiff has no cause of action? OPD

6. Whether the plaintiff has waived his right of pre-emption? OPD

7. Whether the plaintiff has not come to the Court with clean hands? OPD

8. Relief.

4. Parties to the suit in support of their respective claims produced oral as well as documentary evidence before the learned trial Court. Petitioner, Sarfraz Ahmed, appeared himself as PW-1 and produced Muhammad Shafi (PW-2), Muhammad Riaz (PW-3), Shafique-ur-Rehman (PW-4) and Ali Jan (PW-5). He also produced notice of Talab-e-Ishhad (Ex.P1), postal envelope (Ex.P2), A.D card (Ex.P3), copy of record of rights 2001-2002 (Ex.P4 and Ex.P5), copy of record of rights for the year 2004-2006 (Ex.P6 and Ex.P7) and copy of Aks Shajra (Ex.P8). On the contrary respondent, Iftikhar Ahmad, got examined himself as DW-1 and produced Samar Pervez as (DW-2). The respondent also produced a copy of record of rights for the year 2005-06 (Ex.D1), copy of Aks Shajra (Ex.D2) and copy of report of Commission (Ex.D3). The learned trial Court vide judgment and decree dated 26.1.2010 dismissed the suit on the ground that the petitioner had failed to prove his superior right of pre-emption and also could not fulfill the requirements of Talabs. The petitioner feeling aggrieved by the judgment and decree passed by the learned trial Court preferred an appeal before the learned Additional District Judge but it also met the same fate on the same ground. Hence this civil revision.

5. Learned counsel for the petitioner in support of this petition contends that both the Courts below have mis-read and non-read the evidence available on record and resultantly mis-applied the provisions of law as the petitioner through evidence has established his superior right of pre-emption and also compliance of requirements of Talbs contemplated in Section 13 of the Punjab Pre-emption Act, 1991.

6. I have heard learned counsel for the petitioner and perused the record. The pre-emption right is a feeble right and, therefore, pre-emptor is bound to establish his superior right of pre-emption and to perform and "fulfill requirements of Talabs meticulously and any failure in that behalf would deprive the pre-emptor of success in getting a pre-emption decree. In this perspective the learned trial Court framed Issue Nos. 1 and 2. Onus probandi to prove Issue No. 1 was on the plaintiff/petitioner and, that is, as to whether the plaintiff had superior right of pre-emption qua the defendant. The petitioner in Para 5 of the plaint has stated that his property is situated adjacent to the pre-emptor's property and he also share right of passage and of water and, therefore, claimed himself to be Shaf-e-Khalit and Shaf-e-Jar. In support of this assertion the petitioner produced: (i) copy of record of rights 2000-2001 (Ex.P4) which establishes the petitioner's ownership over 10 marlas of land in Khewat No. 51, Khatuni No. 58, (ii) copy of record of rights 2005-06 (Ex.P6) which discloses petitioner's ownership over 10 marlas of land in Khewat No. 53, Khatuni No. 63; and, ownership over 15 kanals of land situated in Khewat No. 76, Khatuni No. 87; and (iv). Aks Shajra (Ex.P8). On the contrary the respondent, Iftikhar Ahmad, produced record of rights 2005-06 (Ex. D1) regarding his property situated in Khewat No. 21, Khatuni No. 22

(87 kanals 17 marlas); Khewat No. 76, Khatuni No. 87 (8 kanals 14 marlas); and Khewat No. 76, Khatuni No. 88 (21 kanals 7 marlas). He also produced a copy of Aks Shajra (Ex. D2). A perusal of the oral as well as documentary evidence conclusively establishes that both the plaintiff and defendant are Shaf-e-Khalit and Shaf-e-Jar and, therefore, relying upon the principle laid down in the case of Sardar Khan v. Gulzar and another (2006 YLR 1203) it is held that the plaintiff/petitioner has failed to prove his superior right of pre-emption as the land of the respondent is excess in area to the land of the plaintiff/petitioner. Hence the Courts below have rightly declared that the petitioner has no superior right of pre-emption qua the defendant.

7. Now I advert to Issue No. 2 viz whether the plaintiff fulfilled the requirements of Talab in accordance with law. In the instant case the petitioner alleged that he came to know about the sale on 8.12.2004 at his Fish Farm at 4 p.m. through Muhammad Riaz (PW-3) in presence of Muhammad Shafi, (PW-2) and he immediately declared his intention of pre-emption. He further stated that after obtaining copy of Mutation No. 661 (Ex.P1) on 13.12.2004 notice of Talab-e-Ishhad (Ex. P1) attested by two witnesses confirming Talab-e-Muwathibat was dispatched under registered postal cover on 14.12.2004. The respondent, however, controverted the petitioner's assertion qua making of Talabs and stated that the petitioner had waived his right of pre-emption. Sarfraz Ahmed/petitioner while appearing as PW-1 deposed that he came to know about the sale on 8.12.2004 at his Fish Farm through Muhammad Riaz (PW-3) at 4 p.m. and after obtaining copy of mutation Ex. P1 from Patwari, notice of Talab-e-Ishhad was got drafted on 14.12.2004 from the office of Khalid, Advocate. He further states that Muhammad Riaz (PW-3) and Muhammad Shafi (PW-2) were with him and Muhammad Shafi (PW-2) affixed his thumb impression whereas Muhammad Riaz (PW-3) signed the notice of Talab-e-Ishhad. Muhammad Shafi who appeared as PW-2 in the course of cross-examination made the following statement:--

''بیان پر منشی نے کاغذ پر انگوٹھا لگایا اور انگوٹھا لگوانے کے بعد منشی نے لکھا۔ میں انگوٹھا لگانے کے بعد چلا گیا۔ میں اکیلا ہی گیا تھا۔ یہ دونوں یہاں رہ گئے۔ یہ غلط ہے کہ میں نے جھوٹی شہادت دی ہے۔''

According to Section 13(3) of the Punjab Pre-emption Act, 1991 the notice of Talab-e-Ishhad should be attested by two truthful witnesses. "Attestation" and "Execution" are two different acts. The attestation is meant to ensure that the executant was a free agent and not under pressure nor subject to fraud while executing the document/notice. Now a question arises that whether Muhammad Shafi (PW-2), in view of his above quoted statement can be declared as attesting witness of notice of Talab-e-Ishhad (Ex.P1). The attesting witness in terms

of Article 79 of Qanun-e-Shahadat Order, 1984 read with Section 3 of the Transfer of Property Act, 1882 is a person who had witnessed the execution of an instrument by the executant and also signed the instrument for the purpose of attesting signature of the executant. It has been held in the case of Riaz-ur-Rehman and others v. Muhammad Urus (2005 MLD 1954) that attesting witness is one who not only writes or sees a document being executed and appends his name at the end of document, but is a person who also signs it as a witness. It is well settled principle that attestation in relation to instrument means attested by two or more witnesses each of whom has seen the executant, sign, or affix his mark to the instrument, or has seen other person sign the instrument in the presence and by the direction of the executant or has received from the executant a personal acknowledgement of his signature or mark or of the signatures of such other persons and each of whom has signed the instrument in presence of the executant. The word "attested" means that person has signed the document by way of testimony to the fact that he saw it executed. The necessary conditions for a witness attesting the deed are: firstly, that he has seen the executant; and, secondly, he has signed the instrument in the presence of the executant. If these two conditions are fulfilled by the witness, there can be no doubt about his being attesting witness. In this regard reliance is placed on Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639), Rai Ganga Pershad Singh and others v. Ishri Pershad Singh and others (A.I.R. 1918 Privy Council 3), Banarsi Das and others v. Collector of Saharanpur and
others (A.I.R. 1936 Allahabad 712) and Zaharul Hussain v. Mahadeo Ramji De shmukh and others (A.I.R. (36) 1949 Nagpur 149). In view of above, it is clear that Muhammad Shafi (PW-2) cannot be treated as attesting witness of notice of Talab-e-Ishhad (Ex. P1) as he neither witnessed the execution of notice by the executant/Sarfraz Ahmed nor affixed his thumb mark for the purpose of attesting mark of the executant/Sarfraz Ahmed and this is evident from his statement made during cross-examination that he affixed his thumb mark on the blank paper and notice was written in his absence. In these circumstances, Talab-e-Ishhad is not proved on record as notice of Talab-e-Ishhad has not been attested by two truthful witnesses. The learned Courts below have rightly placed reliance on the case titled Imam Ali v. Muhammad Siddique and 3 others (2007 CLC 277) which on all fours is applicable to the facts of the instant case wherein it has also been held as follows:--

"Now Siddique Respondent No. 1 has appeared as D.W.3 to state that the petitioner never made a Talb and never came to him with any persona and that Imam Ali petitioner and his witnesses are lying. Now so far as the matter of the said notice (Exh.P.3) is concerned, I am afraid that the petitioner himself negated the testimony of his said witnesses. In the course of his cross-examination, he has stated that he got the thumb impressions of the witnesses on the notice. He admitted without any demur that the thumb-impressions were obtained on blank papers and thereafter the notice was typed. He was further cross-examined and he admitted that when notice

was being typed the witnesses had left for their village. He has further stated that he does not at all know as to what was written in the notice. To my mind, the allegation that the petitioner went to the house of the Respondent No. 1 with the consideration amount and he refused to accept it stands duly rebutted on record while it is in the statment of the petitioner himself that no valid notice evidencing Talb-i-Ishhad was given. I, therefore, do confirm the finding of the learned Additional District Judge that making of a valid Talb-i-lshhad has not been proved on record."

8. The petitioner has failed to prove his superior right of pre-emption and has also failed to fulfill the requirement of Section 13 of the Punjab Pre-emption Act, 1991 qua the Talabs and, therefore, no case has been made out for interference in the concurrent findings of the Courts below.

9. In view of what has been discussed above, the instant civil revision being bereft of any merit is dismissed in limine.

(R.A.) Petition dismissed.

**PLJ 2012 Lahore 482 (DB)**
**Present: Muhammad Khalid Mehmood Khan and Shahid Waheed, JJ.**
**CH. IFTIKHAR AHMAD--Appellant**
**Versus**
**CHIEF SECRETARY PUNJAB, etc.--Respondents**

ICA No. 893 of 2010, heard on 26.4.2012.

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

----R. 22--Constitution of Pakistan, 1973, Art. 189--Law Reforms Ordinance, (XII of 1972), S. 3--Intra Court Appeal--Govt. of Punjab terminated on block the services of all ad-hoc lecturers and as a consequence thereof she joined service as S.S.T.--Termination order was recalled with direction to appear before committee for assessment of suitability of selection in service--Civil servant could not appear before committee--Service Tribunal directed to secretaries to consider reconstitution of adhoc Board so as to assess suitability--Department did not challenge judgment before Supreme Court--After death of (deceased civil servants) appellant made request for implementation of judgment rendered by service tribunal so as to get due pensionary benefits but respondents did not budge--Challenge to--Recklessness and negligent attitude of secretaries--Order was discriminatory and irrational--Deceased civil servant was a law abiding citizen and obedient civil servant--Rules were relaxed only for benefit of working civil servants and not for those civil servants who died because of their negligence and malfeasance--Validity--Chief Secretary and department had been regularizing services of adhoc employees who did not appear before special selection board and appellant drew attention of Court towards office orders whereby services of different adhoc employees were regularized from date of joining their duty and such fact was not denied by respondents--Principle was binding on High Court as well as on each and every organ of state and, therefore, respondents would have applied principle of equality and regularized services of deceased civil servant from date of her joining duty as adhoc lecturer--Appeal was allowed. [P. 488] B & C
PLD 2011 SC 22.

**Constitution of Pakistan, 1973--**

----Art. 25--Right of fair trial to citizen of Pakistan--It is an established principle of law that no one can be penalized for act of public functionaries. [P. 488] A

2006 SCMR 496, 2007 SCMR 554 & 2007 SCMR 569, rel.
Ch. Waris Ali Saroya, Advocate for Appellant.
Mr. Muammad Iftikhar-ur-Rasheed, AAG with Shahid Fareed Deputy Secretary Higher Education Department for Respondents. Date of hearing: 26.4.2012.

## Judgment

**Shahid Waheed, J.--**The appellant, Ch. Iftikhar Ahmad, has moved instant Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972 calling in question order dated 20.10.2010 passed by the learned Single Judge of this Court in W.P. No. 21585/10 whereby the aforesaid petition was dismissed.

2. Briefly, the facts of the case are that wife of the appellant namely Mrs. Akhtar Tufail joined the service as a regular Senior School Teacher. Later on, she was appointed as an Adhoc Lecturer vide Notification dated 29.09.1985. Government of the Punjab in the year 1986 terminated on block the services of all Adhoc Lecturers and as a consequence thereof she joined her previous service as Senior School Teacher. However, on 11.01.1989 the Government of Punjab recalled the termination orders of all Adhoc Lecturers and in pursuance thereof she was given post of lecturer at Government Girls College, Pattoki with a direction to appear before a Special Selection Board constituted by Government of the Punjab for interview/assessment of her suitability of selection/ regularization in service. After eight months she was relieved from her duties from the Government Girls High School, Pattoki and joined as lecturer vide order dated 13.11.1989. She could not appear before Special Selection Board which was abolished before her joining the post. She applied for her regularization to the Director Public Instructions (Colleges), Punjab who vide memo. dated 09.08.1995 strongly recommended her case for regularization but the request was turned down. It is worth mentioning here that in the meantime her colleagues who also did not appear before the Special Selection Board were regularized by the Education Department, Government of the Punjab. However, Secretary, Government of Punjab, Education Department refused to regularize the services of the appellant's wife vide order dated 31.01.2005. The deceased civil servant during her life time assailed order dated 31.10.2005 before the Chief Secretary but it remained undecided and in these circumstances, she moved an appeal Bearing No. 665/06 before the learned Punjab Services Tribunal. On 05.05.2007, the learned Punjab Services Tribunal disposed of the appeal with a direction to the Chief Secretary as well Secretary Education to seriously consider the reconstitution of an Adhoc Special Selection Board so as to assess her suitability for selection/ regularization in service after an interview. The department did not challenge judgment dated 05.05.2007, passed by the learned Punjab Services Tribunal before the Hon'ble Supreme Court of Pakistan and resultantly it attained finality. Consequent upon the judgment rendered by the learned Punjab Services Tribunal, Mst. Akhtar Tufail moved representation before the respondents for the implementation of the judgment but it could not evoke favourable response. In these circumstances and being helpless Mst. Akhtar Tufail moved C.M., No. 754/08 in Appeal No. 665/06 before the learned Punjab Services Tribunal for the implementation of judgment dated 05.05.2007. The learned Punjab Service Tribunal vide judgment dated 14.12.2009 again directed the respondent to implement the

judgment dated 05.05.2007. The wife of the appellant again approached the respondents for the compliance of judgment but all in vain. With this sense of frustration she died on 05.02.2010. After the death of Mst. Akhtar Tufail the appellant made a request to the respondent for the implementation of the judgment rendered by the learned Punjab Services Tribunal and to regularize 28 years service as adhoc lecturer of Mst. Akhtar Tufail so as to get her due pensionary benefits but the respondents did not budge. Feeling aggrieved, the appellant moved this Court through W.P. No. 21585/10 and it was dismissed vide order dated 20.10.2010. Hence this appeal.

3. In response to notice issued by this Court, the respondents submitted report and parawise comments wherein they stated that the case of Mst. Akhtar Tufail (deceased) was referred by the Education Department to the Chief Minister, Punjab with the proposal to regularize her services with effect from 24.09.1985 to 03.06.1986 and 17.09.1989 to 05.02.2010 in relaxation of Rule 22 of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 but the Regulation Wing, S&GAD, Government of Punjab observed that aforesaid rule could only be relaxed in favour of a civil servant and not in favour of a deceased civil servant and resultantly declined to regularize her services.

4. After perusing the facts of the case and report and parawise comments submitted on behalf of the respondents the notice was issued vide order dated 16.02.2012 to the Secretary Education, Government of Punjab to appear in person along with relevant record and to explain why the judgment of the Punjab Services Tribunal was not implemented and also why the matter was sent to the Chief Minister Punjab in violation of the direction of the learned Punjab Services Tribunal. On 28.02.2012, the learned Assistant Advocate General presented record of the case before this Court and it was observed in order dated 28.02.2012 that prima facie the perusal of the record proved the recklessness and negligent attitude of two Secretaries i.e. Secretary Law and Secretary Education. In this situation, this Court issued notice to both the Secretaries to appear in person before this Court and explain why the order of learned Punjab Services Tribunal was not implemented. On 26.03.2012, Dr. Ijaz Munir, Secretary Higher Education and Dr. Syed Abu-ul-Hassan, Law Secretary appeared in person and sought time to resolve the dispute amicably. The case was accordingly adjourned. Today the representative of the Higher Education Department, Government of Punjab presented before us Order No. SO(CE-III)22-1/95(58) dated 25th April, 2012 whereby the service of (late) Mst. Akhtar Tufail, Adhoc Lecturer were regularized w.e.f. 28.03.2009. After perusing order dated 25.04.2012, the learned counsel for the appellant submitted that this order was discriminatory and irrational.

5. Before proceeding further we would like to cite judgment passed in the case of Council of Civil Services Union v. Minister for Civil Services (1985)1 AC 374, wherein Lord Diplock has suggested a three fold classification of the various

grounds on which administrative decision can be reviewed by a Court. These grounds are:--

"(i) `Illegality' which means that the "decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it".

It means that the decision-maker must keep within the scope of his legal power. Illegality means that the decision-maker has made an error of law; it represents infidelity of an official action to a statutory propose. Such grounds as excess of jurisdiction, patent error of law, etc. fall under the head of "illegality ".

(ii) `Irrationality' denotes unreasonableness in the sense of Wednesbury unreasonableness.

(iii) Procedural Impropriety--The expression includes failure to observe procedural rules including the rules of natural justice or fairness wherever these are applicable."

The principle of Wednesbury unreasonableness have been laid down in the case of Associated Provincial Picture Houses vs. Wednesbury Corporation (1947) 1-KB-223 wherein Lord Greene, M.R., has observed as follows:--

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to he acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v. Poole Corporation (1926) Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

The principle of Wednesbury unreasonableness has also been approved by the Hon'ble Supreme Court of Pakistan in the case of Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455). Keeping in view the principle laid down in the case of Council of Civil Service Union (supra) we analyze the facts of the case.

6. The perusal of the facts shows that (late) Mst. Akhtar Tufail was a law abiding citizen and an obedient civil servant and this fact finds corroboration from her conduct as, firstly, she moved an application before the competent authority for

relieving her to join the new assignment but the matter was unnecessarily delayed and as a result thereof she could not promptly join duty as Lecturer and appear before the Special Selection Board for interview; secondly, she moved repeated representations before the higher Authorities for the redressal of her grievance but departmental red-tape always came in her way; thirdly, she approached the Punjab Services Tribunal to get her lawful right. The department did not implement the judgment dated 04.05.2007 passed in Appeal No. 665/06 and did not constitute a Special Selection Board for her; fourthly, she moved a Miscellaneous Application Bearing No. 754 of 2008 before the learned Punjab Services Tribunal whereby the earlier directions were reiterated by the learned Punjab Services Tribunal vide judgment dated 14.12.2009. Even then the respondents remained non-responsive and showed usual recklessness and lethargy towards the matter and as a result thereof (late) Mst. Akhtar Tufail died in frustration. All these facts show malice in law and malice in fact on the part of respondents. On the one hand, the department was regularizing the colleagues of (late) Mst. Akhtar Tufail who also did not appear before the Selection Board and on the other hand, the department taking benefits of his own misdeeds refused to implement the judgment rendered by the learned Punjab Services Tribunal on the pretext that the rules are relaxed only for the benefit of working civil servants and not for those civil servants who died because of their negligence and malfeasance. The above resume shows that respondents being public officers abused their respective offices, either by an act of omission or commission, and as a consequence thereof an injury was caused to (late) Mst. Akhtar Tufail. The action on the part of the respondents by all means constitutes misfeasance in public office. The deliberate maladministration and unlawful acts of respondents caused injury to (late) Mst. Akhtar Tufail who due to their mischief died in frustration. This is also a clear violation of Article 9 of the Constitution of Islamic Republic of Pakistan which guarantees life with dignity, Article 10-A which guarantees right of fair trial to the citizens of Pakistan and Article 25 which prevents discriminatory action. It is an established principle of law that no one can be penalized for the act of public functionaries and this principle has been approved by the Hon'ble Supreme Court of Pakistan in the cases of Najam Abbass and others vs. SP City Division, Gujranwala and others (2006 SCMR 496), Province of the Punjab through Collector District Khushab, Joharabad and others vs. Haji Yaqub Khan and others (2007 SCMR 554) and Overseas Pakistanis Foundations and others vs. Sqn. Ldr. (Retd.) Syed Mukhtar Ali Shah and another (2007 SCMR 569). By applying the test laid down in the case of Council of Civil Services Union (supra) we have no hesitation in saying that the action of the respondent is illegal, irrational and shows procedural impropriety for the reasons that the respondents neither applied the law correctly nor considered the above relevant facts while passing order dated 25.04.2012 whereby the service of late Mst. Akhtar Tufail have been regularized with effect from 28.03.2009.

7. It is an admitted fact that the respondents have been regularizing the services of those adhoc employees who also did not appear before the Special Selection Board and in this regard the learned counsel for the appellant drew our attention towards the office orders dated 22.8.95, 29.06.1989, 29.03.1994 and 18.04.1995 whereby the services of different adhoc employees were regularized from the date of joining their duty and this fact was not denied by the respondents. Somewhat similar situation came up for consideration before the Hon'ble Supreme Court of Pakistan in the case of Ijaz Akbar Kasi and others vs. Minister of Information and Broadcasting and others (PLD 2011 SC 22) and it was held as follows:

"Therefore, we are of the opinion that the case of the petitioners deserves to be considered by the Board of Directors for the reasons noted hereinahove as they cannot be discriminated without any cogent reason by violating the provisions of Article 25 of the Constitution and at the same time after having spent a considerable period of their lives in the Organization performing duties on contract basis. It is also the duty of the Organization to protect their fundamental rights enshrined in Article 9 of the Constitution."

The aforesaid principle laid down by the Hon'ble Supreme Court of Pakistan by virtue of Article 189 of the Constitution of Islamic Republic of Pakistan is binding on this Court as well as on each and every organ of the State and, therefore, respondents should have applied the principle of equality and regularized the services of Mst. Akhtar Tufail from the date of her joining duty as Adhoc Lecturer.

8. In view of what has been discussed above, this appeal is allowed and the order dated 20.10.2010 passed by the learned Single judge in W.P. No. 21585/10 is set aside and we direct the respondents to regularize the services of (late) Mst. Akhtar Tufail from the date when she joined duty as Adhoc Lecturer. No order as to cost.

(R.A.) Appeal allowed

**PLJ 2012 Lahore 489**

**Present: Shahid Waheed, J.**

**MUHAMMAD MUZAMMIL SAEED--Petitioner**

**versus**

**VICE CHANCELLOR UNIVERSITY OF THE PUNJAB etc.--Respondents**

W.P. No. 9284 of 2012, decided on 25.4.2012.

**Educational Institution--**

----Unfair means case was made against petitioner--Bundle of answer books and unfair means cases were snatched from invigilator--Candidates against whom unfair means cases were registered would not be allowed to sit in re-examination--Appeal was filed before vice-chancellor for reconsideration--Assailed the decision of disciplinary committee--No charge within contemplation of Regulation 12 & 13 was made out--Held: Disciplinary Committee and V.C. while inflicting punishment did not give any reason in support of decision--None of committee had stated whether material recovered from the petitioner was relevant to syllabus so as to attract the provisions of Regulation as set out charge sheet stands proved against the petitioner--If decisions were expressed in these terms then same would be termed as arbitrary and autocratic and had character of being deleterious passed without considering facts, circumstances, rules and regulations made to regulate such decision--University is in nature of a mere Domestic Tribunal constituted under law and dispute of such kind between the university and candidate admitted to examination arranged by it, is primarily domestic, and such dispute can be resolved in the homely and domestic atmosphere of university and should not be allowed to be dragged to law Courts--Matter was remitted to disciplinary committee to pass fresh cogent order after affording opportunity of hearing to petitioner before commencement of forthcoming examination--Petition was accordingly allowed. [Pp. 493, 494, 495 & 496] A, B, C & D

2003 SCMR 1250, PLD 1964 SC 260, PLD 1970 SC 39, PLD 1970 SC 29, PLD 1996 SC 709, 1998 SCMR 2268 & 1995 SCMR 650, rel.

Rana M. Ayub Tahir Joyya, Advocate for Petitioner.

Sardar Tariq Mehmood, Advocate Vice Counsel for University of the Punjab.

Date of hearing: 25.4.2012.

**JUDGMENT**

The petitioner, Muhammad Muzammil Saeed, being a regular student of Punjab University Law College appeared in LL.B. (Part-I) Annual Examination, 2011 under Roll No. 3470 from the Examination Centre constituted at Punjab College of Commerce, Lahore (LHR-17). On 28.07.2011, the University Monitoring Team comprising Addl. Controller of Examinations, Deputy Controller of Examination-II,

Deputy Controller of Examination-I and Deputy Controller (Conduct) visited the above said Examination Centre and while checking the petitioner was found having in his possession one old question paper bearing handwritten notes and resultantly on the direction of the Monitoring Team the Centre Superintendent made an unfair means case against the petitioner. After the termination of examination, when Centre Superintendent Ch. Muhammad Shafique, Lecturer, Government Diyal Singh College, Lahore was coming towards Secrecy Branch of University for depositing answer books including unfair means cases, eight persons on four motorcycles suddenly came ahead of him and asked him to handover answer books on gun point. They snatched the bundle of answer books and unfair means cases from the invigilator who was sitting with the Centre Superintendent on the motorcycle. Immediately FIR. No. 374 dated 28.07.2011 under Section 395, P.P.C. was got registered at P.S. Muslim Town, Lahore and the incident was reported to the Vice Chancellor of the University of the Punjab who constituted a Committee for probing into the matter. The Committee held its meeting on 29.07.2011 and recommended that Re-examination of 108 candidates be conducted and the candidates including the petitioner against whom unfair means cases had been registered should not be allowed to sit in Re-examination. The recommendations were approved by the Vice Chancellor on 30.07.2011. Thereafter, on 03.08.2011 charge-sheet was issued to the petitioner under Regulation Nos. 12 and 13. The Disciplinary Committee vide its decision dated 29.9.2011 disqualified the petitioner for three years. The decision of the Disciplinary Committee was communicated to the petitioner vide letter dated 10.10.2011. Feeling aggrieved, the petitioner moved a representation/ appeal before the Vice Chancellor, University of the Punjab who referred the case to the Independent Disciplinary Committee for reconsideration. The Independent Disciplinary Committee on 23.12.2011 upheld the previous decision. The decision of the Independent Disciplinary Committee was confirmed by the Vice Chancellor and the decision was communicated to the petitioner vide letter dated 02.01.2012. The petitioner being dissatisfied with decision of the Disciplinary Committee had invoked the constitutional jurisdiction of this Court.

2. Learned counsel for the petitioner submits that the petitioner is not guilty of using any objectionable material and, therefore, no charge within the contemplation of Regulation Nos. 12 and 13 is made out; that the decisions of the Disciplinary Committee are bereft of any reason; and, that the Vice Chancellor has passed the order without applying his independent mind to the facts of the case.

3. Conversely, Sardar Tariq Mehmood, learned counsel for the respondent contends that the Disciplinary Committee is in the nature of Domestic Tribunal and their findings cannot be substituted by this Court; that the Disciplinary Committee after evaluating the evidence on record and affording opportunity of hearing to the petitioner has disqualified the petitioner for three years; and, that the order passed by the Disciplinary Committee are in consonance with law.

4. I have heard the learned counsel for the parties and perused the record appended with the petition.
5. The Secretary Disciplinary Committee on 03.08.2011, issued a charge-sheet to the petitioner with the following allegation:--
"You appeared in LLB. Part-I, first Annual Examination, 2011 under Roll No. 3470. On 28.07.2011, while you were taking examination in Paper-VI (Criminal Law), one old question paper bearing handwritten notes relevant to the syllabus/question paper was recovered from your possession."
After having received reply to the charge-sheet, the matter was placed before the Disciplinary Committee consisting of three members. On 29.09.2011 the Disciplinary Committee passed following decision (Attached with the report and parawise comments at page 11);

"Disqualified for three years/ R-12 & 13".
However, on the same date i.e. 29.09.2011, the Secretary Disciplinary Committee prepared following note:--

"The University Monitoring Team consisting of Addl. Controller of Examinations, Deputy Controller Examination-II, Deputy Controller Examination-I and Deputy Controller Conduct reported that on 28.07.2011, the day of examination in Paper-VI (Criminal Law), the candidate Roll No. 3470 was found having in his possession the helping material i.e. one old question paper bearing handwritten notes.
The candidate was charge sheeted on the above charges. He was also called upon to appear before the Disciplinary Committee. He appeared before the Disciplinary Committee on 15.09.2011. He was explained the charges and then was heard in person.

He denied the charges saying that neither any material was recovered from his possession nor he copied anything there from. He stated that the material was lying on the floor near his seat which was picked up by the monitoring Team and attributed to him. In reply to the question whether the Monitoring team had any grudge against him, he stated in negative.

After hearing the candidate the Committee examined the documents available in the file and noted that at 5.45 p.m. when Centre Superintendent of Lahore-17 for depositing answer books bundles and reached ahead of Faisal Auditorium, 8 persons on four Motor Cycles suddenly came ahead of him and asked him to hand over answer books bundles on gunpoint. They snatched bundles of answer books and two unfair means cases from Invigilators who was sitting with him on the Motor Cycle. The Committee also observed that the two candidates against whom UMCs were registered are involved in this incident.
The Disciplinary Committee after going through the case on various aspects held the candidate guilty and disqualified him for a period of three years under Regulation 13."

It is noteworthy here that the decision of the Disciplinary Committee, available at page 11 of the report and para-wise comments, is signed by all the three members of the Disciplinary Committee whereas the above quoted note of the Secretary is signed by two members of the Disciplinary Committee and this inconsistency shows that the decision and the note were not prepared on the same date. Feeling aggrieved, the petitioner moved representation against the decision of the Disciplinary Committee before the Vice Chancellor who referred the matter to an Independent Disciplinary Committee. On 23.12.11, the Independent Committee passed following decision (Attached with the report and parawise comments at page 14):
"Previous decision upheld."

6. The Secretary Independent Disciplinary Committee prepared a note dated 27.12.2011 and sought confirmation of the decision of the Independent Disciplinary Committee from the Vice Chancellor who without hearing the petitioner and expressing any reason just signed the note. Thereafter, vide letter dated 02.01.12 the decision of the Vice Chancellor was communicated to the petitioner and the same reads as under (Attached with the report and parawise comments at page 17):

"Reference your representation addressed to the Vice Chancellor against the orders of the Disciplinary Committee disqualifying you for a period of three years for using unfair means in LLB. Part-I, First Annual Examination, 2011, Roll No. 3470.
This is to inform you that the Vice-Chancellor referred your case to the Independent Disciplinary Committee for re-consideration. The Committee after re-considering the case decided to uphold its previous, decision."

It is regrettable to note that the Disciplinary Committee, Independent Disciplinary Committee and the Vice Chancellor while inflicting punishment did not give any reason in support of their decision. None of the Committees has stated whether the material recovered from the petitioner was relevant to the syllabus/ question paper so as to attract the provisions of Regulations 12 & 13 or the allegation as set out in the charge-sheet stands proved against the petitioner. The Hon'ble Supreme Court of Pakistan in the case of Walayat Ali Mir vs. Pakistan International Airlines Corporation through its Chairman and another (1995 SCMR 650) has held that mere writing the words "disproved" or "rejected" will not suffice. If decisions are expressed in these terms then the same shall be termed as arbitrary and autocratic and has the character of being deleterious passed without considering the facts, circumstances, rules and regulations made to regulate such decisions. Lord Denning, M.R. in Breen v. Amalgamated Engg. Union (1971) 1 All ER 1148 observed: "the giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974 ICR 120) it was observed "Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." This doctrine has been recognized and augmented by the

insertion of Section 24-A in the General Clauses Act, 1897 which declares that where a Statute confers a power to make any order or to give any direction to any Authority, office or person, such would be exercised reasonably, fairly, justly and for the advancement of the purpose of the enactment. The Hon'ble Supreme Court of Pakistan in the case of Airport Services vs. The Airport Manager, Quaid-i-Azam International Airport Karachi and others (1998 SCMR 2268) has held that the order or direction, so far as necessary or appropriate would reflect reasons for its making or issuance and, where the same is lacking, the affectee may demand the necessary reasons, which, in response would be furnished. In the instant case the perusal of record shows that the punishment has been inflicted on conjectures and surmises. The impugned decisions of the Disciplinary Committees are not sustainable as firstly, the University got registered F.I.R. No. 374 dated 28.07.2011 under Section 395, P.P.C. with P.S. Muslim Town, Lahore which subsequently on 08.01.2012 was cancelled as the bundle of answer books was recovered on 28.07.2011 from a garden near the Admn Block of the University; secondly, a Probe Committee constituted by the Vice Chancellor in its recommendations dated 29.07.2011, without hearing the petitioner declared him guilty and, therefore, not allowed him to sit in Re-examination. This constitutes pre-determination of issue before the decision of the Disciplinary Committee; thirdly, the Disciplinary Committee did not give any reason whether the material recovered from the petitioner was relevant for the subject of paper VI i.e. Criminal Law; and, lastly no reason has been expressed in the decisions. All these facts show malice in law on the part of the University. The Hon'ble Supreme Court of Pakistan in the case of Abdul Jannan but the University of Peshawar (PLD 1996 SC 709) has held that the orders passed by the University Authorities inflicting punishment on students must at least be intelligible showing application of mind and capable of conveying the intention of the Authority passing the order. I am helpless to observe that in the case before me the order passed by the Disciplinary Committee and the Independent Disciplinary Committee and the Vice Chancellor do not show application of mind to the facts and circumstances of the case.

6. Sardar Tariq Mahmood, learned counsel for respondents has rightly pointed out that University is in the nature of a mere Domestic Tribunal constituted under the law and a dispute of this kind between the University and the candidate admitted to the examination arranged by it, is primarily domestic; and such a dispute can be more properly resolved in the homely and domestic atmosphere of the University and should not be allowed to be dragged to the law Courts. The salutary reason behind the above said contention of the learned counsel for the respondents is enshrined in the following observations made by Kindersley, V.C. in the case of Thomson v. The University of London (1966) 2 All ER 338:

"Whatever relates to the internal arrangements and dealings with regard to the Government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor, and this only under the jurisdiction of

the Visitor, and this Court will not interfere in those matters; but when it comes to a question of right of property, or rights as between the University and a third person dehors the University, or with regard, it may be, to any breach of trust committed by the corporation, that is, the University, and so on, or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed, this Court will interfere."

The constitutional jurisdiction of the High Court is circumscribe by Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 and in exercise of this jurisdiction the Court can simply pronounce upon the invalidity of the order and declare that it was without lawful authority and is of no legal effect. Beyond it, strictly speaking, this Court has no jurisdiction to issue any other direction and substitute its own judgment in the matter. In this connection the Hon'ble Supreme Court of Pakistan in Begum B.H. Syed vs. Mst. Afzal Jhan Begum and another (PLD 1970 SC 29) observed that it is not disputed that the High Court had no jurisdiction to go into the merits of the case and substitute its own findings on the merit. Similarly, in another case Nawaz v. The Addl. Settlement and Rehabilitation Commissioner (PLD 1970 SC 39) the Hon'ble Supreme Court held that the High Court in the exercise of its writ jurisdiction does not act as a Court of facts and ought not to enter into and decide disputed questions of fact. In Syed Azmat Ali vs. Chief Settlement and Rehabilitation Commissioner, Lahore and others (PLD 1964 SC 260) the Hon'ble Supreme Court held that the superior Courts exercising writ jurisdiction had full power to do justice but not to substitute its own decision for the decision of inferior Authority and it was more appropriate to return the case to the Authority or Tribunal concerned for a decision in accordance with law after quashing the order complained against. This view was also adopted by the Hon'ble Supreme Court in the case of Naveed Rauf vs. Board of Intermediate and Secondary Education, Lahore (2003 SCMR 1250).

7. In view of the dictum laid down by the Hon'ble Supreme Court of Pakistan the decision dated 29.09.11, passed by the Disciplinary Committee and decision dated 23.12.2011 passed by the Independent Disciplinary Committee which was subsequently confirmed by the Vice-Chancellor on 27.12.2011 and communicated to the petitioner vide letter dated 02.01.2012 are hereby set aside. The matter is remitted to the Disciplinary Committee to pass a fresh cogent order after affording opportunity of hearing to the petitioner before the commencement of the forthcoming LL.B. (Part-I) Examination. This petition, therefore, succeeds and is accordingly allowed.

(R.A.) Petition allowed

**2012 C L C 1663**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD AMEER and others----Appellants**
**Versus**
**Mst. FAJJAN and others----Respondents**

Regular Second Appeal No.46 of 2009, heard on 12th June, 2012.

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

----S. 24-A---Speaking order---Scope---Judicial order must be a speaking order maintaining by itself that court has made an endeavour to sift grains from chaff for resolution of issues involved for their proper adjudication---Ultimate result may be reached at by diligent effort but if final order does not bear imprint of that effort and in contrary discloses arbitrariness of thought and action, such justice has neither been done nor seems to have been done is inescapable.

Muhammad Akhtar v. The State PLD 1957 SC 297; Mollah Ejahar Ali v. Government of Pakistan and others 20 DLR 221=PLD 1970 SC 173; Gouranga Mohan Sikdar v. The Controller of Imports and Exports and 2 others PLD 1970 SC 158 and Ms. Clare Benedicta Conville and others v. Mst. Sabahat Idrees and others 2009 SCMR 851 ref.

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

----Ss. 96, 100 & O. XLI, R.31---Specific Relief Act (I of 1877), S.42---Suit for declaration---Judgment of Appellate Court---Necessary ingredients---Suit was decreed by Trial Court and Lower Appellate Court in favour of plaintiff---Plea raised by defendant was that Lower Appellate Court did not consider evidence on record and did not come to independent conclusions---Validity---Court of first appeal was duty bound to deal with all issues, as first appeal was a valuable right in which both questions of law and facts were to be considered and judgment in first appeal was to address itself to all issues of law and facts and decide it by giving discrete reasoning---Appeal under section 96 C.P.C. was a substantive right conferred by statute and it was continuation of proceedings, which had come entirely upon first appellate court, carrying with it a right of rehearing of law and facts as well as reviewing pleadings and evidences afresh---Duty was cast upon Lower Appellate Court to re-examine pleadings and evidence on record and then determine relevant issues---Lower Appellate Court had to marshal facts and evidence in both cases of reversal as well as affirmance---Where judgment of Lower Appellate Court was of reversal the Appellate Court should consider all relevant and material evidence on record and give reasons for its decision---Where judgment was of affirmance it was not necessary that every piece of evidence was

considered once again but there must be sufficient discussion to show that the court had reassessed facts and circumstances of the case---High Court, in the present case, declined to reappraise evidence and come to his own conclusion, as it was for Lower Appellate Court to give its finding after a proper appreciation of evidence---Judgment and decree passed by Lower Appellate Court was set aside and appeal was remanded for decision afresh in accordance with law.

Devram Bilve v. Indumati (2000) 10 SCC 540; Shiv Shati Cooperative Housing Society, Nagpur v. Swaraj Developers and others (2003) 6 SCC 659; Ramchandra Sakharan Mahajan v. Damodar Trimbak Tanksale (dead) and others (2007) 6 SCC 737; Haryana State Industrial Development Corporation v. Cork Manufacturing Co. (2007) 8 SCC 120; Messrs Farooq International v. The Chief Controller of Imports and Exports and 4 others 1985 CLC 1780; Allah Bakhsh and others v. Noor Khan and others 1980 CLC 498; Mst. Inayat Bibi v. Nazir Ahmad and others 1991 CLC 1660; Mst. Aisha v. Mst. Fatima and others 1991 CLC 1499; Trustees of the Port of Karachi and others v. Faqir Muhammad 1992 MLD 1782; Imam Dino and others v. Nawaz Ali Shah 2003 CLC 1889; Abdur Razzaq Sabar Khan 2004 CLC 950; Mst. Sabahat Idrees and another v. Ms. Clare Benedicta Conville and 4 others 2007 MLD 1732; Muhammad Ibrahim v. Mst. Mehmooda 1991 CLC 1795; Sailajananda Pandey v. Lakhichand Sao AIR 1951 Pat. 502; Ujagar Singh and others v. Gopal Singh and others AIR 1952 Pepsu 57; Mst. Anita M. Harretto v. Abdul Wahid AIR 1985 Bom. 98; Ram Lal Dutt Sarkar v. Dhirendra Nath Roy and others AIR 1943 PC 24; Mubarak Hussain v. Syed Shah Hamid Hussain AIR 1916 Pat. 262; Anbor Ali v. Nichar Ali AIR 1950 Assam 79; Mahabir Prasad v. Mahadeo Prasad and others AIR 1916 All. 260; Balwant Singh v. Baldev Singh and others AIR 1921 Lah. 119; Mahant Gyan Prakash Das v. Mt. Dakhan Kuar and others AIR 1938 Pat. 69 and Bhagwan Das and others Shamsher Singh AIR 1918 Lah. 135 rel.

**(c) Civil Procedure Code (V of 1908)---**

----O. XLI, R.31---Judgment in appeal---Principles to be followed by appellate court enumerated---Judgment which was not "proper judgment", identified.
According to O.XLI, R.31, C.P.C., appellate Court was required to follow the following principles:---

(i) to state in its judgment the points that arise for determination;

(ii) in order to understand and note what the points for determination relate to and why they were raised, it is absolutely essential to mention the facts of the case. It is not sufficient to state that the facts are given in the judgment of the trial Court;

(iii) the points for determination must cover all the important questions involved in the case;

(iv) the points for determination must not be general and vague.
In view of afore-stated requirements of law the following are not the proper judgments:---

(a) a mere statement that a point is proved or not proved;

(b) that counsel admits that certain evidence is the best evidence;

(c) that the arguments of plaintiff's counsel represent the correct view of the case;

(d) that the point is absurd or ridiculous or worthless;

(e) that the judge is in agreement with the court below;

(f) judgment based on mere conjunctures and presumptions;

(g) judgment based on evidence not legally admitted; and

(h) judgment not based on independent application of mind to the facts and evidence of the case.

Devram Bilve v. Indumati (2000) 10 SCC 540; Shiv Shati Cooperative Housing Society, Nagpur v. Swaraj Developers and others (2003) 6 SCC 659; Ramchandra Sakharan Mahajan v. Damodar Trimbak Tanksale (dead) and others (2007) 6 SCC 737; Haryana State Industrial Development Corporation v. Cork Manufacturing Co. (2007) 8 SCC 120; Messrs Farooq International v. The Chief Controller of Imports and Exports and 4 others 1985 CLC 1780; Allah Bakhsh and others v. Noor Khan and others 1980 CLC 498; Mst. Inayat Bibi v. Nazir Ahmad and others 1991 CLC 1660; Mst. Aisha v. Mst. Fatima and others 1991 CLC 1499; Trustees of the Port of Karachi and others v. Faqir Muhammad 1992 MLD 1782; Imam Dino and others v. Nawaz Ali Shah 2003 CLC 1889; Abdur Razzaq Sabar Khan 2004 CLC 950; Mst. Sabahat Idrees and another v. Ms. Clare Benedicta Conville and 4 others 2007 MLD 1732; Muhammad Ibrahim v. Mst. Mehmooda 1991 CLC 1795; Sailajananda Pandey v. Lakhichand Sao AIR 1951 Pat. 502; Ujagar Singh and others v. Gopal Singh and others AIR 1952 Pepsu 57; Mst. Anita M. Harretto v. Abdul Waihd AIR 1985 Bom. 98; Ram Lal Dutt Sarkar v. Dhirendra Watii Roy and others AIR 1943 PC 24; Mubarak Hussain v. Syed Shah Hamid Hussain AIR 1916 Pat. 262; Anbor Ali v. Nichar AIR 1950 Assam 79; Mahabir Prasad v. Mawdeo Prasad and others AIR 1916 All. 260; Balwant Singh v. Baldev Singh and others AIR 1921 Lah. 119; Mahant Gyan Prakash Das v. Mt. Dakhan Kuar and others AIR 1938 Pat. 69 and Bhagwan Das and others Shamsher Singh AIR 1918 Lah. 135 rel.

**(d) Constitution of Pakistan---**

----Art. 10-A---Fair trial, opportunity of---Judicial proceedings---Scope---Judge should accord fair and proper hearing to person sought to be affected by his orders and give sufficiently clear and explicit reasons in support of orders made by him---Such right has become a fundamental right under Art.10A of the Constitution.
Lahore Development Authority, Lahore and others 2003 YLR 1579 rel.

**(e) Administration of justice---**

----Judicial power, exercise of---Scope---When judicial power is exercised by an authority normally performing executive or administrative functions, superior courts insist upon disclosure of reasons in support of the order on two grounds: one that party aggrieved in proceedings before court has opportunity to demonstrate that reasons which persuaded authority to reject his case were erroneous; the order that obligations to record reasons operates as deterrent against possible arbitrary action by executive authority with judicial power---Such principle is also applicable to judicial officers who are trained to look at things objectively and therefore, supposed to excel in such trait of character in view of sacred and sensitive nature of his duties.

Malik Javed Akhtar Wains for Appellants.
Sagheer Ahmad Bhatti for Respondent No.1.
Malik Bashir Lakhesir, A.A.-G. for Respondent No.2.
Nemo for Respondents Nos.3(a) to 3(e).

**JUDGMENT**

**SHAHID WAHEED, J.---** The instant regular second appeal under section 100, C.P.C. is from the judgment and decree dated 3-11-2009 passed by the learned Additional District Judge, Vehari who while dismissing first appeal of the appellants affirmed judgment and decree dated 7-1-2008 of the learned trial Court whereby the respondent No.1's suit was decreed.

2. Briefly the facts of the case are that Muhammad Ismail and Muhammad Din both sons of Mahya instituted a suit for declaration to the effect that they were owner in possession of suit-land and called in question power of attorney (Exh.P.1). dated 21-3-1993 registered vide Document No.181 Book No. 4, Volume 21 with Sub-Registrar, Burewala purportedly executed in favour of Peer Noor Nabi Chishti and subsequent transaction made on the basis thereof i.e. (i) Mutation No.458 (Exh.P.2) attested on 12-7-1994 whereby Peer Noor Nabi Chishti transferred the suit-land to his brother-in-law namely Muhammad Ameer (appellant No.1) through exchange; (ii) exchange Mutation No.482 (Exh.P.3) attested on 28-2-1995 whereby Muhammad Ameer (Appellant No. 1) on the strength of Mutation No.458 (Exh.P.2) further transferred the suit property to Allah Bakhsh (appellant No.3); and, (iii) Mutation No.483 (Exh.P.4) attested on 28-2-1995 through which Muhammad

Ameer (appellant No.1) gifted the property to his wife Mst. Mehran Bibi (appellant No. 2). It is pertinent to mention here that during the pendency of the suit Muhammad Din and Muhammad Ismail died. Muhammad Ismail died issueless and therefore, his name was deleted whereas after the death of Muhammad Din his wife Mst. Fajjan (respondent No.1) was impleaded as plaintiff. Subsequently, Peer Noor Nabi Chishti also died and, therefore, his legal heirs i.e. respondent No.3(a) to 3(e) were impleaded. In the suit Province of Punjab through District Officer (Revenue), Vehari was also impleaded as respondent. The appellants and the predecessor-in-interest of respondent No.3 i.e. Peer Noor Nabi Chishti filed a joint written statement and contested the suit. Province of Punjab also filed a written statement. In view of divergent pleadings, the learned trial Court framed issues and called upon the parties to produce evidence in support of this respective claims. After recording evidence and affording opportunity of hearing to the parties to the suit, the learned Civil Judge on 7-1-2008 decreed the suit. Feeling dissatisfied, the present appellants filed an appeal before the learned Additional District Judge, Vehari and the same was dismissed vide judgment and decree dated 3-11-2009. Hence, this second appeal.

3. The main submission of the learned counsel for the appellants is that the learned lower appellate Court did not consider the evidence on record and did not come to any independent conclusions, but merely reproduced large portions of the judgment of the learned trial Court and dismissed the appeal, without applying its mind and without grappling with the questions involved in the appeal. Conversely, the learned counsel for respondent No.1 argued that though the learned Additional District Judge quoted extensively from the judgment of the learned trial Court, he was correct in dismissing the appeal. He invited me to reappraise the evidence in the matter and took me through the findings of both the learned Courts.

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

5. A perusal of the impugned judgment of the learned Additional District Judge shows that he did not apply his mind to the questions involved in the appeal. I find that several paragraphs i.e. paragraph Nos.2, 3, 4, 5, 6, 7, 9, 10 and 11 of the judgment of the learned Additional District Judge are verbatim .copy of the judgment of the learned Trial Court and rest of photographs are either loaded with the judgments of the contains the re-worded/rephrased reasoning expressed by the learned Trial Court for decreeing the suit. In fact the judgment of the lower Appellate Court is a faithful reproduction of the judgment of the learned Trial Court. Such a perfunctory disposal leads to wastage of judicial time and the time of the litigants as well and, therefore, is always, regarded as improper judgment and is of doubtful validity. In this regard I find fortification from the principle laid down by the Hon'ble Supreme Court of Pakistan in the case of MUHAMMAD AKHTAR v. THE STATE (PLD 1957 SC 297) wherein it has been held as follows:---

"We note here, with regret, and wish to draw the attention of the High Court to the fact that the Sessions Judge's judgment is for the most part a verbatim copy of considerable portions of the trial Court's judgment. In our typed foolscap record, the Sessions Judge's judgment covers 9 pages. Of this matter except for 9 lines at the Commencement and 18 lines at the end, the remaining 7 pages are copies, word by word, from the trial Court's judgment. In this copy, there are reproduced several paragraphs commencing with such words as the following.
"The learned counsel for the defence has laid considerable stress on the fact that etc., etc.,

"It is again contended by the learned counsel for the defence that etc, etc."
The arguments referred to were presented before the trial Court and it surprises us to find them being represented as having been placed before the Sessions Court, in the very words used by the trial Court. The contribution made by the- Sessions Judge to ascertainment of facts upon appreciation of the evidence appears to be negligible. A judgment of this kind delivered by an appellate Court cannot be regarded as proper and is of doubtful validity. It does not represent an honest discharge of its duty by the appellate Court."

6. It is an established principle of law that a judicial order must be speaking order manifesting by itself that the Court has made an endeavour to sift the grains from the chaff for the resolution of the issues involved for their proper adjudication. The ultimate result may be reached by a diligent effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, the feeling with the painful results, that justice has neither been done nor seems to have been done is inescapable. In this regard reference may be made to the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of MOLLAH EJAHAR ALI v. GOVERNMENT OF PAKISTAN and others (20 DLR 221=PLD 1970 SC 173), GOURANGA MOHAN SIKDAR v. THE CONTROLLER OF IMPORTS AND EXPORTS and 2 others (PLD 1970 SC 158) and Ms. CLARE BENEDICTA CONVILLE and others vs. Mst. SABAHAT IDREES and others (2009 SCMR 851). In the instant case, I find that the judgment recorded by the learned Additional District Judge does not exhibit a judicious treatment of the case and the determination of the dispute and, therefore, cannot be held a valid judgment.

7. It is the duty of the Court of first appeal to deal with all the issues, as the first appeal is a valuable right in which both the questions of law and facts are to be considered and the judgment in the first appeal is to address itself to all the issues of law and facts and decide it by giving direct reasonings. The law is well settled that an appeal under section 96 of The Code of Civil Procedure, 1908 is a substantive right conferred by the statute and it is continuation of the proceedings, which comes entirely upon the first Appellate Court, carrying with it a right of rehearing of law and facts as well as reviewing pleadings and evidences afresh. Thus a duty is cast

upon the lower Appellate Court to re-examine the pleadings arid evidence on record and then determine the relevant issues. Reference in this regard may be made to the case of DEVRAM BILVE v. INDUMATI (2000) 10 SCC 540) and the case of SHIV SHATI COOPERATIVE HOUSING SOCIETY, NAGPUR v. SWARAJ DEVELOPERS and others (2003) 6 SCC 659). In the present case the learned Additional District Judge has not validly decided the legality or, otherwise of the findings and judgment of the trial Court as mere, repetition and harping upon the findings of the trial Court in the impugned judgment of the lower Appellate Court makes it perverse and arbitrary apart from grossly illegal. Reference in this regard may be made to the case of RAMCHANDRA SAKHARAN MAHAJAN v. DAMODAR TRIMBAK TANKSALE (Dead) and others (2007) 6 SCC 737 and case of HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION v. CORK MANUFACTURING CO. (2007) 8 SCC 120.

8. The object of requiring an Appellate Court to record in its judgment the particulars mentioned in Order XLI, Rule 31 of the C.P.C. is twofold namely:---

(a) to afford the parties an opportunity of knowing and understanding the grounds of the decision with a view to enable them to exercise, if they deem fit and are so advised, the right of second appeal conferred by section 100, C.P.C., and

(b) to enable the High Court in second appeal to judge whether the lower appellate Court has properly appreciated the case.

The Appellate Court has to marshal the facts and evidence in both the cases of reversal as well as affirmance. Where the judgment of Appellate Court is of reversal the Appellate Court should consider all the relevant and material evidence on record and give reasons for the said decision. Where the judgment is of affirmance it is not necessary that every piece of evidence is considered once again. But, it is reiterated, there must be sufficient discussion to show that the Court has reassessed the facts and circumstances of the case. In this regard I get assistance from the case of Messrs FAROOQ INTERNATIONAL v. The CHIEF CONTROLLER OF IMPORTS AND EXPORTS and 4 others (1985 CLC 1780), ALLAH BAKHSH and others v. NOOR KHAN and others (1980 CLC 498), Mst. INAYAT BIBI v. NAZIR AHMAD and others (1991 CLC 1660), Mst. AISHA v. Mst. FATIMA and others (1991 CLC 1499), TRUSTEES OF THE PORT OF KARACHI and others v. FAQIR MUHAMMAD (1992 MLD 1782), IMAM DINO and others v. NAWAZ ALI SHAH (2003 CLC 1889), ABDUR RAZZAQ SABAR KHAN (2004 CLC 950), Mst. SABAHAT IDREES and another v. Ms. CLARE BENEDICTA CONVILLE and 4 others (2007 MLD 1732), and MUHAMMAD IBRAHIM v. Mst. MEHMOODA (1991 CLC 1795). According to provision of Order XLI, Rule 31 of the C.P.C. and principles of law laid down in SAILAJANANDA PANDEY v. LAKHICHAND SAO (AIR 1951 Pat. 502) UJAGAR SINGH and others v. GOPAL SINGH and others (AIR 1952 Pepsu 57), Mst. ANITA M. HARRETTO v. ABDUL WAHID (AIR 1985 Bom. 98) and RAM LAL DUTT SARKAR V. DHIRENDRA

NATH ROY and others (AIR 1943 PC 24), the Appellate Court is required as follows:---

(i) to state in its judgment the points that arise for determination;

(ii) in order to understand and note what the points for determination relates to and why they were raised, it is absolutely essential to mention the facts of the case. It is not sufficient to state that the facts are given in the judgment of the trial Court;

(iii) the points for determination must cover all the important questions involved in the case;

(iv) the points for determination must not be general and vague.
In view of afore-stated requirements of law it is now well-settled that the following are not the proper judgments:---

(a) a mere statement that a point is proved or not proved;

(b) that counsel admits that certain evidence is the best evidence;

(c) the arguments of plaintiff's counsel represent the correct view of the case;

(d) that the point is absurd or ridiculous or worthless;

(e) that the Judge is in agreement with the court below;

(f) judgment based on mere conjunctures and presumptions;

(g) judgment based on evidence not legally admitted; and

(h) judgment not based on independent application of mind to the facts and evidence of the case.

In this regard reference may be made to MUBARAK HUSSAIN v. Syed SHAH HAMID HUSSAIN (AIR 1916 Pat. 262), ANBOR ALI v. NICHAR ALI (AIR 1950 Assam 79), MAHABIR PRASAD v. MAHADEO PRASAD and others (AIR 1916 All. 260), BALWANT SINGH v. BALDEV SINGH and others (AIR 1921 Lah. 119), MAHANT GYAN PRAKASH DAS v. Mt. DAKHAN KUAR and others (AIR 1938 Pat. 69) and BHAGWAN DAS and others SHAMSHER SINGH (AIR 1918 Lah. 135).

The judgment before me is practically nothing but a recapitulation
of the judgment of the trial Court. It is unfortunate that the lower Appellate Court di
d not make a bid for proper appraisement of merits of the case put forward by the

parties. This is nothing but dereliction of duty and complete failure to exercise jurisdiction.

9. It is essential that a Judge should accord fair and proper hearing to the persons sought to be affected by his orders and give sufficiently clear and explicit reasons in support of the orders made by him. Now, after the Constitution (Eighteenth Amendment) Act, 2010 this right has become a fundamental right under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. The rule requiring independent reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. In the instant case the learned first Appellate Court passed the impugned order without recording its own reasons in support of the impugned judgment but on the contrary it merely felt content by reproducing the paragraphs from the judgment of the trial Court. This is clearly a violation of law and Constitution. In this regard reference may be made to the case of LAHORE DEVELOPMENT AUTHORITY, LAHORE and others (2003 YLR 1579).

10. Before parting I deem it necessary to observe that when judicial power is exercised by an authority normally performing executive or administrative functions the superior courts insists upon disclosure of reasons in support of the order on two grounds: one that the party aggrieved in a proceeding before the court has the opportunity to demonstrate that the reasons which persuaded authority to reject his case were erroneous; the other that the obligations to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power. This principle on all fours is also applicable to judicial officers who are trained to look at things objectively and, therefore, he is supposed to excel in this trait of character in view of the sacred and sensitive nature of his duties and the pivotal position which justice occupies in Islam. Injunctions of Islam also enjoin that those who performs the function of a Judge must not only possess profound knowledge and deep insight but also the man of integrity and capable of holding the scales of justice even under all circumstances. The judicial officer is not only expected to guard his reputation jealously but also perform his sensitive duty with due diligence and his conduct should not exhibit dereliction of duty and complete failure of exercise of jurisdiction.

11. In view of above, I cannot accede to the request of the learned counsel for the respondent that I should reappraise the evidence and come to my own conclusions. It is for the First Appellate Court to give its finding after a proper appreciation of the evidence. Thus, without going in the other questions raised by the parties, this second appeal is hereby allowed on the basis of aforesaid preliminary substantial question of law raised by the appellants. The impugned judgment and decree dated 3-11-2009 of the learned Additional District Judge, Vehari is hereby set aside and the matter is remanded to the learned Additional District Judge, Vehari for fresh

disposal in accordance with law preferably within a period of six months. The parties are directed to appear before the learned Additional District Judge, Vehari on 16-7-2012. No order as to cost.

MH/M-259/L Case remanded.

**2012 C L C 1679**
**[Lahore]**
**Before Muhammad Khalid Mehmood Khan and Shahid Waheed, JJ**
**MUHAMMAD HUSSAIN----Appellant**
**Versus**
**Malik ALLAH YAR KHAN----Respondent**

Regular First Appeal No.418 of 2006, decided on 24th April, 2012.

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

----O. XXXVII, Rr.1 & 2---Suit for recovery of money---Pro note, consideration of---Proof---Suit filed by plaintiff on the basis of pro note was dismissed by Trial Court---Plaintiff did not produce any witness to prove payment of consideration amount---Pro note was proved to be without consideration and no decree on the basis of such pro note could be passed, as plaintiff had no cause of action against defendant---High Court declined to interfere in judgment passed by Trial Court---Appeal was dismissed in circumstances.

Pakistan v. Abdul Ghani PLD 1964 SC 68; Messrs Ch. Brothers Ltd. v. Jaranwala Central Cooperative Bank Ltd and others 1968 SCMR 804 and Amir Shah v. Ziarat Gul 1998 SCMR 593 ref.

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

----O. XXXVII, Rr.1 & 2---Negotiable Instruments Act (XXVI of 1881), S.13---Stamp Act (II of 1899), S.35 & Art.49 [as amended by Punjab Finance Act (VI of 1995)]---Negotiable instrument---Deficient stamp---Admissibility in evidence---Principle---Pro note is liable to be stamped under Article 49 of Stamp Act, 1899 and by virtue of amendment made by Punjab Finance Act, 1995, stamp of an amount of Rs.100/- is payable if amount exceeds Rs.500,000/----Provision of proviso (a) to section 35 of Stamp Act, 1899, is curative and covers situation according to which if any instrument is not stamped or insufficiently stamped would be admitted in evidence on payment of penalty---Payment of stamp duty is a matter between a citizen and the State and an adversary cannot be permitted to capitalize on a technicality which otherwise is not fatal to suit.

Muhammad Akram v. Muhammad Saleem PLD 1971 SC 561; Union Insurance Company of Pakistan Ltd. v. Hafiz Muhammad Siddique PLD 1978 SC 279; Rehmat Ali v. Wahid Bux NLR 1979 Civil SC 809 and Sirbaland v. Allah Loke and others 1996 SCMR 575 ref.

Amir Abdullah Khan Niazi for Appellant.
Nemo for Respondent.Date of hearing: 24th April, 2012.

## JUDGMENT

**SHAHID WAHEED, J.---** Challenge in this appeal is to the judgment and decree dated 30-6-2006 passed by the learned Additional District Judge, Mianwali, whereby the appellant's suit for recovery of Rs.2,10,000/- was dismissed.

2. Briefly stated the facts of the case arc that the appellant Muhammad Hussain instituted a suit under Order XXXVII, Rule 2, C.P.C. against the respondent/defendant, Malik Allah Yar Khan, for recovery of a sum of Rs.2,10,000/- on the basis of pro note dated 16-8-2002 (Exh.P.1).

As per contents of the plaint, the respondent on 16-8-2002 approached the appellant for Qarze Hasna amounting to Rs.2,10,000/-. The appellant keeping in view the cordial and previous conduct of the respondent extended Qarze Hasna to the respondent in the presence of Muhammad Saeed (P.W.2) and Muhammad Hanif and as a security thereof the respondent executed pro note (Exh.P.1) and promised to return the amount on demand. In response to summons issued by the learned trial Court the respondent appeared before the court and moved an application for grant of permission to appear and defend the suit. In the said application the respondent denied the receipt of disputed amount and execution of the pro note. Learned trial Court granted leave to appear and defend the suit and in pursuance thereof a contesting written statement was filed by the respondent.

3. The learned trial Court reduced the controversy into following issues:---

(1) Whether the pro note regarding Qarze Hasna of Rs.2,10,000/- was executed between the parties ?OPP.

(2) Whether the suit is not maintainable in view of principle of estoppel and waiver? OPD.

(3) Whether the plaintiff has no cause of action against the defendant? OPD

(3A) Whether the pro note dated 16-8-2002 is illegal and based on fraud, misrepresentation and liable to be rejected? OPD

(4) Relief.

In support of their respective pleadings the parties to the suit produced oral as well as documentary evidence. Abdul Waheed appeared as P.W.1, Muhammad Saeed appeared as P.W.2, Muhammad Amir (Special Attorney of the plaintiff) appeared as P.W.3. The plaintiff produced documentary evidence i.e. pro note (Exh.P.l.), special

power of attorney (Ex.P.2), attested copy of pre-emption suit (Exh.P.3), attested copy of revision petition (Exh.P.4) and copy of Identity Card (Mark A). Conversely the respondent/defendant, Malik Allah Yar appeared as D.W.1. He produced Wakalatnama executed in favour of Malik Saeed Akhtar Ghaanjera, Advocate (Exh.D.l). Application for permission to appear and defend the case (Exh.D.2) and Wakalatnama extended in favour of Syed Azhar Abbas Naqvi, Advocate (Exh.D.3). Learned trial Court after recording the evidence dismissed the suit vide judgment and decree dated 30-6-2006. Feeling aggrieved, the appellant has preferred the instant appeal.

4. Learned counsel for the appellant submits that the impugned judgment and decree suffer from misreading and non-reading of evidence; and, that the learned trial Court fell in error while dismissing the suit on the ground that the pro note (Exh.P.1) was not properly stamped.

5. We have heard the learned counsel for the appellant and perused the record.

6. Pivotal issues in the instant case are Issue Nos.1 and 3-A. The onus probandi was on the plaintiff to prove Issue No.1 i.e. whether the pro note regarding Qarze Hasna of Rs.2,10,000/- was executed between the parties, whereas the burden to prove Issue No.3-A viz whether pro note dated 16-8-2002 is illegal, void and based on fraud, mis representation and liable to be rejected was on the defendant/respondent. These two issues are interlinked and are, therefore, decided together. Before proceeding further we may like to mention the important principle of law which says that a party is not allowed under the law to improve its case from what was not originally set up in the pleadings. This principle is contained in maxim Secundum allegata et probata which means that the fact has to be alleged by the parties before it is allowed to be proved and this principle has also been affirmed by the Hon'ble Supreme Court in the case of Pakistan v. Abdul Ghani (PLD 1964 SC 68), Messrs Ch. Brothers Ltd. v. Jaranwala Central Cooperative Bank Ltd and others (1968 SCMR 804) and Amir Shah v. Ziarat Gul (1998 SCMR 593). Keeping in view the afore stated principle of law, the cumulative reading of the contents of the plaint, statement of Muhammad Amir (special attorney of the plaintiff) P.W.3 and statement of the respondent, Malik Allah Yar Khan (D.W.1) would be helpful to resolve the aforesaid issues. The plaintiff in para-2 of the plaint states that on 16-8-2002 he extended financial assistance amounting to Rs.2,10,000/- as Qarze Hasna to the respondent in the presence of witnesses, namely, Muhammad Saeed (P.W.2) and Muhammad Hanif. On the contrary, Muhammad Amir being special attorney of the plaintiff appeared as P.W.3 and in his examination-in-chief admitted that his brother Noor Zaman sold his property and the respondent along with one Muzaffar Khan persuaded him to file a suit for pre-emption against the vendee. On their insistence a suit for possession through pre-emption was instituted for the benefit of Muzaffar Khan. P.W.3 also stated that Muzaffar Khan on the request of the respondent gave Rs.2,10,000/- to the respondent for pursuing the suit. During the course of cross-

examination P.W.3 further admitted that the plaintiff told him that instant suit had been filed for recovery of that amount which Muzaffar Khan gave to the respondent for pursuing the suit for, pre-emption. The statement of P.W.3 and contents of the plaint are contradictory. In fact special attorney of the plaintiff, Muhammad Amir (P.W.3) has negated the case set up in the plaint and resultantly it is established that no Qarze Hasna, as alleged in the plaint, was lent to the respondent/defendant. Besides above, other two witnesses, namely, Muhammad Saeed (P.W.2) and Abdul Waheed (P.W.1) have not stated a single word about the contemporaneous payment of consideration amount of pro note (Exh.P.1) to the respondent. In other words no witness has been produced to prove the payment of consideration amount. In this view of the matter, one irresistible conclusion is that pro note is without any consideration and, therefore no decree on its basis can be passed and the plaintiff had no cause of action against the defendant.

7. Notwithstanding above findings on Issues Nos.1 and 3-A we are constrained to hold that the learned trial Court has erroneously
held that the suit could not be decreed as pro note was not properly stamped. In order to clarify this issue, it is stated that a pro note is liable to be stamped under Article 49 of the Stamp Act and by virtue of the amendment made by the Punjab Finance Act, 1995 stamp of an amount of Rs.100/- was payable if the amount of pro note exceeds Rs.5,00,000. Pro note (Exh.P.1) was, thus, deficient stamp. However, proviso- (a) to section 35 of the Stamp Act, which is a curative provision, covers the situation according to which if any instrument is not stamped or insufficiently stamped, shall be admitted in evidence on payment of penalty. In the case of Muhammad Akram v. Muhammad Saleem (PLD 1971 SC 561) the Hon'ble Supreme Court has held as follows:---

"This view is on principle too sound for once a document has been admitted in evidence without objection, its admissibility cannot subsequently be challenged, on any technical ground or any ground which does not affect the parties. The collection of revenue is no concern of the parties. That purpose is adequately served by section 61. There is no reason, therefore, as to why the bar created by section 36 should not be given effect to. In the present case there can be no manner of doubt that the document was admitted, marked as an exhibit without any objection and when it was put a number of witnesses in examination and cross- examination. The objection on the ground of want of stamp cannot, therefore, be raised at this stage."

Hon'ble Supreme Court in the case of Union Insurance Company of Pakistan Ltd. v. Hafiz Muhammad Siddique (PLD 1978 SC 279) while interpreting sections 35-and 36 of the Stamp Act has held as:---

"Additionally, I find nothing in the section which would support the appellant's plea that an instrument becomes invalid, if it falls within the mischief of the section. After all, if an instrument is invalid, it must be invalid for all purposes, but proviso

(d) to the section expressly saves unstamped instruments in most criminal proceedings, whilst the other provisos to the section enable the parties to overcome the disabilities attached to an instrument not properly stamped by paying the requisite duty together with a penalty, therefore, this would suggest that the object of the section is to protect public revenue. Again, if an instrument is invalid, it should not be admissible in evidence, and it is so stated in section 35. But the next section prescribes that if an instrument has been admitted in evidence, howsoever erroneously, its admissibility cannot be questioned at any stage thereafter, and even the appellate Court's powers to entertain an objection about the admissibility of documents have been removed by section 61, which instead empowers the appellate Court to collect the duty payable on the unstamped instrument together with a penalty. These provisions as well as other provisions in Chapter IV of the said Act, such as sections 33, 38, 39 and 40, can only lead to the conclusion that the object of the Legislature in enacting the said Act was to protect public revenues and not to interfere with commercial life by invalidating instruments vital to the smooth flow of trade and commerce."

In the case of Rehmat Ali v. Wahid Bux (NLR 1979 Civil SC 809) Hon'ble Supreme Court has held as follows:---

"An instrument which has been received in evidence in violation of section 12, such as in the instant case, could be admitted in evidence and under section 26 its admissibility would not be open to question."

Hon'ble Supreme Court in the case of Sirbaland v. Allah Loke and others (1996 SCMR 575) has recorded the following observations:---

"10. Adverting to Ch. Khalil-ur-Rehman's third submission that Exh.P.W.1/1 was not admissible for want of payment of proper stamp duty, it may be observed that no objection was raised by Sirbaland or his counsel when the above document was exhibited. In this view of the matter, section 36. of the Stamp Act, 1899, hereinafter referred to as the Act, was attracted to, which provides as follows:---

36. Admission of instrument where not to be questioned--- Where an instrument has been admitted in evidence, such admission shall not except as provided in section 61, be called in question at any stage of the same suit or proceedings on the ground that the instrument has not been duly stamped."

In terms of the above section read with section 61 of the Act, above respondents had deposited Rs.44, of which they have produced a certificate from the District Accounts Officer, Sialkot, dated 26-4-1995. In this behalf reference may be made to the case of Union Insurance Company of Pakistan Ltd. v. Hafiz Muhammad Siddique (PLD 1978 SC 279), in which it has been held that the object of section 35 of the Act is not to invalidate the instrument not properly stamped but to protect the

public revenues. It was further held that unstamped or improperly stamped arbitration agreements were not invalid but only subject to disabilities specified in section 35 of the Act. The above stamping is done at the behest of the Court below."

8. In view of afore-cited judgments rendered by the Hon'ble Supreme Court, we do not approve the finding of the learned trial Court qua the inadmissibility of pro note (Exh.P.1) and observe that payment of stamp duty is a matter between a citizen and the State and an adversary cannot be permitted to capitalize on a technicality which, otherwise was not fatal to the suit.

9. For what has been discussed above, the appeal being devoid of any merit and substance is dismissed with no orders to cost.

MH/M-258/L Appeal dismissed.

**2012 P L C (C.S.) 1366**
**[Lahore High Court]**
**Before Shahid Waheed, J**
**Syed KHALID MEHMOOD BUKHARI**
**Versus**
**G.M. (HRO) PTCL and others**

Writ Petition No.18564 of 2012, decided on 17th July, 2012.

**Constitution of Pakistan---**

----Art. 199---Pakistan Telecommunication Company Limited Service Regulations, 1996---Constitutional petition---Show-cause notice---Quashing of proceedings---Petitioner was aggrieved of show cause notice issued to him by authorities and sought quashing of the same---Validity---Interference in interlocutory orders such as charge-sheet/ show-cause notice and putting an end to them at its inception, unless same was shown to be without jurisdiction, would amount to stifling of disciplinary proceedings---High Court declined to interfere on petition filed by delinquent employee challenging and quashing show cause notice---Appropriate course for petitioner to adopt was to file his reply to show cause notice and invite decision of disciplinary authority thereon---Prior to such stage, any petition for quashing of charge sheet or show cause notice was pre-mature---Petition was dismissed in circumstances.

Mst. Shagufta Begum v. Income Tax Officer Circle XI, Zone-B, Lahore PLD 1989 SC 360; Muhammad Yousaf Khan v. Habib Bank Ltd. through President and others 2004 SCMR149; Allah Bukhsh v. D.I.-G. Police 2003 UC 60; Abdul Wahab Khan v. Government of the Punjab and 3 others PLD 1989 SC 508 and Muhammad Javed v. Executive District Officer (Education), Sialkot and 2 others PLJ 2002 Lah. 1393 and Khalid Mehmood Ch. and others v. Government of the Punjab 2002 SCMR 805 rel.

Ms. Rizwana Anjum Mufti for Petitioner.

**ORDER**

**SHAHID WAHEED, J.---** The petitioner, Syed Khalid Mehmood Bukhari, through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has called in question show-cause notice dated 22-5-2012 issued under the PTCL Service Regulations, 1996.

2. Briefly the facts of the case are that the petitioner joined service as Engineer Supervisor on 1-2-1986 in the Telephone and Telegraph (T&T) Department which was subsequently converted into Pakistan Telecommunication Company Limited.

On 22-5-2012, respondent No.1 on behalf of the Authority issued a show-cause notice to the petitioner in respect of following allegations:---

(i) Despite of having received timely information/absentee report from the ABM Farooqabad, vide letters dated 18-8-2008 and 17-11-2008, you did not stop the salary of Mr. Shahbaz Alam, ALM Qila, Sheikhupura who is absent from duty w.e.f. 18-8-2008.

(ii) Further-more, you neither initiated any disciplinary action against the absconder employee nor reported to this effect to the regional management.

The petitioner, instead of submitting reply to the show-cause notice, has moved this Court through the instant petition and assailed the legality of show-cause notice.

3. Learned counsel for the petitioner submits that the impugned show cause notice is not valid as the same has been issued under the wrong provisions of law; that the impugned show cause notice suffers from malice; and, that no material in respect of allegations is available and, therefore, no punishment can be awarded to the petitioner.

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

5. The petitioner was working as Business Manager in the Pakistan Telecommunication Company Limited when the Competent Authority issued show cause notice dated 22-5-2012 and called upon his defense as to why major penalty of dismissal from service along with recovery of pecuniary loss to the Company should not be imposed in terms of Regulation No.7.04(1)(b-iv) of PTCL Service Regulations 1996. The petitioner instead of submitting reply has moved the instant petition and assailed the vires of show-cause notice. It is settled principle of law that when charge sheet or a show-cause notice is issued then full opportunity is given to an employee to reply to the charge sheet or show cause notice and to raise all the points available to him. I am not persuaded to accept the contention of the learned counsel for the petitioner that the impugned show cause notice may be assailed before this court in constitutional jurisdiction as it suffers from malice and has been issued under the wrong provisions of law. Shows-cause notice may be challenged through writ petition only if the same has been issued by an incompetent authority as High Court is authorized to issue writ of prohibition to stop a person from performing an act which that person is not allowed by law to do. It is not the case of the petitioner that impugned show cause notice has been issued by an incompetent authority and, therefore, interference of High Court in matter of issuance of show-cause notice is not warranted by law. I am conscious of the fact that striking down any act for mala fide exercise of power is a judicial reserve power exercised lethally, but rarely. The charge of mala fides against public bodies and authorities is more easily made than made out and, therefore, it would be apposite if an employee

is asked to raise this objection, at the first instance, before the Competent Authority or the departmental forum. Similarly, plea of wrong provision of law, allegedly cited in the impugned show-cause notice, may be canvassed before the departmental authority. The Hon'ble Supreme Court of Pakistan in the case of Mst. SHAGUFTA BEGUM v. INCOME TAX OFFICER CIRCLE XI, ZONE-B, LAHORE (PLD 1989 SC 360) has held that objection, if any, to the show cause notice should be raised at the first instance before the Competent Authority or the departmental forum and thereafter the employee should pursue the channel of appeal/revision before the higher departmental forum. The relevant extract of the judgment reads as under:---

"Accordingly we consider it fit case in which the petitioner would be well advised if he raises the pleas sought to be advanced before this Court, in the departmental forum in the first instance and also pursue the normal channels of appeal/ revision/ reference to the higher departmental forum. The apprehension expressed by the learned counsel that the departmental authorities are likely to support the issuance of notice after this contest before the superior court, is unfounded at least at this stage. The learned Income Tax Officer having thought, prima facie, that he had the jurisdiction, issued the impugned notice. There would be nothing wrong in his hearing the party concerned on the relevant objections including that of his jurisdiction. He would not make it a question of personal prestige if he finds that the notice was issued without jurisdiction. On the other hand, if he feels satisfied that he had the jurisdiction; same would apply to him such a determination accordingly. It is well known that a plea regarding the assumption of jurisdiction by Tribunal or a Court is available to a litigant even when appearing before the highest court in the country. It is, therefore, hoped and expected that when an objection in this behalf is raised before the learned officer concerned, he would dispassionately examine it on its own merits and render a decision which he believes, bona fide, to be correct."

Same view has been reiterated by the Hon'ble Supreme Court of Pakistan in the case of MUHAMMAD YOUSAF KHAN v. HABIB BANK LTD. through President and others (2004 SCMR 149).

6. A show-cause notice or a charge-sheet is merely an expression made by a Department/Organization against its employee stating therein that particular acts of misconduct are alleged against him. This is the first step of the disciplinary proceedings and being interlocutory orders are in the nature of a step towards a final order eventually to be passed and will be merged with the final order. The Hon'ble Supreme Court of Pakistan in the case of "ALLAH BUKHSH v. D.I.-G. POLICE" (2003 UC 60) has held that constitutional petition against show-cause notice is not maintainable and civil servants in disciplinary proceedings will have to wait till a final order is passed. It is also settled principle of law that writ petition is not maintainable against intermediate stages or steps of departmental disciplinary proceedings. In this regard reference may be made to the case of "ABDUL

WAHAB KHAN v. GOVERNMENT OF THE PUNJAB and 3 others" (PLD 1989 SC 508) and "MUHAMMAD JAVED v. EXECUTIVE DISTRICT OFFICER (EDUCATION), SIALKOT and 2 others" (PLJ 2002 Lah. 1393). Interference in the interlocutory orders such as charge-sheet/show-cause notice and putting an end to them at its inception, unless same is shown to be without jurisdiction, would amount to stifling of disciplinary proceedings. In view of above, this is not the stage at which this court should entertain the petitions filed by a delinquent employee challenging and for quashing the show cause notice and appropriate course for the petitioner to adopt is to file his reply to the impugned show-cause notice and invite the decision of the disciplinary authority thereon. Prior to that stage, any petition for quashing the charge sheet or show cause notice is pre mature. In this regard reference may be made to the case of KHALID MEHMOOD CH. and others v. GOVERNMENT OF THE PUNJAB (2002 SCMR 805).

7. This petition, being not maintainable, is dismissed in limine.

MH/K-26/L Petition dismissed.

**2012 M L D 1559**
**[Lahore]**
**Before Shahid Waheed, J**
**IMAM DIN---Appellant**
**Versus**
**ISHAQ AHMAD---Respondent**

Regular Second Appeal No. 21 of 1996, decided on 18th May, 2012.

**(a) Punjab Pre-emption Act (I of 1913)---**

----S. 30---Suit for pre-emption was dismissed concurrently on the ground of being barred by time---Validity---Suit was filed within the prescribed period of limitation as sale mutation was dated 30-11-1988 and the suit was filed on 26-10-1989, which was within one year of the mutation---Suit was, therefore, not barred by time.

Abdul Waris v. Muhammad Yousaf PLD 1997 SC 366 distinguished.

**(b) Punjab Pre-emption Act (IX of 1991)---**

----S.6---Suit for pre-emption filed on 26-10-1989---"Zarorrat" and avoidance of "zarrar"---Plaintiff was required, under law, to first assert "Zaroorat" or avoidance of "Zarar" in the plaint---Date of institution of suit was 26.10.1989 and the date of sale of suit land was 30-11-1988 and both said dates fell prior to the cut off date of 31-12-1993 fixed by the Supreme Court (which declared provisions of S.6(2) of the Punjab Pre-emption Act, 1991 as against the injunctions of Islam)---Decree was passed on 29-9-1993 when provisions of S.6(2) of the Punjab Pre-emption Act, 1991 were no longer in force---Plaintiff could only have succeeded in proving the right of pre-emption as it existed on three dates i.e. date of sale, date of filing of suit and date of decree---Plaintiff was required to assert "Zarrorat" and avoidance of "zarar" in the plaint but did not do so; and therefore, failed to establish his right of pre-emption on the date of the institution of the suit---Appeal was dismissed.

Rab Nawaz v. Mehmood Khan 1993 SCMR 2318; Ms. Bashiran Bibi v. Muhammad Kashif Khan and others PLD 1995 Lah. 200; Fazal Elahi and 2 others v. District Judge Attock and 3 others 1993 CLC 85; Falak Sher v. Muhammad Mumtaz and 2 others 1992 MLD 1879; Fazal Din v. Farzand Ali and others 2004 YLR 927; Atta Muhammad v. Dost Muhammad and others NLR 2004 CLJ 451; Shabir's case PLD 1994 SC 1 and Fateh Din Shah v. Ahmad Khan 2006 MLD 934 rel. Mian Abbas Ahmad and Mian Muhammad Shahid Riaz for Appellants.
Mian Bashir Ahmad Bhatti for Respondent.

Date of hearing: 16th May, 2012.

## JUDGMENT

**SHAHID WAHEED, J.**---This second appeal under section 100, C.P.C. is directed against judgment and decree dated 15-1-1996 passed by the learned Addl. District Judge, Muzaffargarh who dismissed the appellant's appeal and confirmed the judgment and decree dated 20-9-1994 passed by the learned Senior Civil Judge, Muzaffargarh whereby the appellant's suit for possession through pre-emption was dismissed.

2. Briefly the facts of the case are that the appellant on 26-10-1989 instituted a suit for possession through pre-emption regarding the suit land which was purchased by the respondent vide Mutation No. 3236 attested on 30-11-1988. In response to summons the respondent appeared before the learned trial Court and submitted a contesting written statement on 13-3-1990. The learned trial Court vide judgment and decree dated 20-9-1994 dismissed the suit declaring it as time barred. Feeling aggrieved, the appellant preferred an appeal before the learned Addl. District Judge, Muzaffargarh and the same was dismissed vide judgment and decree dated 15-1-1996. Hence this second appeal.

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

4. In the instant case, the Courts below decided the case solely on the question of limitation and did not touch other aspects of the case. I am of the view that findings of the Courts below about the limitation in view of the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Abdul Waris v. Muhammad Yousaf (PLD 1997 SC 366) are not valid and the suit was filed within the prescribed period of limitation as sale mutation is dated 30-11-1988 and the suit was filed on 26-10-1989 i.e. within one year of the aforementioned mutation. Learned counsel for both the parties are of the same view on this point.

5. I have held above that the findings of the learned Courts below qua period of limitation was erroneous and, therefore, now a question arises that whether the case be remanded to the trial Court for determination of other issues involved in the case after recording evidence. In the given facts and circumstances of the case, besides question of limitation, the appellant, under the law, was also required to first assert 'Zaroorat' or avoidance of 'Zarar' in the plaint and then to prove it through evidence. This question was raised during the course of arguments before this Court on 3-12-2003 and the learned counsel for the appellant sought time to examine this point. Today, learned counsel for the appellant could not submit any convincing argument but prayed that this issue would be resolved only after recording of evidence. In my view remand of the case would not be in the interest of justice. In the instant case the element of 'Zaroorat' or avoidance of 'Zarar' is conspicuously absent in the plaint of the pre-emption suit. There is no averment on them in the plaint. The Hon'ble Supreme Court of Pakistan in the case of Rab Nawaz v. Mehmood Khan (1993

SCMR 2318) has held that 'Zaroorat' or avoidance of 'Zarar', being question of fact, unless same is expressly pleaded, could neither be implied nor as rule be exist by merely asserting pre-emption. This judgment was followed by this court in the case of Ms. Bashiran Bibi v. Muhammad Kashif Khan and others (PLD 1995 Lah. 200) and relevant extract thereof reads as under:--

"In my opinion, it was a necessary requirement of law to aver existence of Zaroorat or avoidance of Zarar for exercise of pre-emption in the plaint. Unless these were expressly pleaded, no amount of evidence could be given on them. In taking this view, I am supported by my judgment in case of Fazal Ellahi and 2 others v. District Judge, Attock and 3 others 1993 CLC 85 (Lahore). It had also the support from the decision of the Supreme Court in petition for Special Leave to Appeal No. 180 of 1990 where in my view about the statement of Zaroorat or avoidance of Zarar in the plaint was not interfered with. Further case of Ghulam Hussain and others v. Mushtaq Ahmad and others PLD 1994 SC 870 takes the same view. Plaint of the pre-emption suit was, therefore, materially defective on this score. Omission in it of Zaroorat or avoidance of Zarar was fatal to the pre-emption suit. As far period of limitation, though, there was no specific prescription by the Statute law on the date of filing of the pre-emption suit on 15-11-1989, yet in view of section 35(2) of the Punjab Pre-emption Act, 1991 covering the period of interregnum from 1-8-1986 to 28-3-1990, the period of limitation for pre-emption suit shall be one year."

The similar view has been expressed in the case of Fazal Elahi and 2 others v. District Judge Attock and 3 others (1993 CLC 85) wherein it has been held as followed:--

"Neither 'Zaroorat' nor avoidance of 'Zarar' which were necessary for exercise of right of pre-emption under the new Act was pleaded in the plaint of the pre-emption suit dismissed on 28-7-1990, therefore, suit could not be resurrected for decision afresh."

In this regard it would be advantageous to refer the judgments rendered in the case of Falak Sher v. Muhammad Mumtaz and 2 others (1992 MLD 1879), Fazal Din v. Farzand Ali and others (2004 YLR 927) and Atta Muhammad v. Dost Muhammad and others (NLR 2004 CLJ 451) wherein the above referred principle has been reiterated.

6. There is yet another angle to address the question of 'Zarar' and 'Zaroorat'. In the instant case the date of sale of suit land was 30-11-1988 and the date of institution of suit was 26-10-1989. Both said dates fell prior to cut off date 31-12-1993 fixed by the Hon'ble Supreme Court of Pakistan in Shabir's case (PLD 1994 SC 1), but decree was passed on 20-9-1994 when provisions of section 6(2) of Punjab Pre-emption Act, 1991 which dealt with 'Zaroorat' or avoidance of 'Zarar' were no longer in force. The appellant/ plaintiff could only have succeeded by proving the

right of pre-emption as it existed on three dates i.e. date of sale, date of filing of suit and date of decree. The appellant/ plaintiff was required to assert 'Zaroorat' and avoidance of 'Zarar' in the plaint but he did not discuss this fact in plaint and, therefore, failed to establish his right of pre-emption on date of institution of suit. In this regard reference may be made to the case of Fateh Din Shah v. Ahmad Khan (2006 MLD 934).

7. In view of what has been discussed above, this appeal is dismissed with no order as to cost.

KMZ/I-29/L Appeal dismissed.

**2012 M L D 1613**
**[Lahore]**
**Before Shahid Waheed, J**
**NAZIR AHMAD---Petitioner**
**Versus**
**MUHAMMAD AKBAR and others---Respondents**

Writ Petition No.18508 of 2012, decided on 17th July, 2012.

**Punjab Rented Premises Act (VII of 2009)---**

----Ss. 9, 22, 28 & Preamble---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant---Interlocutory order---Additional issues, non-framing of---Application for framing of additional issues, filed by tenant was dismissed by Rent Court---Validity---Punjab Rented Premises Act, 2009 was promulgated to regulate relationship of landlord and tenant expeditiously and to provide a mechanism for settlement of disputes inter se in an expeditious and cost effective manner---If interlocutory orders regarding framing of additional issues, summoning of witnesses and closing of evidence were challenged in constitutional jurisdiction of High Court, then it would delay adjudication of disputes between landlord and tenant and result in defeating the object for which Punjab Rented Premises Act, 2009, was enacted---Petitioner should wait till final order was passed and then to attack same in proper exclusive forum created for the purpose for examining such orders---High Court declined to exercise constitutional jurisdiction in a manner by which object of Punjab Rented Premises Act, 2009, was defeated and the same was rendered nugatory---Petition was dismissed in circumstances.
Syed Saghir Ali Naqvi v. Province of Sindh and others 1996 SCMR 1165 and Muhammad Iftikhar Muhmand v. Javed Muhammad and 3 others 1998 SCMR 328 ref.
Ch. Iqbal Javed Dhillon for Petitioner.

**ORDER**

**SHAHID WAHEED, J.**---Petitioner, Nazir Ahmad, through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has called in question the order dated 26-6-2012 passed by learned Special Judge (Rent), Gojra, Distt. Toba Tek Singh, whereby the petitioner's application for framing of additional issue has been dismissed.

2. Briefly, the facts giving rise to the instant petition are that respondents Nos.1 to 3 filed an application for the eviction of the petitioner from the rented premises before the learned Special Judge (Rent), Gojra Distt. Toba Tek Singh/respondent No.4. In response to notice, the petitioner appeared before the learned Special Judge (Rent) and moved an application under Section 22 of the Punjab Rented Premises Act, 2009 for leave to contest the petition. Learned Special Judge (Rent) vide order dated

19-7-2011 granted leave to contest; framed issues; and, called upon the parties to produce evidence in support of their respective claims. Subsequently, on 21-6-2012, the petitioner moved an application for framing of additional issue as the petitioner claimed that through an agreement he purchased the rented premises from the father of the respondents Nos.1 to 3 and occupying the same as owner. Respondents Nos.1 to 3 resisted this application by filing a contesting reply. Learned Special Judge (Rent) vide order dated 26-6-2012, dismissed the application. Hence, this petition.

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

4. At the outset of the arguments I called upon the learned counsel for the petitioner to make submissions regarding the maintainability of this petition which has been moved against an interlocutory order dated 26-6-2012 passed by the learned Special Judge (Rent) whereby petitioner's application for framing of additional issue has been dismissed. In reply thereto, the learned counsel submits that the petitioner has no remedy except to invoke the constitutional jurisdiction of this court. I am afraid this contention has no force. According to section 28 of the Punjab Rented Premises Act, 2009 no appeal is competent against an interlocutory order passed by a Rent Tribunal. It is well settled principle of law that when a statute does not provide an appeal against an interlocutory order then the same cannot be challenged by way of constitutional petition as allowing such an order to be impugned by way of constitutional petition would amount to negating the provisions of statute which does not provide for an appeal against an interlocutory order. In this regard reference may be made to Syed Saghir Ali Naqvi v. Province of Sindh and others (1996 SCMR 1165) and Muhammad Iftikhar Mohmand v. Javed Muhammad and 3 others (1998 SCMR 328). The Punjab Rented Premises Act, 2009 has been promulgated so as to regulate the relationship of landlord and tenant expeditiously and to provide a mechanism for settlement of disputes inter se in an expeditious and cost effective manner. If interlocutory orders regarding framing of additional issues, summoning of witnesses and closing of evidence are challenged in constitutional jurisdiction of this Court then it would delay the adjudication of disputes between landlord and tenant and would, therefore, result in defeating the object for which the Punjab Rented Premises Act, 2009 was promulgated.

5. In view of above, the instant petition is not maintainable and the petitioner shall have to wait till a final order is passed and then to attack it in the proper exclusive forum created for the purpose for examining such orders. I am, therefore, not inclined to exercise constitutional jurisdiction in a manner by which object of Punjab Rented Premises Act, 2009 is defeated and the same is rendered nugatory.

6. This writ petition being not maintainable is dismissed in limine.

MH/N-49/L Petition dismissed.

**2012 C L C 1900**
**[Lahore]**
**Before Shahid Waheed, J**
**Mian SHOAIB AKRAM----Petitioner**
**versus**
**JUDGE FAMILY COURT and 4 others----Respondents**

Writ Petition No.9621 of 2012, decided on 17th April, 2012.

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

----S. 14(3)---Constitution of Pakistan, Art.199---Constitutional Jurisdiction---Scope---Constitutional petition did not lie against an interim order as under section 14(3) of the West Pakistan Family Court Act, 1964; no appeal or revision was competent against an interim order of the Family Court.

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

----Art. 199---Constitutional jurisdiction of High Court---Scope---Principles---When a statute did not provide for an appeal against an interlocutory order, then the same could not be challenged by the way of a Constitutional petition as allowing such an order to be impugned by way of a Constitutional petition would amount to negating the provisions of the statute which did not provide for an appeal against an interlocutory order.
Syed Saghir Ahmed Naqvi v. Province of Sindh 1996 SCMR 1165 rel.

**(c) Interpretation of Statutes---**

----Court would not act in a manner by which the object of a statute was defeated and by which the same was rendered nugatory.

**(d) Administration of justice---**

----When no appeal was provided against an interlocutory order, then the same could only be challenged in the appeal to be filed against the final court judgment.

Muhammad Iftikhar Muhammad v. Javed Muhammad and 3 others 1998 SCMR 328 rel.
Ch. Saeed Sabir, Advocate.

**ORDER**

**SHAHID WAHEED, J.---** Petitioner, Mian Shoaib Akram, through this constitutional petition has called in question the validity and legality of an interim

order dated 21-3-2012 passed by the learned Judge, Family Court, Lahore, whereby interim maintenance allowance of the minor respondents Nos.3 to 5 has been fixed in a suit instituted by respondent No.2 for very maintenance, dowry articles and dissolution of marriage.

2. Without touching merit of the case it is suffice to say that a constitutional petition does not lie against an interim order as under section 14(3) of the West Pakistan Family Courts Act, 1964 no appeal or revision is competent against an interim order passed by a Family Court. It is a settled principle of law that when a statute does not provide an appeal against an interlocutory order then the same cannot be challenged by way of a constitutional petition as allowing such an order to be impugned by way of a constitutional petition would amount to negating the provisions of the statute which does not provide for an appeal against an interlocutory order. According to the principles of interpretation of statute the Court would not act in a manner by which the object of a statute is defeated and the same is rendered nugatory. In the case of Syed Saghir Ahmed Naqvi v. Province of Sindh and another reported in 1996 SCMR 1165, the Hon'ble Supreme Court has pronounced that when a statute does not provide an appeal against an interlocutory order the same cannot also be challenged by way of a constitutional petition as constitutional petition would amount to defeating the object of the statute. A similar pronouncement was made by the Supreme Court in the case of Muhammad Iftikhar Muhammad v. Javed Muhammad and 3 others reported in 1998 SCMR 328. In this case the Hon'ble Supreme Court observed that when no appeal was provided against an interlocutory order then the same could only be challenged in the appeal to be filed against the final order/judgment.

3. In view of above, this petition being not maintainable is dismissed in limine.

KMZ/S-63/L Constitution petition dismissed.

**2012 C L C 1581**
**[Lahore]**
**Before Shahid Waheed, J**
**SAKHI MUHAMMAD through L.Rs. and 9 others----Petitioners**
**Versus**
**ASHRAF ALI and 3 others----Respondents**

Civil Revision No.452-D of 2005, heard on 14th May, 2012.

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

----O. VI, R. 17 & Schedule, Appendix "A" Serial Nos.47 and 48---Specific Relief Act (I of 1877), Ss.42 & 54---Suit for declaration and injunction---Amendment of pleadings---Principles---Suit filed by plaintiffs was dismissed by Trial Court and during pendency of appeal before Lower Appellate Court plaintiff filed application to amend prayer---Lower Appellate Court dismissed application and appeal---Validity---Application for amendment of plaint so as to add only prayer for a decree of specific performance of agreement could not be allowed as plaintiffs in the suit did not assert mandatory fact of readiness and willingness as per forms of pleadings prescribed in the Schedule, Appendix "A" at serial Nos.4 and 48, C.P.C. and agreement to sell remained unproved during evidence---Proposed amendment only in prayer without bringing any change in body of plaint showed mala fide of plaintiffs so as to deprive defendants of their property which they purchased for valuable consideration, as such proposed amendment in prayer was inconsistent with contents of plaint and plaintiffs could not be allowed to substitute cause of action so as to prejudice valuable rights of defendants who were bona fide purchasers of suit property---High Court declined to interfere in judgments passed by Courts below and application under O.V1, R.17, C.P.C. was rightly dismissed---Revision was dismissed in circumstances.
Beli Ram and Brothers v. Ram Lal and others AIR 1925 Lah. 644; Lal Chand v. Sohan Lal and others AIR 1938 Lah. 220; Abdul Sattar v. Muhammad Khan and others 1981 CLC 791; Mst. Saeeda Akhtar and others v. Lal Din and others PLD 1981 Lah. 623; Sakhi Muhammad v. Munshi Khan PLD 1992 SC 256; Memon Educational Board v. Munawwar Hussain 2001 YLR 1241; Messrs Pakistan Telecommunication Corporation through its Director v. Abdus Sattar and 5 others 1995 MLD 1563; Mst. Mariam and 5 others v. Haji Ali and 3 others PLD 1985 Kar. 705; Dwipal Chandra Bardhan v. Jiban Debi and others AIR 1931 Cal. 574; Shyam Lal Bhat v. Ahmat Bhat and others AIR 1957 J&K 23; Province of the Punjab through Collector District Khushab Joharabad and others v. Haji Yaqub Khan and

others 2007 SCMR 544; Fazal Begum and another v. Municipal Corporation, Lahore and 5 others 1983 CLC 1643 and Mst. Ghulam Bibi and others v. Sarsa Khan and others PLD 1985 SC 345 ref.

Sahibzada Mehboob Ali Khan for Petitioners.

Naved Ahmad Khan and Ch. Munir Alam for Respondents.

Date of hearing: 14th May, 2012.

**JUDGMENT**

**SHAHID WAHEED, J.---** Challenge in this civil revision is to the judgment and decree dated 31-1-2005 passed by the learned Additional District Judge, Sahiwal who affirmed the judgment and decree dated 19-12-2000 whereby the petitioners' suit for declaration with permanent injunction was dismissed.

2. Briefly the facts of the case are that Syed Ijaz Hussain (respondent No. 3) was allotted a land measuring 100 Kanals, 18 Marlas (the "suit-land") under the Islamabad Oustees Scheme. Being an allottee, Syed Ijaz Hussain, on 31-7-1973 orally agreed to sell the suit-land to the tenants namely Nazar Din, Khushi Muhammad, Sakhi Muhammad and Fazal Din (hereinafter called "the petitioners") for a consideration of Rs.72,500/- and after having received Rs.60,000/- handed over the possession of the suit-land to the petitioners. Subsequently, on 21-1-1974 Syed Ijaz Hussain/respondent No.3 executed agreement (Exh.P.8) and confirmed the oral agreement to sell. On the basis of agreement dated 21-1-1974 (Exh.P.8) the petitioners on 22-1-1974 instituted a suit for permanent injunction against Syed Ijaz Hussain (respondent No.3) who appeared before the learned trial Court and got recorded his conceding statement (Exh.P.4) that the suit be decreed as prayed for and resultantly the suit was decreed on 31-1-1974 (Exh.P.5) whereby Syed Ijaz Hussain was restrained to interfere in the possession of the petitioners; to create hindrance in the execution of sale-deed qua the suit-land in favour of the petitioners; and, to sell the suit-land to any third party. After a lapse of almost 10 years, Syed Ijaz Hussain (respondent No.3) orally sold the suit-land to Ashraf Ali (respondent No.1) and Akbar Ali (respondent No.2) for a consideration of Rs.250,000/-and thereafter moved an application before the District Collector, District Sahiwal under section 19 of the Colonization of Government Lands (Punjab) Act, 1912 (hereinafter called "the Act, 1912") seeking approval for the transfer of rights in respect of the suit-land. The District Collector after soliciting the report (Exh.P.2) granted approval vide order dated 21-3-1984 (Exh.P.1) and in pursuance thereof Mutation No.281 (Exh.P.3) was attested on 9-9-1985 in favour of respondent No.1 (Ashraf Ali) and respondent No.2 (Akbar Ali). Consequent upon attestation of Mutation No.281 (Exh.P.3), the petitioners moved an application under Order XXI, Rule 32, C.P.C. for the execution of decree dated 31-1-1974 (Exh.P.5). During the pendency of execution petition, the petitioners on 30-7-1989 instituted first suit for declaration against the present respondents and prayed that order dated 21-3-1984 (Exh.P.1) passed by the District Collector and Mutation No.281 dated 9-9-1985

(Exh.P.3) be declared illegal. The respondents moved an application under Order VII, Rule 11, C.P.C. for rejection of plaint on the plea that all the questions raised in the suit were under consideration in the execution proceedings filed by the petitioners for the execution of decree dated 31-1-1974 (Exh.P.5). The learned Civil Judge rejected the plaint under Order VII, Rule 11, C.P.C. vide order dated 9-12-1989 (Exh.D.8). Feeling aggrieved, the petitioners moved an appeal before the learned Addl. District Judge but the same was dismissed vide judgment and decree dated 28-9-1992 (Exh.D.9). Although, it is not available on record, yet learned counsel for the petitioners submits that consequent upon dismissal of appeal the petitioners also withdrew application moved under Order XXI, Rule 32, C.P.C. for the execution of decree dated 31-1-1974 (Exh.P.5). However, on 29-9-1992, the petitioners instituted a second suit for declaration and permanent injunction seeking the same relief which was prayed for in the first suit for declaration. In response to summons, the respondents Nos.1 and 2 appeared before the learned trial Court and submitted a contesting written statement. The suit to the extent of respondent No.3 (Syed Ijaz Hussain) was dismissed vide order dated 6-5-1993 due to non-deposit of process fee.

3. The learned trial Court on 5-7-1995 out of the divergent pleadings of the parties reduced the controversy into following issues:---

(1) Whether plaintiffs Nos. 1 to 3 and Fazal Din predecessor-in-interest of the plaintiffs Nos. 4 to 9 entered into sale agreement for the consideration of Rs.72500/- with defendant No.3? OPP.

(2) Whether the defendant No.3 is restrained by agreement dated 31-7-1973 and consent decree from alienating of the land in dispute to any other? OPP

(3). Whether the District Collector gave permission for alienation of the land in dispute without hearing and the consent of parties on 21-3-1984 and Mutation No.281 dated 9-9-1985, in favour of the defendants Nos.1 and 2 is against law and facts and is inoperative on the rights of the plaintiffs? OPP

(4) Whether the parties are entitled to the declaration that the defendants Nos.1 and 2 are not entitled to purchase the land in dispute on account of the facts averred in the plaint and the defendant No. 3 is bound to get alienation of the land in dispute in favour of the plaintiffs? OPP

(5) Whether the plaintiffs are entitled to the decree as prayed for? OPP

(6) Whether the suit cannot proceed due to non joinder of Province of Punjab, if so its effect? OPD

(7) Whether the suit is barred by section 47 of CPC, Principle of res judicata, section 36 of the Colonization of the Government Land Act and the plaint of the suit is liable to be rejected under Order VII, Rule 11 C.P.C.? OPD

(8) Whether the plaintiff's have locus standi and cause of action to file this suit? OPP
(9) Whether suit is within time?

(10) Whether the suit is barred by Order II, Rule 2, C.P.C.? OPD

(11) Whether the decree dated 31-1-1974 is against law and without legal authority, if so its legal impact? OPD

(12) Whether the impugned agreement is without lawful authority and is liable to be cancelled? OPD

(13) Whether the suit of the plaintiff is baseless mala fide and the defendants are entitled to recover special costs under section 35-A of C.P.C.? OPD

(14) Relief.

4. After framing of issues, the Province of Punjab was impleaded as defendant No.4 in the suit vide order dated 1-10-1996. Parties to the suit produced oral as well as documentary evidence in support of their respective claims. The petitioner/Sakhi Muhammad himself appeared as P.W.1 and produced Hashmat Ali (P.W.2) and Rulia (P.W.3). The petitioners in their documentary evidence tendered copy of order dated 21-3-1984 passed by the District Collector (Exh.P.1), report dated 19-3-1984 for transferring the suit-land (Exh.P.2), copy of Mutation No.281 (Exh.P.3), copy of statement of Syed Ijaz Hussain dated 22-1-1974 (Exh.P.4), copy of order dated 31-1-1974 (Exh.P.5), copy of Jamabandi Khata No.142 Khatuni No.411-407 (Exh.P.6), copy of Khasra Girdawari Kharif 1984-85 (Exh.P.7) and copy of sale agreement on behalf of Ijaz Hussain (Exh.P.8). Conversely, Ashraf Ali, respondent himself appeared as D.W.1 and in documentary evidence he tendered a copy of Jamabandi for the year 1983-84 (Exh.D.1), copy of Jamabandi for the year 1986-87 (Exh.D.2), copy of Jamabandi for the year 1991-92 (Exh.D.3), Jamabandi for the year 1995-96 (Exh.D.4), copy of Mutation No.281 (Exh.D.5), copy of Khasra Girdawari (Exh.D.6), copy of plaint titled as Mst. Haliman Bibi vs. Syed Ijaz Hussain (Exh.D.7), copy of order dated 9-12-1989 (Exh.D.8) and copy of judgment dated 28-9-1992 passed by the learned Addl. District Judge (Exh.D.9).

5. After recording evidence the learned trial Court vide judgment and decree dated 19-12-2000 dismissed the suit. Being dissatisfied, the petitioners moved an appeal before the learned Additional District Judge. During the pendency of appeal the

petitioners moved an application under Order VI, Rule 17, C.P.C. for amendment in the plaint so as to add the prayer for specific performance of agreement. The learned Additional District Judge after getting reply dismissed the application vide order dated 29-1-2005. Thereafter, the learned Additional District Judge vide judgment and decree dated 31-1-2005 also dismissed the appeal. Hence this civil revision.

6. Learned counsel for the petitioners submits that the learned Additional District Judge erroneously dismissed the application seeking amendment in the plaint on the reasons extraneous to principles of amendment of pleadings; that after the statement of respondent No.3 (Exh.P.4) and decree dated 31-1-1974 (Exh.P.5), the respondent No.3 could not sell the land to respondents Nos.1 and 2; that permission of the District Collector under section 19 of the Act, 1912 does not mean that the obligation of the vendor arising out of the decree dated 31-1-1974 (Exh.P.5) were rendered nugatory; that the principle of res judicata, provision of section 47,C.P.C. or Order II, Rule 2C.P.C. were wrongly invoked by the Courts below; and, that written agreement dated 21-1-1974 (Exh.P.8) was per se admissible in evidence.

7. Conversely learned counsel for the respondents Nos.1 and 2 submits that the petitioners' suit was heavily time-barred; that written agreement dated 21-1-1974 (Exh.P.8) was not proved by producing witnesses; that the consent decree dated 31-1-1974 (Exh.P.5) does not bind the Province of the Punjab or the respondents Nos.1 and 2; that the suit was not maintainable on the principle of res judicata; and that the concurrent findings of fact cannot be disturbed as there is no misreading or non-reading of evidence available on record.

8. I have heard the learned counsel for the parties and perused the record appended with the petition.

9. The Issues Nos.1, 2, 4, 5, 8, 11, 12 and 13 are interlinked and, therefore, I deem it appropriate to discuss the same at the outset. Although the conclusion drawn by the learned Courts below qua these issues is correct yet the rationale thereof requires little more elaboration. It is an admitted fact that Syed Ijaz Hussain (respondent No.3) was an allottee of the suit-land measuring 100 Kanals, 18 Marlas under the Islamabad Oustees Scheme. The petitioners in their plaint has asserted that the allottee Syed Ijaz Hussain, vide agreement dated 21-1-1974 (Exh.P.8) agreed to sell the land for a consideration of Rs.72,500/- and on the basis of this agreement a consent decree was obtained on 31-1-1974 (Exh.P.5) whereby the respondent No.3, Syed Ijaz Hussain, was permanently restrained to sell the suit-land to any other person except the petitioners; and, that Syed Ijaz Hussain would neither disturb the possession of the petitioners nor would create any hindrance in the execution of sale-deed qua the suit-land. The first pivot of the petitioners' claim is agreement dated 21-1-1974 (Exh.P.8) but the petitioners have failed to prove the said agreement for the reasons: firstly, that while appearing

as P.W.1, Sakhi Muhammad deposed before the learned trial Court that the sale consideration was paid to respondent No.3 in the presence of Yousaf, Nambardar Ali Muhammad, Abdul Aziz and Sharif but the petitioners did not produce any of the above said witnesses before the learned trial Court to prove the transactions; secondly, the statements of other witnesses are neither trustworthy nor can be relied upon as the plaintiff himself admitted that they were not present at the time of making payments; thirdly, the petitioners also did not produce any witness qua the execution of agreement dated 21-1-1974 (Exh.P.8); and, fourthly, suit to the extent of Syed Ijaz Hussain was dismissed by the learned trial Court vide order dated 6-5-1993 due to non-deposit of process fee. In these circumstances, the claim of the petitioners on the basis of unproved agreement dated 21-1-1974 (Exh.P.8) could not be decreed. The other document, that is, decree dated 31-1-1974 (Exh.P.5) also does not lend any help to the petitioners. The contention of the learned counsel for the petitioners that in view of decree for permanent injunction the respondent No.3 (Syed Ijaz Hussain) could not sell the land to respondents Nos.1 and 2, has no force as it is an established principle of law that a decree for perpetual injunction does not invalidate the sale but entails penal consequences for vendor. In this regard it would be germane to cite judgment rendered in the case of Beli Ram and Brothers v. Ram Lal and others (AIR 1925 Lah. 644) Lal Chand v. Sohan Lal and others (AIR 1938 Lah. 220) and this Court followed the above judgments in the case of Abdul Sattar v. Muhammad Khan and others (1981 CLC 791) wherein it has been held as follows:---

"In view of Beli Ram and Brothers v. Ral Lal and others (AIR 1925 Lah. 644) bona fide purchasers of property, under temporary injunction restraining alienation, for valuable consideration without notice of any fraud or collusion on the part of the vendor are protected. The same is the position in respect of a decree for perpetual injunction and such a decree does not invalidate the sale, although penal action might be taken against the alienor".

The above principle was also followed by the learned Division Bench of this Court in the case of Mst. Saeeda Akhtar and others v. Lal Din and others (PLD 1981 Lah 623).

10. There is yet another angle to address this issue. The petitioners' claim was that the respondent No.3, Syed Ijaz Hussain vide agreement dated 21-1-1974 (Exh.P.8) and decree dated 31-1-1974 (Exh.P.5) was bound to transfer the suit-land in their favour after getting due approval of the Collector under section 19 of the Act, 1912. Learned trial Court vide order dated 6-5-1993, dismissed the petitioners' suit to the extent of defendant No.3/respondent No.3 (Syed Ijaz Hussain), due to non deposit of process fee. The petitioners neither challenged order dated 6-5-1993 before the learned Additional District Judge nor in the instant civil revision. Hence the order dated 6-5-1993 has attained finality. In other words the petitioners' basic claim was

against respondent No.3 and when it was dismissed, the petitioners could not maintain claim against respondent Nos.1 and 2.

11. Now, a question arises that whether respondents Nos.1 and 2 are bona fide purchasers of the suit property. The respondents Nos.1 and 2 during the course of evidence proved that before purchasing the suit-land they made discrete inquiry about the title of respondent No.3 by inspecting the Revenue Record. In this regard respondent No.1 (Ashraf Ali), while appearing as D.W.1 in his examination-in-chief categorically stated that before purchasing the suit-land he went to the Patwari and examined the record qua the ownership of respondent No.3 and this part of the statement was not cross examined by the petitioners. The petitioners have not alleged any fraud or collusion on the part of respondents Nos.1 and 2. Besides above, the petitioners' whole claim hinged upon two documents i.e. Agreement (Exh.P.8) and decree (Exh.P.5) and despite this fact the petitioners did not take any step to get the same recorded in the Revenue Record. In view of this fact, respondents Nos.1 and 2 may be held bona fide purchasers. All the essential ingredients for the application of section 41 of the Transfer of Property Act, 1882 are present in the instant case as Syed Ijaz Hussain was the ostensible owner and the sale was made with his express consent for valuable consideration and respondents Nos.1 and 2 being transferees while acting in good faith took reasonable care before entering into the transaction. The respondents Nos.1 and 2 after examining the Revenue Record got moved an application through Syed Ijaz Hussain to the District Collector for soliciting due approval under section 19 of the Act, 1912. The District Collector after getting report dated 19-3-1984 (Exh.P.2) and taking into consideration the consent of the transferor, Syed Ijaz Hussain, granted approval and on the basis of which Mutation No.281 dated 9-9-1985 (Exh.P.3) was sanctioned. In these circumstances, the petitioners on the basis of decree for perpetual injunction (Exh.P.5) could not base any claim and challenge the order dated 21-3-1984 (Exh.P.1) passed by the Collector under section 19 of the Act, 1912 and Mutation No.281 dated 9-9-1985 (Exh.P.3).

12. The findings of the Courts below with regard to Issue No.7 are not in accordance with the provisions of law. The plaint of the petitioners' first suit for declaration was rejected under Order VII, Rule 11, C.P.C. vide order dated 9-12-1989 (Exh.D.8) and appeal against this order was also dismissed vide judgment and decree dated 28-9-1992 (Exh.D.9). According to Order VII, Rule 13, C.P.C. when a plaint is rejected under Rule 11 of Order VII, C.P.C. on the ground enumerated under said rule, a fresh plaint on the same cause of action is not barred. Rejection of plaint does not operate res judicata because same is not a decision on merits and the plaintiff is not precluded from presenting a fresh plaint in respect of same cause of action. In this regard reference may be made to Sakhi Muhammad v. Munshi Khan (PLD 1992 SC 256), Memon Educational Board v. Munawwar Hussain (2001 YLR 1241), Messrs Pakistan Telecommunication Corporation through its Director v.

Abdus Sattar and 5 others (1995 MLD 1563). Similarly, the provisions of section 47, C.P.C. also could not be invoked to non-suit the petitioners as the questions or claims raised in the second suit for declaration could not be determined during the course of execution of decree dated 31-1-1974 (Exh.P.5) passed in the suit for perpetual injunction for the reasons, firstly the word "parties" used in section 47, C.P.C. only means parties to the suit or their legal representatives and does not include strangers. In this regard reference may be made to Mst. Mariam and 5 others v. Haji Ali and 3 others (PLD 1985 K 705), Dwipal Chandra Bardhan v. Jiban Debi and others (AIR 1931 Cal 574), Shyam Lal Bhat v. Ahmat Bhat and others (AIR 1957 J&K 23). Admittedly, in the suit in which decree dated 31-1-1974 (Exh.P.5) was passed, neither respondent Nos.1 and 2 nor the Province of Punjab was party and; secondly, as held hereinabove that a decree for perpetual injunction does not invalidate the approval granted by the District Collector under section 19 of the Act, 1912 (Exh.P.1) and Sale Mutation No.281 (Exh.P.3).

13. As regard to bar of jurisdiction of Civil Court, it may be stated that order dated 21-3-1984 (Exh.P.1) passed by the District Collector under section 19 of the Act, 1912 could not be assailed before the learned Civil Court in view of section 36 of the Act, 1912 which contemplates that a civil court shall not have jurisdiction in any matter of which the Collector is empowered by the Act, 1912 to dispose and shall not take cognizance of the matter in which the Collector exercises any power vested in him by or under the Act, 1912. In the instant case Syed Ijaz Hussain was the allottee of the land and he moved an application before the Collector under section 19 of the Act, 1912 for seeking his approval. The Collector after observing due formalities and getting report dated 19-3-1984 (Exh.P.2), wherein the application moved by the petitioners was also evaluated or examined, granted approval for transfer of rights in favour of respondents Nos.1 and 2. In other words the grant of approval under section 19 of the Act, 1912 falls within the powers of the Collector and he validly exercised the power on the application of the allottee, Syed Ijaz Hussain. The Hon'ble Supreme Court of Pakistan in the case of Province of the Punjab through Collector District Khushab Joharabad and others v. Haji Yaqub Khan and others (2007 SCMR 544) has held that bar under section 36 of the Act, 1912 would be available only where Authorities acted within the four corners of their jurisdiction. In the instant case, learned counsel for the petitioner has failed to point out any transgression of power on the part of the Collector and, thus, the learned Civil Court had no jurisdiction to interfere with the order dated 21-3-1984 (Exh.P.1) passed by the Collector under section 19 of the Act, 1912 and Mutation No.281 dated 9-9-1985 (Exh.P.3).

14. The findings of the Courts below qua Issue No.9 are also not valid. It is an admitted fact that the petitioners were in possession of the suit property at the time of institution of suit. Thus, in view of the principle laid down by this Court in the case of Fazal Begum and another v. Municipal Corporation, Lahore and 5 others (1983 CLC 1643) the petitioners were not bound to sue on every denial of their title

and could file a declaratory suit at their option and, therefore, the suit filed by the petitioners was within time. The findings recorded by the Courts below on Issue No.9 are erroneous and thus reversed.

15. The respondents Nos.1 and 2 in their written statement raised a preliminary objection that the second suit for declaration instituted by the petitioners was liable to be dismissed in view of the bar contained in Order II, Rule 2, C.P.C. The learned trial court, in this context, framed Issue No.10. The learned trial Court decided this issue in favour of the defendants and held that the petitioners should have sought the relief of declaration in the earlier suit for permanent injunction. These findings were upheld by the learned Additional District Judge. In my view the findings of the learned Courts below with respect to Issue No.10 are not correct. The object of Order II, Rule 2, C.P.C. is two fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent the plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order II, Rule 2, C.P.C. is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not, however, bar a second suit based on a different and distinct cause of action. It is an established principle of law that in order that a plea of a bar under Order II, Rule 2, C.P.C. should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar. Admittedly in the instant case the respondents Nos.1 and 2 being defendants raised a preliminary objection of the bar under Order II, Rule 2, C.P.C. and the learned trial Court also framed the issues. In order to discharge the burden to prove this issue the respondents Nos.1 and 2 produced copy of the first suit for declaration with permanent injunction (Exh.D.7), order dated 9-12-1989 whereby plaint was rejected under Order VII, Rule 11, C.P.C. (Exh.D.8), judgment of the learned Additional District Judge (Exh.D.-9) and also decree dated 31-1-1974 passed in a suit for permanent injunction (Exh.P.5). In my view in order to prove the bar contained in Order II, Rule 2, C.P.C. the pleadings in the earlier suit should be exhibited or marked by consent or at least

admitted by both the parties, so as to provide an opportunity to the plaintiff to explain or demonstrate that the second suit was based on a different cause of action. In the instant case, the defendants/ respondents did not exhibit the pleadings of the suit for permanent injunction in which decree dated 31-1-1974 (Exh.P.5) was passed and, therefore, the defendants/ respondents failed to discharge the onus to prove Issue No.10. Notwithstanding above, the provisions of Order II, Rule 2, C.P.C. could not be pressed into service to substantiate the objection that omission to seek declaration in a suit for permanent injunction, in which decree dated 31-1-1974 (Exh.P.5) was passed, debarred the petitioners to institute the suit for declaration mainly for the simple reasons that (i) at the time of institution of suit for permanent injunction the allottee, Syed Ijaz Hussain, neither had received full consideration amount under agreement to sell (Exh.P.8) nor had obtained permission of the District Collector under section 19 of the Act, 1912; and (ii) that Syed Ijaz Hussain, had not agreed to sell the suit-land to respondents Nos.1 and 2 meaning thereby that the relief claimed in the latter suit was not available at the time of earlier suit.

16. Lastly, I would like to address the legality of order dated 29-1-2005 whereby the learned Additional District Judge, Sahiwal dismissed the petitioners' application moved under Order VI, Rule 17, C.P.C. for amendment to include prayer for relief of specific performance. The bare perusal of Order VI, Rule 17 reveals that it is divided into two parts. First part is discretionary whereas second part is mandatory. Under the first part, if the court comes to the conclusions at any stage of the suit that amendment is just and proper and will go to the real matter in controversy, then under second part the amendment should be allowed; provided the other party is not prejudiced. In this regard reliance is placed on Mst. Ghulam Bibi and others v. Sarsa Khan and others (PLD 1985 SC 345) The superior Courts have always taken into consideration the following principles for allowing or declining amendment in the pleadings:---

(i) The power under Order VI, Rule 17 is discretionary and should be used judicially on consideration of special circumstances of each case and the necessary conditions are (a) if the amendments do not cause injustice to other side; (b) amendment is necessary for determination of real question in controversy;

(ii) No party can be allowed to introduce new cause of action by way of amendment;

(iii) The Court ordinarily should allow the amendment unless it is found that the applicant was acting mala fide or injustice or injury was likely to cause to the opposite party which could not be compensated by cost;

(iv) Where due to subsequent events original relief sought became inappropriate for deciding the controversy, the amendment can be allowed to shorten the litigation;

(v) The Court can allow to cure defective pleadings so as to constitute a cause of action where there was none, provided necessary conditions such as payment of additional court fee or costs of other side are complied with except when there is lapse of time or new cause of action is created;

(vi) Where the court is lacking inherent jurisdiction over the subject matter, it cannot allow amendment to bring the suit within its jurisdiction;

(vii) Introduction of inconsistent or contradictory allegations cannot be allowed;

(viii) Delay for itself, cannot be adequate reason for refusing amendment.

Applying the afore-stated principles, application for amendment of plaint of suit for declaration so as to add only a prayer for a decree of specific performance of agreement could not be allowed for the reasons: (a), the petitioners in the suit did not assert the mandatory fact of readiness and willingness as per forms of pleadings prescribed in the Schedule, Appendix 'A' at Serial Nos.47 and 48 of C.P.C.; (b), agreement to sell (Exh.P.8) remained unproved during evidence; (c), the suit to the extent of vendor, Syed Ijaz Hussain, was dismissed by the learned trial Court vide order dated 6-5-1993 due to non-deposit of process fee under Order II, Rule 2, C.P.C. and the petitioners neither applied to the learned trial Court under Order II, Rule 4, C.P.C. to set the dismissal aside nor was assailed it further before the learned Additional District Judge and, therefore, in the absence of Syed Ijaz Hussain no decree of specific performance could be passed; (d), the proposed amendment only in the prayer without bringing any change in the body of the plaint showed mala fide of the petitioner so as to deprive the respondents Nos.1 and 2 of their property which they purchased for valuable considerations; (e), proposed

amendment in the prayer was inconsistent with the contents of the plaint; and (f) the proposed amendment could not be allowed to substitute cause of action so as to prejudice the valuable rights of respondents Nos.1 and 2 who were bona fide purchasers of the suit property. In view of above, the application under Order VI, Rule 17, C.P.C. was rightly dismissed.

17. In view of what has been discussed above, this petition is dismissed with no order as to costs.

MH/S-84/L Revision dismissed.

**PLJ 2012 Lahore 745**
**Present: Shahid Waheed, J.**
**ZULFIQAR ALI, etc.--Petitioners**
**versus**
**MUHAMMAD BASHIR--Respondent**

C.R. No. 512 of 2011, heard on 14.9.2012.

**Punjab Pre-emption Act, 1991 (IX of 1991)--**

----S. 24--Suit for pre-emption--Determination of probable value of suit property--Question of--Whether trial Court was justified in determining probable value of suit property in presence of price mentioned in mutation--Validity--Whether there was an allegation that price mentioned in mutation or sale deed was inflated, Court was under obligation to examine plaint and documents and after examination and upon being satisfied that price appeared to be inflated, Court was bound by law to determine by approximation probable value and then to direct to deposit 1/3rd thereof--Trial Court was jurisdiction to determine probable value in preliminary inquiry on basis of material placed before it by plaintiff and to provisionally opine that sale price as stipulated in sale deed or mutation was prima facie inflated--For determination of probable value trial Court was not required to held detailed inquiry and to hear after notice as a notice for hearing in preliminary inquiry would cause delay in determination process and order of deposit of zar-e-some beyond statutory period of 30 days--Petition was dismissed. [P. 747] A, B & C
PLJ 2008 SC 95, rel.

2001 CLC 1693, PLD 2006 Lah. 410, PLD 2000 Lah. 190 & 1992 SCMR 746, ref.
Mr. Qamar Zaman Qureshi, Advocate for Petitioners.
Ch. Irshadullah Chattha, Advocate for Respondent.
Date of hearing: 14.9.2012.

**JUDGMENT**

Petitioners through this Civil Revision under Section 115, C.P.C. have called in question the order dated 25.1.2011, passed by the learned Civil Judge, Pindi Bhattian, Distt. Hafizabad whereby the respondent's application for determination of probable value of suit property under Section 24 of the Punjab Pre-emption Act, 1991 has been accepted.

2. Briefly, the facts of the case are that the respondent claiming his superior right instituted a suit for possession of the suit property through pre-emption. It is maintained in the plaint that the petitioners/defendants purchased the suit property from Mst. Safia Bibi daughter of Khan Muhammad vide Mutation No. 485 dated 27.9.2010. Alongwith the plaint, the respondent also filed an application under Section 24 of the Punjab Pre-emption Act, 1991 stating therein that in the sale mutation No. 485 dated 27.9.2010, a fictitious sale price of Rs. 12,600,000/- has been mentioned, whereas the value of the suit property is not more than Rs.4,000,000/-. In support of the above application, the respondent produced copy of different mutations exhibiting the sale of properties adjacent to the suit property and also "Aust bay Yaksala". Learned trial Court after appreciating the above said documents, accepted the application and directed the respondent to deposit 1/3rd of probable sale value i.e. Rs. 4,000,000/- within 30 days. Feeling aggrieved, the petitioners/defendants have filed the instant petition.

3. In support of the instant petition, learned counsel for the petitioners submits that the learned trial Court could not determine probable value of the property because sale price was mentioned in the sale deed or mutation. In support of this contention learned counsel for the petitioners relies upon the case "Abdul Wahid, etc vs. Sardar Ali, etc (2000 Law Notes (Lahore) 99 = PLD 2000 Lahore 190). Conversely, learned counsel for the respondent submits that the respondent/plainliff under Section 24 of the Punjab Pre-emption Act, 1991 could challenge the sale price recorded in the mutation or sale deed and make a request for determination of probable value of the suit property for payment of 1/3rd of sale price. In support of his contention, learned counsel for the respondent places reliance on the case "Perveen Akhtar and another vs. Muhammad Sattar (PLD 2006 Lahore 410).

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

5. The sole point which requires determination is whether the learned trial Court was justified in determining the probable value of the suit property in presence of price mentioned in the mutation. Section 24 of the Punjab Pre-emption Act, 1991 contemplates that in a suit for pre-emption the Court shall require the plaintiff to deposit 1/3rd of the sale price in Court within a period of 30 days of the filing of the suit. Second proviso to Section 24 of the said Act needs special attention in the circumstances of the present case. As per second proviso to Section 24 of the said Act, the probable value of the property can be determined by the Court when: (i) no

sale price is mentioned in the sale deed or mutation; or (ii) the price mentioned in the sale deed or the mutation appears to be inflated. In each of the eventuality the Court is mandatorily required to determine the probable value of the suit property. According to my view in every case where there is an allegation that the price mentioned in the mutation or sale deed is inflated, the Court is under obligation to examine the plaint and the documents appended therewith, and after said examination and upon being satisfied that the price appears to be inflated, the Court is bound by law to determine by approximation the probable value and then to direct the plaintiff to deposit 1/3rd thereof. My view finds support from the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of "Muhammad Din, etc vs. Jamal Din and others (PLJ 2008 SC 95) wherein it has been held that the Court while entertaining suits under the Punjab Pre-emption Act, 1991 ought to examine the plaint and any material accompanying it while passing orders for deposit of 1/3rd of the amount payable and direct the plaintiff to deposit the said amount in order to avoid complication later on. In view of above, it is clear that the learned trial Court has the jurisdiction to determine the probable value in summary/preliminary inquiry on the basis of the material placed before it by the plaintiff and also to provisionally opine that the sale price as stipulated in sale deed or mutation was prima facie inflated. Needless to observe here that for the determination of the probable value the Trial Court is not required, under second proviso to Section 24 of the Punjab Pre-emption Act, 1991, to hold a detailed inquiry and to hear the defendants after a notice as a notice to the defendants for hearing in this preliminary inquiry would cause delay in the determination process and the order of deposit of Zar-e-Some beyond the statutory period of 30 days. In the instant case, the respondent placed before the learned trial Court copy of different mutations showing the sale of properties adjacent to the suit property and yearly average sale index (Aust Bay Yaksala) and on the basis thereof the learned trial Court has rightly determined the probable value of the suit property as Rs.4,000,000/- and directed the respondent to deposit 1/3rd thereof within a period of 30 days.

6. Reliance of the learned counsel for the petitioner on the case of "Abdul Wahid, etc vs. Sardar Ali, etc (2000 Law Notes (Lahore) 99; PLD 2000 Lahore 190) is inapt. In the case of Abdul Wahid, (supra) reliance was placed on the case of "Awwal Noor vs. District Judge Kharak" (1992 SCMR 746) wherein the Hon'ble Supreme Court of Pakistan interpreted Section 24 of the N-WFP Pre-emption Act, 1987. There are marked differences between the provisions of Section 24 of N-WFP Pre-emption Act, 1987 and Section 24 of Punjab Pre-emption Act,

1991. The differences between the above said two Acts have been highlighted by this Court in the case of "Gulzar Ahmad vs. Sardar Aslam and others" (2001 CLC 1693) and on the basis thereof the case of Abdul Wahid (supra) is distinguishable and not applicable to the facts of instance case. Again, the case of Abdul Wahid (supra) was considered in the case of "Perveen Akhtar and others vs. Muhammad Sattar" (PLD 2006 Lahore 410) but was not followed for the similar reasons which have been recorded in the case of Gulzar Ahmad (supra).

7. In view of above, this petition lacks merits and is accordingly dismissed with no order as to costs.

(R.A.) Petition dismissed

**PLJ 2012 Lahore 751 (DB)**

**Present: Muhammad Khalid Mehmood Khan and Shahid Waheed, JJ.**

**Haji MUHAMMAD LATIF--Appellant**

**versus**

**CHIEF EXECUTIVE GEPCO, GUJRANWALA and 3 others--Respondents**

I.C.A. No. 985 of 2010, heard on 18.9.2012.

**Punjab Private Housing Schemes and Land Sub-Division Rules, 2010--**

----Scope--Law Reforms Ordinance, 1972, S. 3--Constitution of Pakistan, 1973, Arts. 25 & 199--Intra Court Appeal--Non-providing electricity connection being owner of land was in process of developing housing colony by constructing small houses--Discriminatory treatments--Violation of fundamental rights--Sought direction for providing electricity connection to four residential units--Fulfilled pre-requisite installation of new domestic electricity connection--Validity--Plea for declining electricity connection to appellant, was devoid of any merit and substance--Appellant being owner of land can neither develop a housing scheme nor can get it approved from TMA as accordingly to provisions of Rules, 2010, no housing colony or society can be launched at a land less than 100 kanals area--GEPCO could not require appellant to first get housing scheme approved by TMA--Land of appellant did not fall in housing scheme or colony and therefore, appellant was entitled to get electricity connection--Electricity poles, main lines and other allied equipments were available at site and electricity connection can be provided to appellant--Refusal of GEPCO to provide electricity to appellant was not only violative of Art. 25 of Constitution but also against policy of GEPCO--Electricity was a basic necessity of life and in such age of science and technology no one can lead a conducive life and play effective role in the society without electricity--Denial of electricity connection to appellant was violation of fundamental right and GEPCO had failed to furnish any reasonable explanation for not providing electricity **connection to appellant--Appeal was allowed. [Pp. 753 & 754] A, B, C & E**

**Constitution of Pakistan, 1973--**

----Art. 9--No person can be deprived of his life save in accordance with law. [P. 754] D

Mr. Amjad Ali Sherazi, Advocate for Appellant.

Mr. Aurangzeb Mirza, Advocate for Respondents.

Date of hearing: 18.9.2012.

**JUDGMENT**

**Shahid Waheed, J.--**The appellant, Haji Muhammad Latif, through this Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972, has called in question

order dated 4.11.2010 passed by the learned Single Judge-in-Chamber whereby the appellant's W.P. No. 4904-2010 was dismissed.

2. The appellant moved this Court through constitutional petition, that is, W.P. No. 4904/2010 seeking a direction to the respondents for providing electricity connection to his four residential houses/units and pleaded therein that he had fulfilled the prerequisites for installation of four new domestic electricity connections vide Applications No. 4913 to 4916 dated 20.5.2009. In response to notice, the respondents entered appearance and filed parawise comments wherein it was stated that electricity connection would be provided to the appellant after the approval of electrification scheme for the whole area as per Rules and Policy of the GEPCO.

3. Learned counsel for the appellant submits that the Sub-Divisional Officer (Respondent No. 4) vide Memo. No. 1307 dated 23.5.2009 forwarded the appellant's Applications No. 4913 to 4916 to the Executive Engineer (Respondent No. 3) for sanction of electricity connection. The Executive Engineer returned the applications to the Sub-Divisional Officer and sought his clarification as to whether the connections were not being processed for a new housing scheme. Consequent upon the above said query, the Sub-Divisional Officer deputed the Line Superintendent/Incharge of Feeder for site inspection. The Line Superintendent after making due inquiry and site inspection submitted report stating therein; (i) that building plans are sanctioned from TMA and constructions are in progress in open area; (ii) that in front of construction three connections have already been provided to one Muhammad Imran Arif; and (iii) that TMA has not mentioned any remark on the building plans and, therefore, it is not clear whether these plans are of colony or not. This report was sent to the Executive Engineer vide Letter No. 1487 dated 12.6.2009. Thereafter, the Executive Engineer alongwith the Sub-Divisional Officer and Line Superintendent visited the site. During inspection the appellant assured the Executive Engineer that his four houses did not fall in a colony and also undertook that if subsequently the area was found to be in a colony then he would pay all charges of the department. Memo. No. 2110 dated 6.8.2009 bear out the above facts but all in vain. Finally, a legal notice dated 10.9.2009 was served upon the Executive Engineer but it could not evoke a favourable response and the Executive Engineer vide Memo. No. 13305-07 dated 26.9.2009 asked the appellant to provide site-plan of the housing scheme for electrification of whole area. In this perspective learned counsel for the appellant contends that the respondents by misconstruing the area as colony; misunderstanding the provisions of law; treating the appellant discriminately; and, without any justification are not providing electricity connection to the appellant which is violative of his fundamental rights.

4. Conversely, learned counsel for the respondents contends that appellant has an area of about 26 Kanals over which the appellant has developed a residential colony and presently he has completed four house and the construction of remaining area is at initial stage of excavation and foundation. Learned counsel for the respondents

further submits that appellant would be provided electricity connection after the approval of electrification scheme for the whole area as per GEPCO.

5. We have heard learned counsel for the parties and perused the record.
6. The respondents are not providing electricity connection to the appellant on the pretext that appellant being an owner of land measuring 26 kanals is in the process of developing a housing colony by constructing small houses and in this background they have required the appellant to first get the colony approved from the concerned TMA and then seek sanction of electrification scheme for the whole area/colony as per policy of GEPCO. we are afraid, the above said plea for declining electricity connection to the appellant, is devoid of any merit and substance. Pakistan Water and Power Development Authority vide Memo. No. 7110-2/GMO/DHQ dated 1.11.2001 communicated to all Chief Executive Officers, DISCOs (including GEPCO) the following policy for provision of electricity to housing scheme:--

"The issue was discussed in Chairman's Monthly conference of CEOs dated 25-26 October, 2001 and it was decided that provision of electricity to Housing Society(ies) registered with Registrar Cooperative Societies and those approved by Development Authorities, irrespective of size of the Society(ies) will be governed by the Policy for Electrification already circulated vide this office No. 567-80/GMO/PA dated 21st April, 2001."

The appellant being owner of land measuring 26 kanals can neither develop a housing scheme nor can get it approved from the concerned TMA as according to provisions of the Punjab Private, Housing Schemes and Land Sub-Division Rules, 2010 no housing colony or society can be launched at a land less than 100 kanals area. In these circumstances the respondents cannot require the appellant to first get the housing scheme approved by the TMA. The area/ land of the appellant does not fall in a housing scheme or colony and, therefore, the appellant is entitled to get electricity connection.

7. Besides above, the action of the respondents is discriminatory. Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 abhors discriminatory treatments. The Sub-Divisional Officer in his Letter No. 1487 dated 12.6.2009 has admitted that in front of the houses of the appellants, three electricity connections have been provided to one Muhammad Imran Arif. It means that electricity poles, main lines and other allied equipments are available at site and electricity connection can be provided to the appellant. In this scenario, the refusal of respondents to provide electricity to appellant is not only violative of Article 25 (supra) but also against the policy of GEPCO.

8. According to Article 9 of the Constitution of Islamic Republic of Pakistan, 1973 no person can be deprived of his life save in accordance with law. The expression

"life" does not mean physical existence but it means enjoyment of all facilities which enable a person to lead a life in a graceful and dignified manner. Electricity is a basic necessity of life and in this age of science and technology no one can lead a conducive life and play effective role in the society without electricity. The denial of electricity connection to the appellant is a violation of fundamental right and the respondents have failed to furnish any reasonable explanation for not providing electricity connection to the appellant.

9. In view of above, this appeal is allowed, order dated 4.11.2010 passed by the learned Single Judge-in-chamber in W.P. No. 4904/2010 is set aside and the respondents are directed to provide electricity connection to the appellant within a period of one month. No order as to costs.

(R.A.) Appeal allowed

**2012 C L C 1976**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD ANWAR and another----Petitioners**
**Versus**
**ADDITIONAL DISTRICT JUDGE, TOBA TEK SINGH and 4 others----Respondents**

Writ Petition No.22883 of 2012, decided on 17th September, 2012.

(a) **Civil Procedure Code (V of 1.908)---**

----0. VI R. 17---Specific Relief Act (I of 1877), S.42---Constitutional petition---Amendment in plaint---Suit for declaration of title---Plaintiff's application for amendment in plaint was allowed by Appellate Court---Contention of the defendant was that amendment sought could not be allowed as the same would change the nature of the suit and that after conclusion of evidence, amendment in plaint could not be allowed---Validity---Defendants did not resist amendment to the extent of correction of square number of suit property but only objected to the addition of prayer of possession in the prayer clause; which would neither change the nature of suit nor cause of action would be affected---Relief for possession was a consequential relief for a suit for declaration---Constitutional petition was dismissed.

Karamat Ali and another v. Muhammad Younas Haji and others PLD 1963 SC 191 and Mst. Barkat Bibi v. Khushi Muhammad and others 1994 SCMR 2240 rel.

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

----S. 42---Civil Procedure Code (V of 1908), O. VI, R.17---Interpretation of S.42, Specific Relief Act, 1877---Suit for declaration---Amendment of plaint---Consequential relief of possession---Scope---Plaintiff's right to maintain a suit for declaratory decree was not affected by the fact that during pendency of the suit,i right to possession had also accrued to the plaintiffs---If original relief claimed becomes by reason of any subsequent change of circumstances, inappropriate, it was open for court to take notice of such events as they happened after the institution of suit and to mold its decree according to the circumstances as they stood at the time when the decree was made---Court was not obliged to dismiss a suit if it was bad under proviso to section 42 of the Specific Relief Act, 1877 as it did not authorize the dismissal of a suit where the plaintiff being able to seek further relief than a mere declaration of title, omits/fails to do so---Said section only forbade the court to make declaration, the prayer for which was not coupled with a prayer for consequential relief---Suit which was defective under section 42 should

not, therefore, be dismissed for failure on part of the plaintiff to pray for further relief and Court should allow the plaintiff to amend the plaint; and it was a settled rule of practice not to dismiss suit for non-compliance of the provisions of section 42 of Specific Relief Act, 1877 but rather to allow the plaintiff to make necessary amendments.

Mian Niaz Hussain and another v. Imdad Hussain PLD 1965 Lah. 172 rel.
M. Anwar Sipra for Petitioners.

**ORDER**

**SHAHID WAHEED, J.---** Petitioner, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has called in question order dated 29-8-2012 passed by the learned Additional District Judge, Toba Tek Singh who set aside order dated 25-4-2012 passed by the learned Civil Judge 1st Class, T.T. Singh and allowed the application moved by respondents Nos.3 and 4 seeking amendment in the plaint.

2. Briefly, the facts of the case are that the respondent No.3 and 4 claiming their share in the suit property instituted a called in question gift Mutation No.757 attested on 5-4-2007 in favour of the petitioners. During the pendency of the suit the respondents Nos.3 and 4 filed an application under Order VI, Rule 17, C.P.C. seeking amendment in the plaint so as to correct description 'of square number of land which was inadvertently written as Square No.68 instead of Square No.61; and, also to add prayer of possession as consequential relief in the prayer clause. The petitioners resisted this application by filing a reply. The learned trial Court vide order dated 25-4-2012 dismissed the application. Feeling aggrieved, the respondents Nos.3 and 4 filed a revision before the learned Additional District Judge, T.T. Singh who vide order dated 29-8-2012 accepted the application for amendment in plaint. Hence, this petition.

3. Learned counsel for the petitioners submits that the amendment sought for cannot be allowed as the same will affect and cause change in the nature of the suit; and, that after the conclusion of evidence the amendment in the plaint cannot be allowed.

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

5. The respondents Nos.3 and 4 filed a suit for declaration and claimed his share in the suit property. During the pendency of the suit an application .under Order VI, Rule 17, C.P.C. was filed seeking amendment in the plaint so as to correct description of land which was inadvertently recorded as Square No.68 instead of Square No.61; and, add a prayer of possession as consequential relief in the prayer clause of the plaint. The petitioners did not resist the amendment to the extent of correction of Square No. before the learned Additional District Judge

but only objected to the addition of prayer of possession in the prayer clause. Now, the sole point which requires determination is whether amendment sought by the plaintiff upto the extent of addition in prayer clause brings any change in the nature of the suit. In my view allowing addition of prayer for possession in the prayer clause of the suit neither would change nature of the suit nor cause of action would be affected. Relief of possession is a consequential relief for declaration. In this regard reference may be made to the case of KARAMAT ALI and another v. MUHAMMAD YOUNAS HAJI and others (PLD 1963 SC 191) wherein one of the questions which came up before the Hon'ble Supreme Court for consideration was whether the suit was barred under section 42 of the Specific Relief Act when the plaintiff to whom the relief of delivery of possession was available failed to claim such consequential relief in order to avoid payment of ad valorem court-fee. It was held by the Hon'ble Supreme Court that the Supreme Court has power even to grant leave to amend the plaint at the stage in which the said matter has reached before the Supreme Court and consequently allowed the amendment and remanded the suit to the learned trial Court for disposal of the same in accordance with law. It was further held in the case of KARAMAT ALI (supra) that by allowing amendment in the prayer clause by adding prayer for possession does not alter nature of the suit. Similarly in the case Mst. BARKAT BIBI v. 'KHUSHI MUHAMMAD and others (1994 SCMR 2240) the Hon'ble Supreme Court refused to grant leave to the defendant against the order of Lahore High Court who was aggrieved by the order of amendment in the plaint allowed by the First Appellate Court whereby prayer for specific performance was added in a declaratory suit. The Hon'ble Supreme Court of Pakistan held that by mere adding an additional prayer in the plaint without changing the contents and averments made in the plaint, the nature, of suit is not changed or altered. It was, further held that such amendment will not change even the cause of action.

6. There is yet another angle to address this issue. The "further relief" contemplated in the proviso to section 42 of the Specific Relief Act, 1877 is a relief which was available to the plaintiff at the time of institution of the suit-and in which he had failed to pray for. What the proviso to section 42 contemplates is the position as obtaining at the date of the suit and not subsequently. The plaintiff's right to maintain a suit for declaratory decree is not affected by the fact that during the pendency of the suit right to possession had also accrued to the plaintiffs. It is settled principle of law that if the original relief claimed becomes, by reason of any subsequent change of circumstances, inappropriate, it is open to a Court of justice to take notice of such events as had happened since the institution of suit and to mold its decree according to the circumstances as they stand at the time when the decree made. It has been held by this Court in the case Mian NIAZ HUSSAIN and another v. IMDAD HUSSAIN (PLD 1965 Lah. 172) that there is no obligation .on the Court to dismiss a suit if it is had under proviso to section 42 of the Specific Relief Act.

Section 42 of the Act does not authorize the dismissal of a suit where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. It only forbids the court to make the declaration, the prayer for which is not coupled with a prayer for a consequential relief. A suit which is defective under section 42 should not, therefore, be dismissed for failure on the part of the plaintiff to pray for further relief and the Court should allow the plaintiff to amend the plaint. It is a settled rule of practice not to dismiss suit for non-compliance of the provisions of section 42 but to allow the plaintiffs) necessary amendments.

In view of above, this petition lacks merit and is accordingly dismissed in limine.

KMZ/M-292/L Petition dismissed.

**PLJ 2013 Lahore 21**
**[Multan Bench Multan]**
**Present: Shahid Waheed, J.**
**MUHAMMAD SIDDIQUE 14 others--Petitioners**
**versus**
**EXECUTIVE DISTRICT OFFICER REVENUE, VEHARI and others--Respondents**

W.P. No. 1126 of 2010, decided on 28.6.2012.

**West Pakistan Land Revenue Act, 1967 (XVII of 1967)--**

----S. 161--Colonization of Govt. Lands (Punjab) Act, 1912 S. 7--Constitution of Pakistan, 1973--Art. 199--Implement directions of High Court--Grant of proprietary right of land was allowed--Validity of order--Notwithstanding, order passed by E.D.O.R. warranted no interference by High Court as through the order a simple direction had been issued to D.O.R. to implement the order passed by High Court. [P. 24] A

Mian Muhammad Akram, Advocate for Petitioners.
Malik Muhammad Bashir Lakhesir, AAG for Respondent Nos. 1 to 3.
M/s. Anwar Mubeen Ansari and Mr. Saghir Ahmad Bhatti, Advocates for Respondents No. 4 to 10.
Date of hearing: 28.6.2012.

**ORDER**

The petitioners through this petition have called in question the order dated 21.07.2008 passed by the Executive District Officer (Revenue), Vehari whereby he has directed the District Officer (Revenue), Vehari to comply with the order dated 06.04.1999 passed by this Court in W.P. Nos. 316/1986 to 318/1986.

2. Briefly the facts of the case are that the land measuring 208 Kanals 08 Marlas situated in Chak No. 58/WB was leased out to the Respondents No. 4 to 10. Subsequently the Respondents Nos.4 to 10 in pursuance of notification dated 03.09.1979 applied for the grant of proprietary rights of the land under their cultivation. The District Collector vide order dated 14.03.1984 allowed proprietary rights of the land to the extent of 100 Kanal out of the land measuring 208 Kanal 08 Marlas. Feeling dis-satisfied, the Respondents No. 4 to 10 moved an appeal before the Additional Commissioner (Revenue), Multan and the same was dismissed vide order dated 03.07.1985. Thereafter, the Member Board of Revenue also rejected the respondents' appeal vide order dated 05.03.1986. Being

aggrieved, the Respondents No. 4 to 10 moved this Court through Writ Petition Nos. 316, 317 and 318 of 1986 which were accepted vide judgment dated 06.04.1999 whereby it was held as follows:--

"Admittedly, the writ petitioners are three brothers. They have independent families. Para 5 of the Notification dated 03.09.1979 has clearly mentioned the persons included in a family. It soya:- `Size of Grant' The size of grant under these conditions shall be one subsistence holding or thereabout per family. The family for the purpose shall include the lessee's parents, minor children, husband, wife or wives and dependents. Thus, the impugned order are patently illegal and those are so declared and set aside. The writ petitions (W.P. No. 316/86, W.P.No. 317/86 and W.P. No. 318/86) are allowed and the petitioner in each of the said writ petitions, is entitled to 100 Kanals of land independently."

The Province of Punjab through Member Board of Revenue (Colonies) filed C.P.No. 1683-L, 1685-L of 1999 and assailed the above cited order of this Court before Hon'ble Supreme Court of Pakistan but the same were dismissed vide order dated 15.11.2000 being time barred. Consequent upon the dismissal of the petitions by the Hon'ble Supreme Court of Pakistan, Respondents Nos.4 to 10 applied for the allotment of land. The District Officer (Revenue), Vehari vide order dated 22.02.2008 rejected the application of Respondent Nos.4 to 10. Thereafter, the Respondent Nos.4 to 10 filed an appeal under Section 161 of the Land Revenue Act, 1967 read with Section 7 of the Colonization of Government Lands (Punjab) Act, 1912 before the Executive District Officer (Revenue) which was accepted vide order dated 21.07.2008 and the case was remanded to the District Officer, Vehari with a direction to implement the afore cited directions of this Court given vide order dated 6.4.1999 passed in the W.P. No. 316/1986. Hence, this petition.

3. Learned counsel for the petitioners submits that a `Kachi Basti' was constructed on the state land situated in Chak No. 56/WB and the `Basti' is called as `Basti Rait Wali'. The land was barren and based on sand dunes and the people of the village including the petitioners, having no home, started living at this `Basti' in the year 1975 and later on their names were duly incorporated in the voters list; that the petitioners applied to the Board of Revenue for the grant of proprietary rights and despite hectic efforts no action has so far been taken on their applications; that the land situated in `Basti' was never allotted to Respondents No. 4 to 10 and, therefore, they with malafide intention and to cause harassment to the petitioners has applied for grant of alternate land in Khasra No. 19/5 to 7, 13 to 19 and 23 to

24; and, that the order dated 21.07.2008 passed by the Executive District Officer (Revenue), Vehari is illegal.

4. Conversely, the learned Assistant Advocate General while making reference to the comments submitted by the District Officer (Revenue) submits that the petitioners are not in possession of the disputed land which is vacant at the spot; and, that no scheme for survey is operative in the field.

5. I have heard the arguments of learned counsel for the parties and perused the available record.

6. The Executive District Officer (Revenue) through impugned order dated 21.07.2008 has directed the District Officer (Revenue), Vehari to implement the order dated 6.04.1999 passed by this Court in W.P. No. 316/1986 and it would be advantageous to reproduce the operative part of the order which reads as under:--

"I have given due consideration to the arguments advanced by learned counsel for the appellants and perused the record. The request of the appellants for the lease of state land situated in Chak No. 56/WB, Vehari has not been acceded to by the Lower Court on the ground that there exists no policy. I am of the view that the Lower Court has not complied with the orders of Hon'ble High Court dated 06.04.1999 passed in Writ Petition No. 316/1986 to 318/1986, whereby the appellants were declared entitled to state land measuring 300 Kanals. Therefore, the appeal is accepted and the impugned order is hereby set-aside. The District Officer (Revenue), Vehari is directed to implement the order of Hon'ble High Court dated 6.4.1999 both in letter and spirit."

The petitioners after the lapse of one year and nine months, have assailed the validity of the above said order and no reason for this delay has been given. The instant petition suffers from laches as the Hon'ble Supreme Court of Pakistan in the case of `Manager, Jammu & Kashmir, State Property in Pakistan Vs. Khuda Yar and another' (PLD 1975 SC 678) and `Dr. Muhammad Shahid Mian and another Vs. Faiz-ur-Rehman Faiz' (PLD 2011 SC 676) has declared that the reasonable period for filing Constitutional Petition is ninty days. Besides above, the issue whether the petitioners are in possession of the disputed land or whether the disputed land is vacant are controversial facts and in view of law declared by the Hon'ble Supreme Court of Pakistan in the case of "Collector of Customs, Lahore and others Vs. Universal Gateway Trading

Corporation and another' (2005 SCMR 37), it can not be resolved in constitutional jurisdiction of this Court. Notwithstanding the above, the order dated 21.07.2008 passed by the Executive District Officer (Revenue), Vehari, warrants no interference by this Court as through the impugned order a simple direction has been issued to the District Officer (Revenue), Vehari to implement the order dated 06.04.1999 passed by this Court in W.P. No. 316/1986.

8. In view of above, this petition lacks merits and, therefore, the same is dismissed in limine.

(R.A.) Petition dismissed

**PLJ 2013 Lahore 55**
**Present: Shahid Waheed, J.**
**ARSHAD ALI etc.--Petitioners**
**versus**
**MUHAMMAD TUFAIL, etc.--Respondents**

C.R. No. 2109 of 2010, heard on 11.10.2012.

**Civil Procedure Code, 1908 (V of 1908)--**
----S. 11--Principles of res judicata--Applicability--Suit was dismissed--Debar from re-agitating matter afresh by a civil suit--Doctrine of res-judicata--When any matter which might and ought to have been made a ground of defence or attack in former proceedings but was not so made, then such a matter in eye of law, to avoid multiplicity of litigation and to bring finality in it, was deemed to have been constructively in issue and was taken as decided--It is correct that Court cannot examine or reject a suit on ground of res-judicata unless an issue was framed focusing the parties on that bar to suit--Pleadings in earlier suit should be exhibited or marked by consent or at least admitted by both the parties--Before civil Court the same issue was re-agitated and sought to be reiterated all over again--Thus they were precluded from doing both on general principle of res-judicata and on ground that decision of High Court deciding question of law was binding on all Courts subordinate to it--Petition was dismissed. [Pp. 60 & 61] A, D & F

**Res-judicata--**
----Scope of--Object and purpose of principle of resjudicata is to uphold rule of conclusiveness of judgment, as to points decided earlier of the fact, or of law in every subsequent suit between same parties--Once matter which was subject matter of lis stood determined by competent Court, no party thereafter can be permitted to reopen it in a subsequent litigation. [P. 60] B

**Civil Procedure Code, 1908 (V of 1908)--**
----S. 11--Resjudicata--Jurisdiction of civil Court--It is true that any order made by Revenue authorities under W.P. Land Revenue Act do not bar any party to establish his right or title in respect of immovable property by invoking jurisdiction of civil Court--There is no cavil to proposition that order passed by Revenue authorities does not operate as resjudicata U/S. 11, CPC. [P. 61] C

**Constitution of Pakistan, 1973--**
----Art. 201--Finding was binding on subordinate Courts--Such being legal position, civil Court could not have held same orders to be illegal and ultra vires, when High Court had already found them to be legal and valid--Judgment of High Court, which was passed in exercise of its constitutional jurisdiction, had left no question in issue undecided. [P. 62] E

Mr. Muhammad Iqbal Mohal, Advocate for Petitioners.
M/s. Ch. Mushtaq Masud and Muhammad Sultan Kasuri, Advocates for Respondents.
Date of hearing: 11.10.2012.

**JUDGMENT**

Challenge in this revision is to the judgment and decree dated 13.4.2010 passed by the learned Addl. District Judge, Pasrur who affirmed the judgment and decree dated 3.10.2009 passed by the learned Civil Judge, Pasrur whereby the petitioners' suit was dismissed on the principle of res judicata.

2. The facts which form the background of the instant petition are that the Petitioners Nos. 1 and 2 and predecessor of the Petitioner Nos. 3 to 7 through Mutation No. 6030 dated 15.3.1963 sold the land measuring 105 Kanals 9 Marlas to Respondent No. 4 (Muhammad Bashir). Thereafter, Muhammad Bashir resold half of the above said land in favour of the petitioners vide Mutation No. 6078 dated 24.2.1964. On 24.2.1964 Sultan Ali, predecessor of Respondent Nos. 1 to 3, instituted a suit for possession through pre-emption against Muhammad Bashir (Respondent No. 4) in respect of Mutation No. 6030. Muhammad Bashir contested the suit. It is worth mentioning here that in this suit the petitioners were not impleaded. The suit filed by Sultan Ali was decreed by the learned trial Court vide judgment and decree dated 17.7.1967 and as a consequence thereof Mutation No. 6328 was attested in favour of Sultan. On coming to know about the attestation of above said Mutation, the petitioners on 3.5.1968 filed a suit against the respondents and called in question Mutation No. 6326. In the meantime, on the application of Sultan Ali, Mutation No. 6328 was cancelled on 9.5.1973 and resultantly the suit was dismissed as withdrawn on 23.6.1973. Pursuant to cancellation of the said mutation, the Respondent Nos. 1 to 3 on 16.1.1974 filed a suit against the petitioners for possession of the suit land. The petitioners contested the suit. This suit was dismissed as withdrawn vide order dated 15.9.1990 with a permission to file a fresh suit. Meanwhile, Mutation No. 1141 was attested on 4.8.1983 in favour of the respondents. Feeling aggrieved, the petitioners challenged Mutation No. 1141 but the same was dismissed vide order dated 27.12.1986 by the Assistant Commissioner, Sialkot. Against the said order, the petitioners' revision was dismissed by the Addl. Commissioner vide order dated 21.8.1989. Being dissatisfied, the petitioners filed a revision before the Member Board of Revenue and it was accepted vide order dated 01.12.1991 and the case was remanded to the District Collector, Sialkot who while accepting the petitioners' appeal vide order dated 27.2.1996 set aside the Mutation No. 1141 dated 4.8.1983. The respondents challenged the vires of order dated 27.2.1996 before the Commissioner, Gujranwala Division and the same was accepted vide order dated 23.9.1996. The petitioners assailed order dated 23.9.1996 before the Board of Revenue, Punjab through a revision petition (ROR 1995 of 1996) but the same was dismissed vide order dated 23.10.2000. Feeling aggrieved, the petitioners filed Writ Petition No. 2988/2001

before this Court and the same was dismissed vide order dated 26.2.2003. The petitioners challenged the order dated 26.2.2003 passed by this Court in the above mentioned writ petition before the Hon'ble Supreme Court of Pakistan through C.P.L.A. No. 769-L/2003 but the same was dismissed as withdrawn vide order dated 19.01.2007. Thereafter, the petitioners instituted a suit for declaration along with permanent injunction against the respondents and called in question Mutation No. 1141 dated 4.8.1983. In response to summons, the respondents entered appearance before the learned trial Court and contested the suit by filing a written statement. The learned trial Court by invoking the provisions of Section 11, C.P.C. dismissed the suit vide judgment and decree dated 3.10.2009. The petitioners assailed the legality of the above said judgment and decree through an appeal before the learned Addl. District Judge but it was dismissed vide judgment and decree dated 13.4.2010. Hence, this petition.

3. Learned counsel for the petitioners submits: (i) that the suit filed by the petitioners could not be dismissed on the principle of res judicate without framing issues. In support of this plea, learned counsel for the petitioners referred GHULAM RASOOL son of KALU VS. GHULAM RASOOL and others (2007 SCMR 1924), ABDUL HAMEED and another Vs. DILAWAR HUSSAIN Alias BHALLI and others (2007 SCMR 945), Q.B.E Insurance (International) Ltd. vs. JAFFAR FLOUR AND OIL MILLS LTD. and others (2008 SCMR 1037), ZAHIR SHAH and others Vs. BAHADAR KHAN and others (2001 MLD 1785), NAWAB VS. REHMAT KHAN (1995 MLD 1014), RAJA GHULAM HAIDAR Vs. Major (R) JAMSHAID ALAMA (1991 MLD 1284), MUHAMMAD ANWAR AND OTHERS V. MIAN NOOR AHMAD AND OTHERS (1995 MLD 269) and MEHBOOB ELAHI V. WAPDA and others (1994 CLC 1337); (ii) that the order passed by the Revenue Authorities neither operate as res judicata nor debar the aggrieved party to establish his right or title in respect of immovable property by invoking the jurisdiction of civil Court. In support of this contention, the learned counsel for the petitioners relied upon GHULAM RASOOL son of KALU VS. GHULAM RASOOL and others (2007 SCMR 1924), Mir REHMAN KHAN and another Vs. Sardar ASADULLAH KHAN and 14 others (PLD 1983 Quetta 52), Mst. GUL PARTI alias GULBARO Vs. ZARIN KHAN and others (PLD 1994 Pesh. 249) and ABDUL KHALIQ and others Vs. KHUDA-E-DAD and others (2008 YLR 781); (iii) that the matter in the suit was different from earlier litigation and, therefore, principle of res judicata could not be applied to the instant case. He made a reference to MUHAMMAD SALEEM ULLAH and others VS ADDL. DISTRICT JUDGE, GUJRANWALA and others (PLD 2005 SC 511), GHULAM MUHAMMAD and others Vs. MUHAMMAD HUSSAIN and others (PLD 2006 Lah. 223), HUSSAIN SHAH Vs. BANO BIBI and 9 others (2007 CLC 680), SARDAR MENHAJUDIN AHMAD VS. SUDHIR KUMAR SINHA and others (PLD 1959 Dacca 316).

4. Conversely, the learned counsel for the respondents vehemently opposes this petition and submits that principles of res judicata in the instant case clearly attracted to debar the petitioners from re-agitating the matter afresh by a civil suit, which had been put at rest by a judgment of this Court passed in W.P. No. 2988/2001. Learned counsel for the respondent further contends that the Civil Court cannot by-pass or over-ride the orders of the High Court competently made in constitutional jurisdiction on the same subject between the same parties. In support of his contention learned counsel for the respondent placed reliance on MUHAMMAD CHIRAGH-UD-DIN BHATTI Vs. THE PROVINCE OF WEST PAKISTAN (Now Province of Punjab) through COLLECTOR, BAHALWAPUR and 2 others (1971 SCMR 447), FAZAL DIN and 14 others Vs. THE CUSTODIAN, EVACUEE PROPERTY, LAHORE and 21 others (PLD 1971 SC 779), MUHAMMAD SHAFI and another Vs. MUHAMMAD BAKHSH and another (PLD 1971 Lah. 148), SHAHIDA PERVEEN VS. DISTRICT JUDGE, SIALKOT and another (PLD 1980 Lah. 7), AZAD GOVERNMENT OF THE STATE OF AZAD JAMMU & KASHMIR and another Vs. KASHMIR TIMBER CORPORATION (PLD 1979 SC (AJK) 139), SYED MIR AHMAD SHAH VS. THE PAKISTAN and 2 others (PLD 1979 Lah. 599), ABDUL MAJEED and others vs. ABDUL GHAFOOR KHAN and others (PLD 1982 SC 146), Mr. SAGHIR ALAM etc. Vs. Mst. KANIZ FATIMA etc. (1982 CLC 68), MUHAMMAD ANWAR Vs. Mst. NAWAB BIBI etc. (1989 SCMR 836), Sh. ABDUL AZIZ vs. MIRZA and three others (PLD 1989 SC (AJK) 78), MUHAMMAD ISMAIL vs. PROVINCE OF PUNJAB through Collector, District Jhang (PLJ 1986 Lah. 16), Mst. RABIA BIBI and others Vs. FATEH MUHAMMAD through legal heirs (1994 CLC 1151), and KHURSHID KHAN and 7 others Vs. SARDAR MUHAMMAD (PLJ 2002 Lah. 1842).

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

6. The question raised and argued before me with considerable emphasis is that the learned Courts below have erred in holding that the general principles of resjudicata are applicable to the case. It is well known that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits but apart from the codified law, the doctrine of res judicata has been applied since long in various kinds of other proceedings and situation by the superior Courts. The rule of constructive resjudicata is engrafted in Explanation IV of Section 11 of the C.P.C. and in many other situations also the principles not only of direct res judicata but of constructive res judicata are also applied, if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties. The principle of res judicata comes into play when by judgment/order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication even then the principle of res judicata on that issue is directly

applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceedings but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided. The object and purpose of the principle of res-judicata is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of the fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject matter of lis stood determined by a competent Court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment. In the instant case Mutation No. 1141 attested on 4.8.1983 in favour of predecessor of the Respondent Nos. 1 to 3 is the bone of contention between the parties. The validity of the said Mutation came up for consideration before this Court in W.P. No. 2988/2001. Having examined the entire available record, relied upon by both the parties, this Court did not exercise jurisdiction to set aside Mutation No. 1141 dated 4.8.1983. It is worth mentioning here that the High Court also considered the issue of referring the party to the Civil Court but it was not found advisable and, therefore, writ petition was decided on merit and all the pleas raised by the petitioners were repelled. The learned counsel for the petitioners canvassed with vehemence that the Hon'ble Supreme Court of Pakistan in C.P. No, 796-L/2003 granted permission to the petitioners to approach the civil Court for the enforcement of rights and, therefore, the suit could not be dismissed on the principle of res judicata. I am afraid this contention has no force. The Hon'ble Supreme Court recorded the statement of the learned counsel for the petitioners and disposed of the petition as withdrawn vide order dated 19.1.2007. In the above said order the Hon'ble Supreme Court has not granted permission to the petitioners to approach the civil Court so as to impugn the findings recorded by the High Court in W.P. No. 2988/2001. It is true that any order made by Revenue Authorities under the West Pakistan Land Revenue Act, 1967 do not bar any party to establish his right or title in respect of immovable property by invoking jurisdiction of civil Court. There is also no cavil to the proposition that order passed by the Revenue Authorities does not operate as resjudicata under Section 11, C.P.C. In the instant case, it is not the decision of the Revenue Authorities but the order passed by this Court in W.P. No. 2988/ 2001 which is operating as res judicata. Hence, the contention raised by the learned counsel for the petitioner to this effect has no substance as the law is now well established that where the validity of certain orders passed by a statutory or quasi judicial authority are questioned through a constitutional petition before the High Court but this attack fails and the High Court finds that the orders impugned before it are valid and not liable to be interfered with, any subsequent attempt to again impugn the same orders and to question their validity by filing a civil suit before the ordinary Civil Court will be barred on the general principle of res judicata. In this regard, guidance may be had from MUHAMMAD SHAFI and another Vs. MUHAMMAD BAKHSH and another (PLD 1971 Lah. 148), FAZAL

DIN and 14 others Vs. THE CUSTODIAN, EVACUEE PROPERTY, LAHORE and 21 others (1971 SCMR 447), ABDUL MAJID and others Vs. ABDUL GHAFOOR and others (PLJ 1982 SC 286) and Ch. REHMAT ALI Vs. Haji JAN MUHAMMAD and others (PLJ 1983 SC 463). The findings recorded by the learned Courts below are unexceptionable and do not warrant any interference.

7. Mr. Muhammad Iqbal Mohal, learned counsel for the petitioner, in his usual eloquence laid much emphasis on the point that the learned trial Court could not dismiss the suit on the principle of res judicata without framing an issue to this effect. It is correct that the Court cannot examine or reject a suit on the ground of res judicata unless an issue is framed focusing the parties on that bar to suit. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both the parties. It is settled principle of law that the plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. But the above said principles, in the instant case, in my view, are not applicable and the learned trial Court was not required to frame an issue to examine or reject the suit for the reasons: firstly, the petitioners in their plaint not only recorded all the facts in detail but also highlighted the pleadings of the earlier litigation and the judgment passed by this Court in W.P. No. 2988/2001; and, secondly, the parties were not at variance on question of earlier litigation. It may be added that the judgment of the High Court in the petitioners' Writ Petition No. 2988/2001, wherein the validity of the impugned Mutation No. 1141 dated 4.8.1983 was upheld, was, indeed, a decision rendered by the High Court on a point of law and, as such, this finding was binding on the subordinate Courts by virtue of Article 201 of the Constitution of Islamic Republic of Pakistan, 1973. Such being the legal position, the learned civil Court could not have, in the present case, held the same orders to be illegal and ultra vires, when the High Court had already found them to be legal and valid. The judgment of the High Court, which was passed in exercise of its constitutional jurisdiction, had left no question in issue undecided. It had, on the other hand, after applying its mind to the questions in issue, given a clear position on it for the reasons stated in the said judgment and proceeded to uphold the Mutation No. 1141 sanctioned by the Revenue Authorities. It is obvious that before the Civil Court the same issue was re-agitated and sought to be reiterated all over again. Thus they were precluded from doing both on the general principle of res judicata and also on the ground that the decision of the High Court deciding question of law is binding on all Courts subordinate to it. In view of this matter, the learned Courts below are clearly justified in dismissing the petitioners' suit.

8. In view of above, this petition lacks merit and is dismissed with no order as to cost.

(R.A.) Petition dismissed

**P L D 2013 Lahore 30**
**Before Shahid Waheed, J**
**NOOR and others---Appellants**
**Versus**
**Mst. SATTAN through Legal Representatives and others---Respondents**

R.S.A. No.207 of 2004 and C.M. No.1-C of 2006, decided on 1st October, 2012.
**(a) Pre-emption---**
----Right of pre-emption---Inheritability and transferability---Scope --- Right of pre-emption could be transferred or inherited only after passing of decree in favour of pre-emptor, but not prior thereto ---Principles.
The right of pre-emption runs with the land and is not personal initially; it turns out to be personal for the purpose of its enforceability in a court of law right from time of sale of the property till the date of decree in favour of the pre-emptor. In other words, the right optimizes to be personal to a pre-emptor until a decree is passed in his favour, and during this interregnum, this right is neither transferrable nor inheritable. In such a situation, if the pre-emptor dies before obtaining a decree in his favour in the Trial Court or as the case may be, the appellate or revisional court, his right of pre-emption shall remain exclusively personal and shall not survive to his heir. But no sooner is a decree passed in favour of the pre-emptor, then the right becomes a proprietary one and is not only capable of being transferred, but also inherited.
Government of N.W.F.P. v. Malik Said Kamal Shah PLD 1986 SC 360; Sardar Ali v. Muhammad Ali PLD 1988 SC 287 and Nazir Begum and others v. Fazal Dad and others 1999 SCMR 210 ref.
Ram Sahai v. Gaya (1884) 7-ALL 107 and Arshad Iqbal through L.Rs. v. Abdul Qayyum Khan Babar 1990 CLC 1883 rel.
**(b) Punjab Pre-emption Act (I of 1913)---**
----Ss. 6 & 22 --- Civil Procedure Code (V of 1908), S.100, O.XIV, R.1 & O. XLI, R. 27---Second appeal---Pre-emption suit---Pre-emptor's plea in plaint that had suit land been offered to her, then she would have purchased same by paying its full sale price---Remand of case by Supreme Court for recording of additional evidence by Trial Court---Suit dismissed by Trial Court, but decreed by First Appellate Court---Plea raised by defendant-vendee in second appeal before High Court that pre-emptor had applied to Trial Court for allowing her to furnish security instead of depositing Zar-e-Punjam, which showed that she had no money at time of institution of suit, thus, she could not raise such plea in plaint---Validity---Defendant had neither raised such plea in written statement nor in first round of litigation up to Supreme Court---Defendant had also not raised any such objection before Trial Court nor got an issue framed to such effect---Plea of a party would stand abandoned in case of its failure to claim any issue thereon---Record showed that pre-emptor had deposited entire decretal amount in accordance with decree

passed in her favour by High Court in earlier round of litigation---High Court overruled such plea of defendant.
Muhammad Qasim and others v. Mushtaq Hussain and 10 others C.Ps. Nos.771-L and 772-L of 1999 and Muhammad Salim v. Suleman 2005 SCMR 929 ref.
Atta Hussain Khan v. Muhammad Siddique Khan and others 1979 SCMR 630 rel.
**(c) Civil Procedure Code (V of 1908)---**
----O.XIV, R.1---Failure of a party to claim framing of an issue on a plea---Effect---Such plea would stand abandoned.
**(d) Civil Procedure Code (V of 1908)---**
----Ss. 96, 100 & O. XLI, R. 22---Second appeal---First Appeal against decree of Trial Court dismissing suit on merits while holding suit to be within limitation---Non-filing of cross-objection by defendant against findings of Trial Court on issue of limitation---Appellate Court decreed suit holding same to be within limitation---Defendant alleged before High Court that suit was barred by time and could not be decreed---Validity---Defendant had not taken any objection in second appeal regarding bar of limitation---High Court overruled such objection in circumstances.
Khairati and 4 others v. Aleemud Din and another PLD 1973 SC 295 rel.
**(e) Civil Procedure Code (V of 1908)---**
----O. XLI, R. 27---Remand of case by Supreme Court for its decision afresh by Trial Court after recording evidence in affirmation and rebuttal---Defendant's objection that Trial Court could not consider evidence recorded prior to such remand order---Validity---Supreme Court had not passed any order for de novo trial of suit---Trial Court was not precluded to consider evidence already available on record---Defendant's objection was rejected in circumstances.
Imam Bakhsh and others v. Ghulam Nabi and others 1999 SCMR 34 rel.
**(f) Punjab Pre-emption Act (I of 1913)---**
----S. 15---Pre-emption, superior right of---Contest between collaterals of vendor for such right---Test for determining such right stated.
Superior right of pre-emption in terms of section 15 of the Punjab Pre-emption Act, 1913 is to be determined in the order of succession in between the contesting parties. If there is a successor, who is higher in order of succession, but does not pre-empt the sale, status of such person is irrelevant and does not debar or exclude any other person from agitating his right of pre-emption even if he is lower in the order of succession. The term "order of succession" under which persons inter se would be entitled to inherit, and if a person nearer in order of succession does not seek to pre-empt the sale, the person next in succession is entitled to do so, and such person shall have the superior right of pre-emption as opposed to an utter stranger.
Federation of Pakistan v. Raja Fazal Dad Khan PLD 1954 Lah. 634 ref.
Jalal Din v. Saeed Ahmad and others PLD 1979 SC 879; Muhammad and another v. Muhammad Yar and another PLD 1986 SC 231; Muhammad Shafi and others v. Muhammad Hussain and another 2006 CLC 899 and Aftab Ahmad Khan and others v. Ghafoor Ahmad and others PLD 2009 Lah. 473 rel.
**(g) Punjab Pre-emption Act (I of 1913)---**

----S. 6 --- Civil Procedure Code (V of 1908), S. 100 & O. XLI, R.1---Pre-emption suit --- Decree passed by First Appellate Court in favour of plaintiff challenged in second appeal by seven vendees out of eight---Maintainability---Sale in the present case was not divisible as amount contributed by eight vendees was not specified qua each vendee---Where transaction was not divisible, then filing of appeal by some of the vendees would not be competent---High Court dismissed second appeal in circumstances.
Abdullah and 3 others v. Abdul Karim and others PLD 1968 SC 140; Sher Muhammad v. Muhammadi and others 1981 Law Notes 214; Nazar Muhammad and others v. Sami Khan and others 1984 CLC 305 and Ghulam Muhammad 5 others v. Shamim Ahmad and 5 others PLD 2003 Lah. 245 rel.
**(h) Civil Procedure Code (V of 1908)---**
----S. 100-- Qanun-e-Shahadat (10 of 1984) Art. 84---Second appeal---Defendant's application to High Court for comparing thumb impression of plaintiff affixed on plaint and on grounds of appeal---Maintainability---Defendant had not taken such objection in written statement---Plaintiff during her life time got her statement recorded in Trial Court, but defendant had not put to her question regarding her disputed thumb impression---Defendant had filed such application after death of plaintiff for first time in second appeal, and also after remand of case by Supreme Court---Omission of signature or thumb impression on appeal or power of attorney were not fatal defects---High Court dismissed such application in circumstances.
**(i) Civil Procedure Code (V of 1908)---**
----O. III, R.1 & O. XLI, R.1---Signature or thumb impression on appeal or power of attorney, omission of---Effect---Such omissions would not be fatal defects.
Mehdi Khan Chauhan for Appellants.
Sh. Naveed Shehryar for Respondent No.1.
Gulzar Ahmad Nanga for Respondent No.2.
Date of hearing: 6th September, 2012.

## JUDGMENT

**SHAHID WAHEED, J.---**Challenge in this second appeal under section 100, C.P.C. is to the judgment and decree dated 27-11-2004 passed by the learned Additional District Judge, Khushab, who while setting aside the judgment and decree dated 29-7-2004 passed by the learned Civil Judge Ist Class, Noorpur Thal, District Khushab, has decreed the respondent No.1's suit for possession through pre-emption.

2. Briefly the facts giving rise to this appeal are that the appellants and respondent No.2, Nazar Muhammad, purchased the suit land from Muhammad Iqbal and Muhammad Hayat both sons of Gama vide Mutation No.221 attested on 26-1-1974 for a consideration of Rs.56,500. Mst. Sattan claiming herself collateral of the vendors and co-sharer in the suit land as against the vendees, that is, present appellants and respondent No.2, instituted a suit for possession through pre-emption asserting therein that the land in fact was sold for a consideration of Rs.10,000. In

response to summons, the appellant and Nazar Muhammad, respondent No.2, entered appearance before the learned Trial Court and filed their contesting written statements taking preliminary objection, inter alia, of bar of limitation and on merits controverted the assertions qua the sale price and superior right of Mst. Sattan (pre-emptor).

3. On pleadings of the parties the learned Trial Court framed the following issues:--

> (1) Whether the suit is incorrectly valued for the purpose of court fee and jurisdiction? If so what is the correct valuation for both the purposes? OPD
>
> (2) Whether the suit is time barred? OPD
>
> (3) Whether the suit is for partial pre-emption? If so its effect? OPD
>
> (4) Whether the plaintiff has got no superior right of pre-emption as against the defendants? OPD
>
> (5) Whether the ostensible sale price of Rs.56500 was fixed in good faith or actually paid by the defendants? OPD
>
> (6) In case of non proof of issue No.5 what was the market value of the suit land at the time of its sale? OPD
>
> (7) Relief.

4. Parties to the suit in support of their respective claims adduced oral as well as documentary evidence before the learned Trial Court. The learned Trial Court after recording evidence decreed the suit vide judgment and decree dated 26-3-1980. Only Nazar Muhammad, respondent No.2, being dissatisfied with the judgment and decree dated 26-3-1980 filed an appeal before the learned Additional District Judge, who accepted the same vide judgment and decree dated 24-6-1989 and dismissed the suit. Mst. Sattan, respondent No.1, assailed the vires of the judgment and decree dated 24-6-1989 before this Court through R.S.A. No.78 of 1989 and the same was allowed vide judgment and decree dated 8-11-2001 (Exh.P34). Nazar Muhammad/respondent No.2 filed Civil Appeal No.2434 of 2001 before the Hon'ble Supreme Court of Pakistan and challenged the legality of judgment and decree dated 8-11-2001 passed by this Court in R.S.A. No.78/89. The Hon'ble Supreme Court vide order dated 1-3-2002 (Exh.P.32) with the consent of the parties disposed of the appeal and remitted the case to the learned Trial Court for recording evidence in affirmative as well as in rebuttal. Consequent upon order dated 1-3-2002 (Exh.P.32) passed by the Hon'ble Supreme Court, the learned Trial Court after recording evidence dismissed the suit vide judgment and decree dated 29-7-2004. Mst. Sattan, respondent No.1, assailed the vires of judgment and decree dated 29-7-

2004 before the learned Additional District Judge who vide judgment and decree dated 27-11-2004 accepted the appeal and decreed the suit. Hence, this second appeal.

5. Mr. Mehdi Khan Chauhan, learned counsel for the appellants, in support of this second appeal submits that right of pre-emption which was un-inheritable stood extinguished with the death of pre-emptor and her legal heirs though brought on record after her death would be disentitled to continue with the case; that the decree dated 26-3-1980 passed by the learned Trial Court which was subsequently affirmed in R.S.A. No.78 of 1989, in favour of Mst Sattan, stood vanished when Hon'ble Supreme Court vide order dated 1-3-2002 (Exh.P32) remitted the matter to the learned Trial Court for recording affirmative evidence and rebuttal evidence and, therefore, as per principle laid down in case of Government of N.-W.F.P. v. Malik Said Kamal Shah (PLD 1986 SC 360) no decree could be passed as the Punjab Pre-emption Act, 1913 stood ceased to exist after 31-7-1986; that Mst. Sattan instituted a suit with mala fide intention as she had no money at the time of filing suit and this fact finds corroboration from her application moved under section 22 of the Punjab Pre-emption Act, 1913 seeking permission for substitution of order for payment of Zar-e-Punjam with security; that one of the vendee namely Abdul Rahim was minor and no next friend was appointed when the order for deposit of security equivalent to Zar-e-Panjam was passed and, therefore, order to the extent of minor was void and thus the suit for partial pre-emption was not maintainable; that suit was barred by time; that impugned judgment and decree is not sustainable for the reasons that it is based on evidence which was recorded prior to remand order dated 1-3-2002 (Exh.P32); and, that Mst. Sattan was not collateral of the vendor and, therefore, could not maintain a suit for pre-emption.

6. Conversely, Sh. Naveed Shehryar, learned counsel for respondent No.1, supports the judgment and decree passed by the learned Additional District Judge and contends that instant appeal is not maintainable as the same has not been filed by all vendees whereas sale was indivisible. However, learned counsel for respondent No.2 supports the arguments of learned counsel for the appellants.

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

8. Mst. Sattan instituted a suit for possession through pre-emption. During the pendency of this R.S.A. No.207 of 2004 pre-emptor/plaintiff, Mst. Sattan, died and as a result thereof her legal heirs were impleaded as respondents. In view of this fact, learned counsel for the appellants raised a preliminary objection that the second appeal is a continuation of the suit and, therefore, right of pre-emption which was un-inheritable stood extinguished with the death of pre-emptor and her legal heirs though brought on record after her death would be disentitled to continue with the case. I am afraid this preliminary objection has no force. The right of pre-emption runs with the land and is not personal initially, it turns out to be personal

for the purpose of its enforceability in a Court of law, right from time of sale of the property till the date of decree in favour of the pre-emptor. In other words, the right optimizes to be personal to a pre-emptor until a decree is passed in his favour and, during this interregnum; this right is neither transferrable nor inheritable. In such a situation if the pre-emptor dies before obtaining a decree in his favour in the Trial Court or as the case may be, the appellate or revisional Court, his right of pre-emption shall remain exclusively personal and shall not survive to his heir. But no sooner is a decree passed in favour of the pre-emptor then the right becomes a proprietary one and capable not only to be transferred but to be inherited as well. This view finds corroboration from judgment rendered in the case of Ram Sahai v. Gaya (1884) 7-ALL.107 and Arshad Iqbal through L.Rs. v. Abdul Qayyum Khan Babar (1990 CLC 1883).

9. It is next contended by the learned counsel for the appellants that the decree dated 26-3-1980 passed by the learned Trial Court in favour of Mst. Sattan stood vanished or ceased to exist when Hon'ble Supreme Court vide order dated 1-3-2002 (Exh.P.32) remitted the matter to the learned Trial Court for recording affirmative evidence and rebuttal evidence and, therefore, as per principle laid down in the case Government of N.-W.F.P. v. Malik Said Kamal Shah (PLD 1986 SC 360) no fresh decree could be passed as the Punjab Pre-emption Act, 1913 stood ceased to exist after 31-7-1986. In support of his contention learned counsel for the appellants relied upon the case of Sardar Ali v. Muhammad Ali (PLD 1988 SC 287). The contention raised by the learned counsel for the petitioner is misconceived. In the instant case initially a decree was passed in favour of the pre-emptor on 26-3-1980. The ratio of Said Kamal's case (supra) is that once a decree is passed in favour of the pre-emptor before the target date i.e. 31-7-1986 the Punjab Pre-emption Act, 1913 will apply and setting aside of the decree subsequently will not adversely affect the position. In this regard reference may be made to the case of Nazir Begum and others v. Fazal Dad and others 1999 SCMR 210 wherein Hon'ble Supreme Court of Pakistan has held that a decree passed in favour of pre-emptor before the target date i.e. 31-7-1986 will remain protected notwithstanding the fact that the same was set aside later and pre-emptor is not debarred to have the case adjudicated in accordance with law applicable before the target date i.e. 31-7-1986.

10. It is submitted that Mst. Sattan instituted the suit with mala fide intention and this fact stands established from her application which was moved before the learned Trial Court under section 22 of the Punjab Pre-emption Act, 1913 seeking permission for substitution of order for payment of Zar-e-Punjam with deposit of security of equivalent amount. Learned counsel for the appellant drew my attention towards contents of the application wherein it had been stated that pre-emptor/respondent No.1, had no money to comply with order of deposit of Zar-e-Punjam and, therefore, request was made to review the order. It is maintained that if the pre-emptor had no money at the time of institution of suit then how could she raise a plea in the plaint that had the sale of the land been offered to her she would

have been in a position to pay full consideration and purchase the suit property. In this regard the learned counsel for the appellants placed reliance on an un-reported judgment passed by the Hon'ble Supreme Court of Pakistan in the case of "Muhammad Qasim and others v. Mushtaq Hussain and 10 others" (C.Ps. Nos. 771-L and 772-L/1999). I am not inclined to accept this contention for the reasons: firstly, that it was not the case of the vendee that pre-emptor had no amount with her to pay the decretal amount at the time of institution of suit as this plea was not taken in the written statement; secondly, the vendee made no efforts to get an issue framed to this effect and it is settled principle of law that if a party does not claim any issue then the plea, if any, stands abandoned. In this regard reference may be made to the case of Atta Hussain Khan v. Muhammad Siddique Khan and others (1979 SCMR 630); thirdly this plea was not taken in the first round of litigation upto Hon'ble Supreme Court; fourthly, no objection to this effect was taken before the learned Trial Court and the learned lower Appellate Court, hence this objection at this stage cannot be appreciated; and lastly, challan forms (Exh.P28 and Exh.P29) show that the entire decretal amount has been deposited by the pre-emptor in accordance with decree dated 8-11-2001 passed by this Court in R.S.A. No.78 of 1989. In view of above the judgment cited by the learned counsel for the appellant is not attracted to the facts of the instant case.

11. Learned counsel for the appellant next contends that one of the vendees/appellants, namely, Abdul Rahim was minor and the suit was filed against him without next friend and thus the order for submission of security equivalent to Zar-e-Punjam was illegal and void. The suit was thus for partial pre-emption and was not maintainable. It is true that Abdul Rahim was minor at the time of institution of suit but later on his father, Ismail, was appointed guardian ad litem before the learned Trial Court vide order dated 22-7-1975. He filed written statement on behalf of minor but no objection to this effect was taken. Subsequently, after the remand order dated 1-3-2002 (Exh.P.32) passed by the Hon'ble Supreme Court, Abdul Rahim filed Writ Petition No.2745 of 2003 before this Court seeking permission to file a written statement but this was not allowed and writ petition was dismissed vide order dated 11-2-2004. This objection in the given facts and circumstances of the case is not fatal as apex Court in the case of Muhammad Salim v. Suleman (2005 SCMR 929) has repelled such type of objection being hyper-technical.

12. Another objection regarding limitation was canvassed with vehemence by the learned counsel for the appellants. Question of limitation was specifically taken in written statement. Learned Trial Court framed issue but as per contention of the learned counsel for the appellants the Courts below did not appreciate evidence available on record. In support of this preliminary objection, learned counsel for the appellants submits that oral sale between the parties was completed in July 1973 and possession of the suit land was given to the vendees/appellants and respondent No.2 and it was for this reason that one of the vendees, Nazar Muhammad,

respondent No.2, was shown in crops inspection report made by Halqa Patwari on 23-10-1973, as tenant Bakhial Bai. In order to substantiate this plea the learned counsel for the appellant took me to the statement of Ghulam Rasool (D.W.2) who has stated that the appellants/vendees got possession of the (sic) before the entry of mutation i.e 29-11-1973. Learned counsel submit that in view of statement of D.W.2 it becomes clear that the appellants got possession of the suit land somewhere in July 1973 and, therefore, the suit filed by respondent No.1 was barred by time. This objection is devoid of any force. Khasra Girdawari (Exh.D1) relates to the period of Kharif 1973 to Rabi 1977. Nazar Muhammad, respondent No.2 has been recorded as tenant Bakhial Bai in Kharif 1973. This was followed by entry in Rabi 1974 wherein only Nazar Muhammad has been shown as in self cultivating possession whereas sale was made in favour of 8 persons i.e. appellants and respondent No.2. It is pertinent to mention here that Khasra Girdawri (Exh.D1) does not bear any date. Now in this perspective the statement of Ghulam Rasool (D.W.2) is examined. Ghulam Rasool (D.W.2) states that possession of the land was taken 4/5 months before mutation was entered. He, however, denied the suggestion that the possession was taken by them after the statements were recorded in the mutation. This statement is negated by Khasra Girdawari (Exh.D1) wherein only Nazar Muhammad/vendee has been recorded as tenant. There is no other evidence that pursuant to sale and before the attestation of mutation, possession was delivered to the vendees/appellants and respondent No.2 and, therefore, the entry of Bakhial Bai does not lend any help to the appellants. There is yet another angle to address the question of limitation. Learned Civil Judge vide judgment and decree dated 29-7-2004 though dismissed the suit yet held the same within limitation. The appellants did not file any cross objection regarding findings on the issue of limitation. It is a matter of record that only Mst. Sattan filed an appeal calling in question the judgment and decree of the learned Trial Court. Hon'ble Supreme Court of Pakistan in the case Khairati and 4 others v. Aleemud Din and another (PLD 1973 SC 295) has held that when no cross objection is filed with regard to finding of any issue then the same becomes final and cannot be agitated. In the instant case learned Additional District Judge has also given a finding that the suit is within limitation but the appellants have not taken any ground in the instant RSA regarding the bar of limitation. Hence, in this perspective objection regarding limitation is overruled.

13. Learned counsel for the appellants also made an attempt to challenge the vires of the impugned judgment on the plea that the same is based on the evidence recorded prior to remand order dated 1-3-2002 (Exh.P.32) passed by the Hon'ble Supreme Court of Pakistan. Learned counsel for the appellant submitted that the Courts below while passing the judgment and decree could not take into consideration the evidence which was recorded prior to 1-3-2002 as the apex Court in its order directed the learned Trial Court to record the evidence in affirmative and in rebuttal and then decide the case meaning thereby the Hon'ble Supreme Court directed the learned Trial Court to conduct a de novo trial. In this regard he placed reliance on the judgment rendered in the case of Imam Bakhsh and others v.

Ghulam Nabi and others (1999 SCMR 34). The case of Imam Bakhsh (supra) does not support the contention raised by the learned counsel for the appellants as in that case the Hon'ble Supreme Court upheld the order of the Majlis-e-Shoora whereby a direction was issued to the Qazi for " " and the words" " were interpreted as de novo trial whereas in the instant case Hon'ble Supreme Court vide order dated 1-3-2002 (Exh. P.32) did not pass any order for de novo trial but only directed to record evidence in affirmative and in rebuttal and it did not mean that the learned Trial Court was precluded to consider the earlier evidence available on record. Wherefore, this objection is also bereft of merit and is rejected.

14. Now a stage has come to examine pivotal issue i.e. whether Mst. Sattan was collateral of the vendor and, therefore, could maintain a suit for pre-emption. Learned counsel for the appellants in this respect submits that the pre-emptor had claimed her right of pre-emption on the basis of " ". In this regard he submits that collateral is a person who relates to one through descendant from common ancestor in male line and females are not considered as collateral; and, respondent No.1 as per Islamic Law of inheritance is neither sharer nor residuary and, therefore, was not entitled to claim superior right. This plea also does not hold water. It is established through evidence that Mst. Sattan was daughter of Shahbaz who was son of Gulab alias Gulla whereas vendor, namely, Iqbal and Hayat are sons of Gama who is son of Gulla. Thus, Sattan was the first cousin of the vendors. In other words, the vendors were Chachazad of Mst. Sattan. The defendants/appellants has placed on record Exh.D11 wherein a pedigree table has been recorded and perusal thereof supports the above stated relationship between Mst. Sattan and vendors. Since Exh.D11 was document of the defendants and they got it exhibited and, therefore, the appellants could not take any exception thereto as per principle laid down in the case of Federation of Pakistan v. Raja Fazal Dad Khan (PLD 1954 Lahore 634). Moreover, it is an established proposition of law that superior right of pre-emption in terms of section 15 of the Punjab Pre-emption Act, 1913 is to be determined in the order of succession in between the contesting parties. If there is a successor who is higher in order of succession but does not pre-empt the sale, status of such person is irrelevant and does not debar or exclude any other person from agitating his right of pre-emption even if he is lower in the order of succession. The term "order of succession" under which persons inter se would be entitled to inherit, and if a person nearer in order of succession does not seek to pre-empt the sale, the person next in succession is entitled to do so, and such person shall have the superior right of pre-emption as opposed to an utter stranger. Such is the dictum of law laid down in the cases reported as Jalal Din v. Saeed Ahmad and others (PLD 1979 SC 879) and Muhammad and another v. Muhammad Yar and another (PLD 1986 SC 231), Muhammad Shafi and others v. Muhammad Hussain and another (2006 CLC 899) and Aftab Ahmad Khan and others v. Ghafoor Ahmad and others (PLD 2009 Lahore 473). In view of above stated relationship and principle of law. Mst. Sattan becomes collateral and could legitimately claim superior right for instituting a suit for pre-emption.

15. There is another aspect of the case and that is with regard to maintainability of this second appeal. The present appeal has been filed by seven vendees. Nazar Muhammad, co-vendee/respondent No.2 has opted not to challenge the decree dated 27-11-2004 passed by the learned lower Appellate Court. Both the learned counsel concur that in view of principle laid down by the Hon'ble Supreme Court of Pakistan in the case of Abdullah and 3 others v. Abdul Karim and others (PLD 1968 SC 140), the sale in the instant case is not divisible as the amount contributed by eight vendees has not been specified qua each vendee. In view of the principle laid down by the apex Court in the case of Sher Muhammad v. Muhammadi and others (1981 Law Notes 214) if the transaction of sale is not divisible then filing of appeal by some of the vendees will not be competent. This view has been followed in Nazar Muhammad and others v. Sami Khan and others (1984 CLC 305) and Ghulam Muhammad and 5 others v. Shamim Ahmad and 5 others (PLD 2003 Lahore 245).

16. In view of above, this regular second appeal is dismissed with no order as to costs.

C.M.No.1-C-06

17. This is an application under Article 84 of Qanun-e-Shahadat Order, 1984 for comparison of thumb impression of respondent No.1/plaintiff affixed on the suit filed by her as well as thumb impression affixed on the appeal filed on 30-11-1974, 2-12-1974 and 3-8-2004 so as to establish preliminary objection with regard to cause of action. This application is bereft of any merit and substance for the reasons: firstly, no objection to this effect was taken in the written statement; secondly, Mst. Sattan appeared before the learned Trial Court and got recorded her statement and the question about thumb impression was not put to her during the course of evidence; and, thirdly, this application smacks of mala fide as the same has been filed after the death of Mst. Sattan. Besides above, the Hon'ble Supreme Court of Pakistan has repeatedly held that the omissions of thumb impressions or signatures on the appeal or power of attorney are not fatal defects. In the instant case the appellants have taken this objection for the first time before this Court and that too after remand from the apex Court. At this belated stage contention raised in the application would not advance the cause of the appellants and, therefore, this application is dismissed.

SAK/N-67/L Order accordingly.

**2013 C L C 333**
**[Lahore]**
**Before Shahid Waheed, J**
**T.M.A., SAMUNDRI through Administrator, and 3 others----Petitioners**
**Versus**
**ABDUL GHAFOOR----Respondent**

Civil Revision No.2399 of 2012, heard on 17th October, 2012.

**(a) Punjab Private Site Development Schemes (Regulation) Rules, 2005---**

----Rr. 6 & 8(4)(iii)---Civil Procedure Code (V of 1908), O.XXXIX, Rr.1 & 2---Specific Relief Act (I of 1877), Ss. 42 & 54---Suit for declaration and injunction---Interim injunction, grant of---Scope---Approval for construction---Principles---Plaintiff started developing housing scheme on his land and submitted layout plan to local government for approval but due to dispute regarding reserving of land for public amenity, authorities did not provide approval for construction---On filing suit by plaintiff, Trial Court as well as Lower Appellate Court granted interim injunction in favour of plaintiff to continue construction---Validity---Construction should be made after obtaining approved layout plan from competent authority and court could not permit construction not duly approved by the Authority---Permission by court would amount to bypassing mandatory requirement of law of obtaining approved plan before raising construction and clothe it with legitimacy under order of court---Public interest was of material and relevant consideration in either exercising or refusing to grant interim injunction; it would be gross violation of law and grave injustice to public-at-large, if a developer was allowed by way of interim injunction to develop housing scheme without wide roads, park, graveyard, school, mosque and other allied facilities---Injunction could not be granted in favour of a person, if he was proceeding to act contrary to law or was trying to make certain constructions which were contrary to granted sanction---Plaintiff failed to make out prima facie case which was an essential ingredient for grant of temporary injunction but such fact was not properly appreciated by courts below while granting temporary injunction in his favour---High Court in exercise of revisional jurisdiction set aside concurrent order passed by two courts below and application under O.XXXIX, rules 1 and 2, C.P.C., filed by plaintiff was dismissed---Revision was allowed in circumstances.

The Engineer in Chief Branch through Ministry of Defence Rawalpindi and another v. Jalaluddin PLD 1992 SC 207; Pakistan through The Secretary, Ministry of Finance v. Muhammad Himayatullah Farukhi PLD 1969 SC 407; Chairman, Selection Committee/ Principal, King Edward Medical College Lahore and 2 others v. Wasif Zameer Ahmad 1997 SCMR 15; Chief Secretary, Government of Sindh and another v. Sher Muhammad Makhdoom and 2 others PLD 1991 SC 973; Tulip

Polybag and others v. Additional Collector (Adjudication) Central Excise, Lahore 2002 YLR 1680; Ghulam Akbar Khan v. Haji Sher Jan and others 1989 CLC 1789; Mst. Hawa Bai v. Haji Ahmad and others 1987 CLC 558 and Swet Rajhansh Co-operative Society Ltd. v. Surat Municipal Corporation AIR 1995 Guj. 60 ref.

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

----O. XXXIX, Rr. 1 & 2---Interim injunction---Public duty---No stay order can be granted, which interferes in performance of public duty, merely for the reason that as a result of act, an individual would suffer monetary loss which can be measured and compensated in terms of money.

Pakistan Water and Power Development Authority through its Project Director v. Pakistan Atomic Energy Commission Employees Cooperative Housing Society Ltd., Islamabad PLD 1993 Lah. 237 and Mst. Khursheed Begum and 92 others v. K.D.A. and others 2003 YLR 1478 rel.

Ms. Sadia Malik for Petitioner.
Muhammad Shehzad Shaukat for Respondent.
Date of hearing: 17th October, 2012.

**JUDGMENT**

**SHAHID WAHEED, J.---** The petitioners through this civil revision have called in question order dated 16-5-2012 passed by the learned Additional District Judge, Sumandri, who affirmed order dated 23-11-2011 passed by the learned Civil Judge 1st Class, Sumandri, whereby an application filed by the respondent under Order XXXIX, Rules 1 and 2, C.P.C. for grant of temporary injunction was allowed.

2. Briefly the facts of the case are that the respondent being owner of land measuring 209 kanals, 18-1/2 marlas decided to establish a housing colony under the name and style of Suleman Garden and for this purpose he on 2-4-2007 submitted his layout plan to the Town Municipal Authority for necessary approval. The Town Municipal Officer vide Letter No.223 TO (P&C) dated 12-4-2007 informed the respondent that Town Nazim had approved the layout plan subject to: (i) deposit of dues; and, (ii) transfer of land measuring 60 kanals, 18-1/2 marlas in the name of Town Municipal Administration as per Rule 6 of the Punjab Private Site Development (Regulation) Rules, 2005 for the purpose of roads, parks, school and mosque. The respondent deposited the dues i.e. Rs.78750 but did not fulfil the other condition. The respondent, however, as per Rule 8 (4) (iii) of the Punjab Private Site Development Scheme (Regulation) Rules, 2005, for the sanction of layout plan, after getting mortgaged 20% of the saleable area of the scheme vide Mutation No.2629 dated 30-1-2008 in favour of the Town Municipal Administration as security for due completion of development works requested for

the issuance of NOC enabling him to get the electrification plan of the housing scheme sanctioned from the concerned Authorities. The Town Officer on 20-2-2008 provisionally approved the layout plan period of one year with a note that the same was approved for the purpose of WAPDA Authorities. It is worth-mentioning here that the District Officer (Revenue), Faisalabad vide Letter No.67/SK dated 1-3-2008 intimated the Deputy District Officer (Revenue), Sumandri, that the respondent vide Mutation No.2629 dated 30-1-2008 has got mortgaged 20% of the property in favour of TMA and asked him to complete Tattimmas and Field Book. Later on, the Town Officer (P&C) in respect of external electrification of housing scheme confirmed the approval of layout plan to the Manager (P&D) Faisalabad Electric Supply Corporation vide letter dated 15-4-2008 as well as to the Executive District Officer (Revenue), Faisalabad vide letter dated 4-8-2008. After scrutiny the petitioners vide Letter No.485/TO (P&C) dated 8-2-2011 informed the respondent that his layout plan for a private housing scheme was not in accordance with the provisions of the Punjab Private Site Development Scheme (Regulation) Rules, 2005 and, therefore, the same was not approved by the competent authority. The respondent was directed to re-submit the layout plan of the housing scheme. The Town Municipal Officer vide Letter No.495/TO (P&C) TMA (S) dated 26-2-2001 requested the Deputy District Officer (Revenue) Sumandri, for stoppage of sale deeds and mutations of un-approved housing scheme of the respondent. Feeling aggrieved, the respondent instituted a suit for declaration and permanent injunction against the petitioners and called in question the above stated two letters dated 8-2-2011 and 26-2-2011. The respondent along with plaint also filed an application under Order XXXIX, Rules 1 and 2, C.P.C. for grant of temporary injunction. In response to summons, the petitioners appeared before the learned trial Court and contested the suit by filing a written statement. The petitioners also resisted the application for grant of temporary injunction. Learned trial Court vide order dated 23-11-2011 accepted the application for grant of temporary injunction. The petitioners, being aggrieved, preferred an appeal before the learned Additional District Judge but the same was dismissed vide order dated 16-5-2012. Hence, this petition.

3. Learned counsel for the petitioners submits that the learned Courts below misconstrued the Letter No.67/SK dated 1-3-2008 issued by the District Officer Revenue, Faisalabad, as approval of the housing scheme; and, that layout plan of the housing scheme was not approved by the competent authority as the same did not conform to the requirement of the Punjab Local Government Ordinance, 2001 and provisions of the Punjab Private Site Development Schemes (Regulation) Rules, 2005. In this regard learned counsel for the petitioners placed reliance on an unreported judgment passed in Writ Petition No.10401 of 2008. Learned counsel for the petitioner further submits that the principle of locus poenitentiae is not attracted to the facts of the case as an illegal order cannot be allowed to be perpetuated. Learned counsel in this regard placed reliance on THE ENGINEER IN CHIEF BRANCH through Ministry of Defence Rawalpindi and another v. JALALUDDIN

(PLD 1992 SC 207). Conversely, learned counsel for the respondent submits that the petitioners after approving the layout plan cannot rescind it as per principle of locus poeniteniae. In this regard he made reference to the PAKISTAN through The Secretary, Ministry of Finance v. MUHAMMAD HIMAYATULLAH FARUKIII (PLD 1969 SC 407), CHAIRMAN, SELECTION COMMITTEE/ PRINCIPAL, KING EDWARD MEDICAL COLLEGE LAHORE and 2 others v. WASIF ZAMEER AHMAD (1997 SCMR 15), CHIEF SECRETARY, GOVERNMENT OF SINDH AND ANOTHER v. SHER MUHAMMAD MAKHDOOM and 2 others (PLD 1991 SC 973); and, that as per principle of peri delicto interim injunction granted in favour of the respondent cannot be recalled. In this regard he made reference to the case of TULIP POLYBAG and others v. ADDITIONAL COLLECTOR (ADJUDICATION) CENTRAL EXCISE, LAHORE (2002 YLR 1680) and GHULAM AKBAR KHAN v. HAJI SHER JAN and others (1989 CLC 1789).

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

5. The respondent for developing a housing colony at his property submitted the layout plan to the TMA for approval. The TMA firstly on 12-4-2007 provisionally approved the layout plan subject to deposit of dues and transfer of land measuring 60 kanlas, 8-1/2 marlas in the name of TMA for roads, parks, school and mosque; and, secondly on 20-2-2008 provisionally sanctioned the layout plan for a period of one year for the purposes of WAPDA Authorities so that the respondent may get approved electrification plan for the housing scheme. Before proceeding further it is worth-mentioning here that prior to sanction of layout plan the developer as per Rule-8(4)(iii) of the Punjab Private Site Development Scheme (Regulation) Rules 2005 is required to mortgage 20% of the saleable area of the scheme as security in the name of Tehsil Municipal Administration for due completion of development work. In view of the said provisions, the respondent vide Mutation No.2629 dated 30-1-2008 got mortgaged the property in favour of the Tehsil Municipal Administration and this fact was conveyed to the Deputy District Officer (Revenue), Sumandri vide Letter No.67/SK dated 1-3-2008. This letter does not say that the layout plan of the housing scheme was finally approved by the competent authority. The condition stipulated in letter dated 12-4-2007 qua transfer of land for purpose of roads, parks, school and mosque was not complied with by the respondent and, therefore, TMA never issued a final sanctioned layout plan. The respondent has failed to bring on record any material/document whereby he was permitted to develop scheme, raise construction and sell plots in violation of law. In this perspective the principle of locus poenitentiae does not attract. Similarly, the principle of pari delicto, as canvassed by the learned counsel for the respondent, is not attracted for the reason that the petitioners have not committed any violation of law. The petitioners being public functionaries are performing their duties in accordance with the provisions of the Punjab Local Government Ordinance, 2001 and the Punjab Private Site

Development Schemes (Regulation) Rules, 2005. It is settled principle of law that construction should be made after obtaining approved layout plan from the competent authority and the court cannot permit construction not duly approved by the Authority because such permission would amount to bypassing mandatory requirement of law of obtaining approved plan before raising construction and clothe it with legitimacy under order of the Court. In this regard reference may be made to the case of Mst. Hawa Bai v. Haji Ahmad and others (1987 CLC 558) and Swet Rajhansh Co-operative Society Ltd v. Surat Municipal Corporation (AIR 1995 Guj. 60). Besides above, in the given facts and circumstances of the case injunction as per bar contained in section 56(f) of the Specific Relief Act, 1877 could not be granted. It is settled principle of law that no stay order can be granted, which interference in the performance of public duty, merely for the reasons that as a result of act an individual will suffer monetary loss which can be measured and compensated in terms of money. In this regard reliance is placed on PAKISTAN WATER AND POWER DEVELOPMENT AUTHORITY through its Project Director v. PAKISTAN ATOMIC ENERGY COMMISSION EMPLOYEES COOPERATIVE HOUSING SOCIETY LTD., ISLAMABAD (PLD 1993 Lahore 237) and Mst. KHURSHEED BEGUM and 92 others v. K.D.A. and others (2003 YLR 1478).

6. I am constrained to observe here that in such like case, public interest is one of the material and relevant consideration in either exercising or refusing to grant interim injunction. It would be a gross violation of law and grave injustice to the public at large if a developer is allowed by way of interim injunction to develop a housing scheme without wide roads, a park, graveyard, school, mosque and other allied facilities. Pakistan is a welfare State governed by the Constitution which holds a place of pride in the heart of its citizens. It seeks to improve the economic and social status of the citizens on the basis of Constitutional guarantees spelled out in its provisions. We live in an age which recognizes that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every citizen under Article 9 of the Constitution Islamic Republic of Pakistan, 1973. And, so in the discharge of its responsibilities to the people, the State has to ensure development of housing schemes in accordance with law and human dignity. Tendency of unauthorized construction and unauthorized encroachment is increasing day by day and such activities are required to be dealt with firm hands. In recent times the courts have come across several cases where unscrupulous builders and developers have misused and abused process of Court. The usual modus operandi adopted by such persons is to obtain interim injunctions/orders which inevitably remain in force for a long time and even during the said period further unauthorized construction is raised by misusing the interim orders granted by the Court. An injunction, therefore, cannot be granted in favour of a person if he is proceeding to act contrary to law or is trying to make certain constructions which are not permissible or which have not been permitted or which are contrary to granted sanction. In the instant case the respondent has failed

to bring on record any document or evidence showing his work/construction legal and in accordance with law. The respondent is also unable to rebut the violations stated in the letter dated 8-2-2011 issued by the Town Officer. The Tehsil Municipal Authority which is an authority constituted under the law to regulate construction and development of housing schemes can certainly maintain the present petition against a tort feasor and a wrongdoer and pray for recalling of injunctive orders passed by the Courts below on misconception of facts as in these circumstances, the respondent was not entitled to seek the equitable jurisdiction of the court for obtaining an interim injunction which tantamounted to legitimizing his illegal activities.

7. The respondent has failed to make out a prima facie case which is an essential ingredient for grant of temporary injunction but this fact was not properly appreciated by the Courts below while granting temporary injunction in his favour.

8. In view of above, this civil revision is allowed by setting aside order dated 26-5-2012 passed by the learned Additional District Judge and order dated 23-11-2001 passed by the learned Civil Judge 1st Class, Sumandari, and the application filed by the respondent under Order XXXIX, Rules 1 and 2, C.P.C. for grant of temporary injunction is dismissed without cost.

MH/T-27/L Revision allowed.

**PLJ 2013 Lahore 190**
**Present: Shahid Waheed, J.**
**NAWAB DIN etc.--Petitioners**
**versus**
**MUHAMMAD ARSHAD--Respondent**

C.R. No. 713-D of 1999, decided on 19.6.2012.

**Civil Procedure code, 1908 (V of 1908)--**

----O. XLI, R. 31--Writing of agreement to sell and pronote reflected heavy doubt on version of respondent--Suit for specific performance of agreement--Agreement to sell and pronote were got executed through fraud and torture--Marginal witnesses of pronote and agreement to sell--Essential to make comparative examination of documentary evidence and oral evidence--Petitioner was on illiterate person and was 70/80 years old at time of execution of alleged pronote and agreement to sell--Validity--In case of transaction with old age and illiterate persons and parda nasheen ladies the burden to prove would always be an beneficiary of transaction--Beneficiary would not only be required to prove genuineness of transaction but also that transaction was effected by such person with his free will and consent having independent advice, that there was no undue influence and coercion on such person--Entire evidence if considered then it would reveal that same was not worthy of reliance--Neither pronote nor agreement to sell can be held validly executed documents--Proof of execution was with regard to writing, signature of the parties as well as author but it had nothing to do with proof of contents of document--Where execution of document is denied then heavy burden lies on beneficiary of document not only to prove execution of document but also its contents--Respondent had failed to prove contents of document and fact that agreement to sell and promote were executed with free will. [Pp. 196 & 197] A, B & C

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

----O. XLI, R. 31--Agreement to sell--Stamp paper for agreement to sell was purchased in Lahore, agreement was allegedly executed in Lahore whereas the parties, witnesses and agreement had no nexus with Lahore--Validity--Agreement was allegedly executed and transfer of title was purportedly agreed to be effected--Respondent had failed to explain reason behind unusual circumstances--No cause of action against petitioner and therefore, was not entitled to specific performance of agreement. [P. 197] D

2006 YLR 2446, ref.
Mr. Muhammad Aslam Zar and Ch. Sarfraz Ahmad Zia, Advocate for Petitioner.
Khawaja Qaisar Butt, Advocate for Respondent. Date of hearing: 19.6.2012.

## JUDGMENT

This civil revision is directed against the judgment and decree dated 02.11.1999 passed by the learned Additional District Judge, Layyah who while accepting the appeal of the respondent reversed the judgment and decree dated 19.03.1996 of the learned Senior Civil Judge, Layyah whereby the respondent's suit was dismissed.

2. Briefly the facts of the case are that Muhammad Arshad (Respondent) instituted a suit against Nawab Din for specific performance of agreement dated 13.10.1988 (Exh.P2) to sell the suit land and it was stated in the plaint that Nawab Din, in connivance with some other persons through mis-representation obtained Rs. 118,000/- from the respondent for getting the land allotted in his favour in a Live Stock Scheme; that on coming to know the fraud committed by Nawab Din, the respondent firstly approached the Police at Layyah and then at Lahore for redressal of his grievance and on their refusal a constitutional petition i.e W.P. No. 3382/1988 (Exh.D3) was moved before this Court wherein vide order dated 04.09.1988 (Exh.P4) direction was issued to the Station House Officer (S.H.O) Police Station New Anarkali, Lahore to hear the respondent and thereafter to proceed with the matter strictly in accordance with law and in pursuance thereof F.I.R No. 232/1988 (Exh.D1) was registered under Sections 406/420/468/471 PPC; that consequent upon registration of above said FIR, Nawab Din contacted the respondent and admitted the liability by executing a pronote dated 24.09.1988 (Exh.P1) and receipt of pronote (Exh.P1/B) as a surety for the return of Rs. 118,000/- within a period of one week; that after the expiry of one week, the respondent demanded the money but Nawab Din did not return the amount and in lieu thereof offered the suit land and executed agreement to sell dated 13.10.1988 (Exh.P2) whereby Nawab Din had agreed to execute sale-deed in favour of the respondent in respect of suit land; and, that on the refusal of Nawab Din, the respondent instituted the suit for specific performance.

3. In response to summons, issued by the learned trial Court, Nawab Din appeared and submitted the contesting written statement stating therein that the respondent by taking undue benefit of his simplicity, old age and illiteracy took him to Lahore on the pretext of getting allotment of land but on reaching Lahore, he was handed over to Police which after torturing him firstly got executed pronote and subsequently on 08.10.1988 arrested him and during custody, the respondent in connivance with the Police got executed agreement to sell (Exh.P2) under coercion; and, that the agreement to sell (Exh.P2) is without consideration and bogus.

4. On the pleading of the parties, the learned trial Court framed the following issues:--

ISSUES:

1. Whether the defendant validly executed a pronote in plaintiff's favour? OPP

2. Whether the defendant entered into an agreement to sell to transfer the suit land to the plaintiff and an agreement to sell dated 13.10.1988 was validly executed in this regard? OPP

3. Whether the plaintiff is entitled to the specific performance of the alleged agreement to sell or for an alternate decree of recovery of Rs. 118,000/-? OPP

3-A. Whether the plaintiff has no cause of action against the defendant? OPD

4. Relief?

5. The parties to the suit produced oral as well as documentary evidence in support of their respective claims. The respondent, Muhammad Arshad, appeared as PW-1 and got examined Bashir Ahmad as PW-2, Sakhi Muhammad PW-3 and Muhammad Ashraf as PW-4. In documentary evidence Muhammad Arshad/respondent produced pronote dated 24.09.1988 (Exh.P1), receipt of pronote (Exh.P1/B), agreement to sell dated 13.10.1988 (Exh.P2) copy of register Haqdaran Zamin 1988-89 (Exh.P3), copy of order dated 04.09.1988 passed in W.P. No. 3382/1988 (Exh.P4).

6. Conversely Nawab Din appeared before the learned trial Court as DW-2 and produced Abdul Qayyum (Constable) as DW-1 and Ghulam Akbar as DW-3. In documentary evidence Nawab Din tendered copy of FIR No. 232/1988 dated 08.10.1988 (Exh.D1), copy of W.P.No. 364/1988 (Exh.D2), copy of W.P.No. 3382/1988 (Exh.D3), copy of order dated 04.09.1988 passed in W.P.No. 3382/1988 (Exh.D4) and copy of order dated 14.03.1992 (Exh.D5).

7. The learned trial Court after recording evidence and granting opportunity of hearing to the parties, dismissed the suit with special compensatory cost of Rs. 25,000/- vide judgment and decree dated 19.03.1996. Feeling aggrieved, the respondent preferred an appeal before the learned Additional District Judge, Layyah. During the pendency of appeal, Nawab Din died and, therefore, his legal heirs i.e the present petitioners were impleaded. The learned Additional District Judge vide judgment and decree dated 02.11.1999 accepted the appeal and decreed the suit. Hence, this revision petition.

8. Learned counsel for the petitioners contends that the learned Additional District Judge while passing the impugned judgment and decree disregarded the mandatory provision of Order XLI, Rule 31 C.P.C. by not deciding all the controverted points/issues; that the judgment passed by the learned Additional District Judge

suffers from mis-reading and non-reading of evidence; that writing of agreement to sell and pronote at hotel in Lahore reflects heavy doubt on the version of respondent; that there is no reference in the agreement to sell that Nawab Din had already received the consideration amount through pronote; and, that the evidence led by the respondent was contrary to the facts stated in the pleadings.

9. The learned counsel for the respondent submits that Nawab Din admitted the execution of agreement to sell and, therefore, the learned Additional District Judge has rightly decreed the suit. In this regard he placed reliance on `Bashir Ahmad Vs. Muhammad Luqman' (1999 SCMR 378), Mst. Baswar Sultan Vs. Mst. Adeeba Alvi' (2002 SCMR 326) and `Mst. Gul Shahnaz Vs. Abdul Qayyum Soomro and another' (PLD 2002 Karachi 333).

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

11. The fate of Issue No. 3, that is, whether the plaintiff is entitled to specific performance of agreement to sell (Exh.P2) hinges upon the findings of Issues No. 1 and 2. The learned Trial Court has decided Issues No. 1 and 2 against the plaintiff-respondent, Muhammad Arshad, and declared that the pronote (Exh.P1) and agreement to sell (Exh.P2) were got executed through fraud and torture. These findings were reversed by the learned Additional District Judge and held that the plaintiff-respondent had got examined all the marginal witnesses of pronote (Exh.P1) and agreement to sell (Exh.P2) who had proved their execution. In order to understand the facts and circumstances under which the pronote dated 24.09.1988 (Exh.P1) and agreement to sell dated 13.10.1988 (Exh.P2) were executed, it is essential to make comparative examination of the documentary evidence and oral evidence. In this regard, the first documentary evidence is copy of Writ Petition No. 364/1988 (Exh.D2) which was moved by one Barkat Ali against: (i) S.H.O Police Station City, Layyah (ii) S.P. Layyah (iii) Respondent (Muhammad Arshad); and (iv) Abdul Ghani wherein prayer was made that a direction be issued to the police for not causing any harassment. In this petition Barkat Ali stated that on 20.05.1986 the respondent, Muhammad Arshad, borrowed Rs. 250,000/- from him for expenses in relation to allotment for chak with a clear understanding that after allotment he would give two lots each consisting of 12« acres of land. It was further agreed that in case of no allotment, the respondent Muhammad Arshad, would pay back Rs. 275,000/- to Barkat Ali. It is stated in the petition that Muhammad Arshad neither got allotted the land in his name nor returned the amount and in this state of affair,

Muhammad Arshad in connivance with the S.H.O. Police Station City, Layyah got summoned Barkat Ali and one Muhammad Sharif, son-in-law of Nawab Din, and started exerting pressure to withdraw civil suit from the Civil Court, Lahore. It would be proper to reproduce Paragraphs No. 8 and 12 of the above said writ petition:-

"8. The Respondent No. 3 with the connivance of Respondent No. 1 had got summoned, the petitioner and one Muhammad Sharif, a witness to the giving of Rs. 250,000/- in Police Station Layyah, on 06.03.1988, where the petitioner and Muhammad Sharif were abused and the petitioner was threatened to withdraw civil suit from Civil Court, Lahore. The petitioner refused, to do so and in consequence thereof the petitioner and Muhammad Sharif aforesaid were made to sit in the police station from 06.03.1988 to 11.03.1988.

12. That the petitioner and Muhammad Sharif were illegally confined for 6-7 days by Respondent No. 1 without registration of any case against the petitioner. In this way, the independence of the petitioner, provided to him under the Constitution of Islamic Republic of Pakistan has been jeopardized and injured. This act of Respondent No. 1 is quite illegal and clear-cut favour to Respondent No. 3".

Thereafter, Muhammad Arshad moved this Court through W.P. No. 3382/1988 (Exh.D3) wherein the prayer was made that S.H.O be directed to register the case against the accused. Muhammad Arshad in this petition has stated the following facts:

"That the petitioner who is a resident of District Layyah was known to one Barkat Ali son of Muhammad Hassan Caste Rajput resident of Ward No. 8 Near Police Station Leih, Tehsil and District Layyah at present resident of 38-Nabha Road, Lahore. Moreover, one Muhammad Sharif son of Khushi Muhammad caste Arain resident of Bet Diwan Tehsil and District Layyah was also known to the petitioner. Both of them approached the petitioner at Al-Mehran Hotel, New Anarkali, Lahore with the offer that the Punjab Government is granting a lease of land to the cultivators under the scheme known as `Live Stock Scheme'. It was further given understanding by them that if petitioner pays them Rs. 118,000/- they can manage allotment of land equivalent to 90 lots which can be allocated among interested persons and no further expenses will be involved. The petitioner being a simple villager was thus defrauded having paid this amount to them in Al-Mehran Hotel, New Anarkali, Lahore in the presence of one Bashir Ahmad S/O Noor Muhammad and Muhammad Boota S/O Ghulam Muhammad. The letter dated

25.07.1987 showing this payment is appended as Annexure-B. The petitioner collected this amount from various interested persons 22

The above said writ petition (Exh.D3) was disposed of vide order dated 04.09.1988 (Exh.D4) with a direction to the S.H.O Police Station New Anarkali, Lahore to hear the respondent and thereafter proceed in the matter in accordance with law. In compliance with order dated 04.09.1988 (Exh.D4) an FIR No. 232/1988 (Exh.D-1) was registered under Sections 406/420/468/471 PPC wherein slight modification was made in the facts which were stated in the W.P. No. 3382/1988 (Exh.D-3) and an attempt was made to rope in Nawab Din in the case. The cumulative reading of W.P. No. 364/1988 (Exh.D2), W.P. No. 3382/1988 (Exh.D-3) and FIR No. 232/1988 (Exh.D1) shows that the respondent, Muhammad Arshad, neither paid sum of Rs. 118,000/- to Nawab Din nor Nawab Din promised the respondent to get the land allotted in any government scheme. Contrary to above stated documentary evidence, the respondent, Muhammad Arshad, in his plaint and thereaftrer while appearing as PW-1 stated that Nawab Din had fraudulently obtained Rs. 118,000/- from him for the purposes of allotment of land in Live Stock Scheme. The statements made by Abdul Qayyum, Constable (DW1) and Nawab Din (DW2) are in line with the facts stated in the above referred documentary evidence. The juxtapositional reading of above stated documentary evidence and oral evidence leads to conclusion that (i) the assertions made in the plaint and statement made by the PWs are false; and (ii) that pronote dated 24.09.1988 (Ex.P1) and agreement to sell dated 13.10.1988 (Exh.P2) are without consideration and void as the respondent, Muhammad Arshad, got executed the above said documents in connivance with Police through coercion and fraud.

12. It is an admitted fact that Nawab Din was an illiterate person and was 70/80 years old at the time of execution of alleged pronote (Exh.P1) and agreement to sell dated 13.10.1988 (Exh.P2). The law on the subject have become settled that in case of transaction with old age and illiterate persons and `Parda Nasheen' ladies the burden to prove would always be on the beneficiary of the transaction. The beneficiary would not only be required to prove the genuineness of the transaction but also that the transaction was effected by such person with his free will and consent having independent advice; that there was no undue influence and coercion on such person. The entire evidence of the respondent if considered in this perspective then it would reveal that the same is not worthy of reliance. Nawab Din in his written statement categorically denied the execution of pronote (Exh.P1) and agreement to sell (Exh.P2). In these circumstances, the respondent was required to

prove that Nawab Din executed the above said agreement with his free will and after having received independent advice. None of the witnesses who were produced by the respondent in support of his claim has stated a single word that Nawab Din executed the pronote and agreement to sell after having received independent advice. On the contrary, as stated above, the respondent got executed the agreement to sell and pronote through coercion and mis-representation and in connivance with the local police. In these circumstances, neither pronote (Exh.P1) nor the agreement to sell (Exh.P2) can be held validly executed documents. Hence, the reliance of the learned counsel for the respondent on the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of `Bashir Ahmad Vs. Muhammad Luqman' (1999 SCMR 378), `Baswar Sultan Vs. Mst.Adeeba Alvi' (2002 SCMR 326) and the judgment of `Mst.Gul Shahnaz Vs. Abdul Qayyum Soomro and another' (PLD 2002 Karachi 333) are inapt as Nawab Din did not admit the execution of pronote (Exh.P1) and agreement to sell (Exh.P2).

13. The salient features of alleged agreement to sell dated 13.10.1988 (Exh.P2) are that: (a) Nawab Din was in need of money so as to meet his domestic requirement and, therefore, he agreed to sell the suit land to the respondent for a consideration of Rs. 118,000/- which he received from the respondent in presence of the witnesses namely Muhammad Sharif (PW-4) and Bashir Ahmad (PW-2); (b) the possession of the suit land was handed over to the respondent; (c) Nawab Din was bound to execute the sale-deed in favour of the respondent up to 23.11.1988; (d) agreement to sell was written by Muhammad Aslam, Wasiqa Navees, Neela Gumbad, Lahore; (c) if, Nawab Din refused to execute the sale-deed in favour of the respondent, then the respondent would be entitled to get double the amount of Rs. 118,000/-. All the witnesses which were produced by the respondent in support of his claim have stated nothing with regard to the above said contents of the agreement to sell dated 13.10.1988 (Exh.P2). The proof of execution is with regard to the writing, signature of the parties as well as of the author but it has nothing to do with the proof of the contents of the document. In such like cases where execution of document is denied by other party, then heavy burden lies on the beneficiary of the document, not only to prove the execution of the document but also its contents. Besides, he is also required to prove that the such document was executed by the person with his free will, without any undue influence and coercion. In the instant case, the respondent has failed to prove the contents of the document and the fact that Nawab Din executed the agreement to sell (Exh.P2) and pronote (Exh.P1) with his free will.

14. The other startling aspect of the case is that the stamp paper for the agreement to sell (Exh.P2) was purchased in Lahore, agreement was also allegedly executed in Lahore whereas the parties, witnesses and the subject matter of the agreement have no nexus with Lahore. I also find it very strange that according to the respondent/plaintiff, he had paid the total consideration of Rs. 11,8,000/- but he did not obtain any conveyance deed. This is even more surprising that the agreement was allegedly executed on 13.10.1988 and the transfer of title was purportedly agreed to be effected on 23.11.1988. Learned counsel for the respondent failed to explain the reason behind these unusual circumstances: The respondent/plaintiff, for reasons noted above, has failed to prove Issue Nos. 1 and 2 and, therefore, he has no cause of action against the petitioners/Nawab Din and, therefore, is not entitled to the specific performance of the agreement (Exh. P2). In this regard reference may be made to the case of `Muhammad Aslam vs. Musarrat Iqbal Akhtar' (2006 YLR 2446).

15. In view of above, the judgment and decree dated 2.11.1999 passed by the learned Additional District Judge, Layyah is set aside and resultantly the judgment and decree dated 19.3.1996 passed by the learned Senior Civil Judge, Layyah stands restored with no order as to cost.

(R.A.) Revision accepted

**PLJ 2013 Lahore 172 (DB)**
**[Multan Bench Multan]**
**Present: Ijaz Ahmed and Shahid Waheed, JJ.**
**MUHAMMAD AMEEN SHAHID--Appellant**
**versus**
**BOARD OF REVENUE, etc.--Respondents**

R.F.A. Nos. 176 & 284 of 2011, heard on 28.11.2011.

**Land Acquisition Act, 1894 (I of 1894)--**
----Ss. 4(1) & 18--Punjab Land Acquisition Rules, 1983, R. 10(1)(iii)(C)--Enhancement of compensation of acquired land--Compulsory land acquisition--Determination compensation of land--Award was announced after completion of codal formalities--Failed to discharge burden of proving his claim for enhancement of compensation--Validity--It is an established principle of law that in land acquisition cases a party interested for enhancement of compensation owe a duty to discharge burden to disprove determination of compensation by land acquisition collector by producing convincing and legal evidence--Period while determining market value was one prevalent during one year preceding to notification u/S. 4 of Land Acquisition Act--Appellant in order to discharge burden of proving issue and produced sale deeds--It is settled principle of law that transactions which take place subsequent to notification were not considered proper for determination of compensation--Appellant had failed to show that compensation fixed by collector was illegal or inadequate. [Pp. 175 & 176] A, B & D
2010 SCMR 1523, PLD 2002 SC 84 & 1979 CLC 523, rel.

**Oral evidence--**
----Oral statement of witness--Oral evidence is not sufficient as in land acquisition cases it is a consistent view that bald statements of witnesses produced by land owner were not sufficient to accept claim for higher price of acquired land. [P. 176] C
2010 SCMR 1523, rel.
Ch. Imtiaz Ahmad Zia, Advocate for Appellant.
Malik Muhammad Bashir Lakhesir, AAG for Respondents.
Date of hearing: 28.11.2012.

**JUDGMENT**

**Shahid Waheed, J.--**This judgment will govern RFA No. 176/2011 and RFA 284/2011 as the same have arisen out of the judgment and decree dated 31.5.2011 passed by the learned Senior Civil Judge, Multan on a reference under Section 18 of the Land Acquisition Act, 1894. RFA No. 176/2011 has been filed by a land owner, Muhammad Ameen Shahid (hereinafter called the appellant) for the enhancement of compensation of acquired land whereas RFA No. 284/2011 has been filed by the

Board of Revenue Punjab and three others (hereinafter referred to as the respondents) for maintaining the compensation assessed by the land Acquisition Collector in the award dated 5.11.2007.

2. Briefly, the facts of the case are that on 02.06.2005, the District Officer (Revenue)/District Collector, Multan issued Notification No. 171-DOR/LAC, published in the Punjab Government Gazette on 24.8.2005, under Section 4 of the Land Acquisition Act, 1894 for the acquisitions of land measuring 401 Kanals-14 Marlas situated in Mauza Dera Muhammdi and Mauza Samurana, Tehsil Multan City, District. Multan for the construction of a hospital. Thereafter, notification under Sections 17(4) and 6 of the Land Acquisition Act was issued by the Executive District Officer (Revenue), Multan and the same was published in the Punjab Gazette on 21.2.2007. The Deputy District Officer (Revenue)/ Land Acquisition Collector on 5.11.2007, after completing the formalities of law, declared the award under Section 11 of the Land Acquisition Act and determined compensation of land, that is, Rs. 800,000/- per acre of the land measuring 185 Kanals-01 Marla (agricultural land) situated in Mauza Dera Muhammadi and Rs. 1200,000/- per acre for the land measuring 47 Kanals-16 Marlas (residential land) situated in Mauza Dera Mohammadi alongwith 15% compulsory land acquisition charges, superstructure and trees. Consequent upon Award, being dissatisfied the appellant on 14.2.2008 filed an application under Section 18 of the Land Acquisition Act, 1894 before the Deputy District Officer (revenue)/Collector for sending the reference to the Civil Court for the determination of amount of compensation. After having received the reference, the learned Senior Civil Judge, Multan issued notices to the respondents. In response to notices, the respondents entered appearance before the learned trial Court; and contested the reference by filing replies. On pleadings of the parties, the learned trial Court framed the following issues:--

1. Whether the reference petitioner has no cause of action and locus standi to bring this reference? OPR
2. Whether the reference petitioner has no come to the Court with clean hands? OPR
3. Whether the petitioner is estopped to file this reference on account of his words and conduct? OPR
4. Whether the reference is time barred? OPR
5. Whether the reference is not maintainable in its present form? OPR
6. Whether the reference petitioner has already received the consideration? If so up to what extent in terms of money? OPR
7. Whether the reference petitioner has not been adequately compensated through impugned award? OPA
8. If above issue is proved in affirmative, what should be the actual extent of compensation to be paid to the reference petitioner? OPA
9. Relief.

3. After framing issues the learned trial Court called upon the parties to produce evidence in support of their respective claims. On behalf of the appellant his

son Nadeem Shahid appeared as AW-1. In support of his version the appellant produced Jamshaid Ali (AW-2) and Rashid Jameel (AW-3). The appellant, in documentary evidence, tendered special power of attorney (Ex.A-1), award (Ex.A-2), sale-deed dated 9.7.2007 (Ex.A-3), sale-deed dated 12.7.2017 (Ex.A-4), sale-deed dated 27.6.2007 (Ex.A-5), sale-deed dated 20.6.2007 (Ex. A-6), copy of Mutation No. 7604 dated 6.5.2000 (Ex.A-7), Aks Shajra (Ex.A-8) and Letter No. 714/DOR/LAC dated 30.6.2007, (Mark-A). Conversely, the respondents in support of their version produced Muhammad Ahsan, Assistant (RW-1). The respondents also produced documentary evidence i.e. copy of acquisition proceedings (Ex. R-1), certified copy of valuation of property (Ex.R-2), copy of Aust Bai Yaksala 2004-05 of Mauza Dera Muhammadi (Ex.R-3), copy of Aust Bai Yaksala 25.8.2004 to 24.8.2005 of Mauza Dera Muhammadi (Ex.R-4), copy of Khasragirdawri (Ex.R-5), Minuets of the meeting of District Price Assessment Committee (Ex.R-6), copy of Notification No. 441/EDOR/LAC dated 26.12.2006 (Ex.R-7), copy of Letter No. 525/EDOR/LAC dated 5.3.2007 (Ex.R-8), copy of Letter No. 1930, 2006/3206-S.II dated 23.12.2006 (Ex.R-9), copy of appellant's application (Ex.R-10), copy of Letter No. 726/DOR/LAC dated 10.7.2007 (Ex.R-11) and copy of Letter No. 851-2007/767-S.II dated 5.7.2007 (Ex.R-12).

4. The learned trial Court after recording evidence partly accepted the reference and the compensation was enhanced from Rs. 5,000/- per Marla to Rs. 30,000/- per Marla along with 15 % compulsory charges and 8 % compound interest. The learned trial Court also held that the appellant was entitled to Rs. 400,000/- as costs of superstructure. Being aggrieved by the judgment and decree dated 31.5.2011 passed by the learned Senior Civil Judge the appellant as well the respondents have filed the appeals before this Court.

5. Learned counsel for the appellant in support of the present appeal submits that findings of the learned trial Court on Issue No. 8 are against law and facts; that the appellant produced different sale-deeds i.e. Ex.A-3 to Ex.A-6 for the determination of compensation of the land acquired but the learned trial Court did not take into consideration the sale-deeds particularly sale-deed (Ex.A-3) which shows that the property was sold at the rate of Rs. 300,000/- per Marla; and, that the value of the land at the time of acquisition was more than Rs. 250,000/- per Marla but the learned trial Court misread and non-read the evidence available on record and, therefore, fell in error while passing the impugned decree. Conversely, the learned Assistant Advocate General, Punjab contends that the compensation of the acquired land was rightly fixed in the award as the same was in consonance with the prevailing rates in the market at that time and therefore, the same could not be enhanced by the learned trial Court; that according to survey report of the revenue field staff the land acquired was Nall Nehri at the spot and, therefore, the District Price Assessment Committee rightly assessed the price of the land as agricultural; that the award was announced after completion of codal formalities; and, that the appellant has failed to discharge the burden of proving his claim for the enhancement of compensation.

6. We have heard the learned counsel for the appellant as well as the learned Assistant Advocate-General Punjab and perused the record.

7. It is an established principle of law that in land acquisition cases a party interested for enhancement of the compensation owe a duty to discharge the burden to disprove the determination of compensation by the Land Acquisition Collector in producing convincing and legal evidence. As per Rule 10(1)(iii)(c) of the Punjab Land Acquisition Rules, 1983, the relevant period while determining the market value is the one prevalent during the one year preceding to the notification under Section 4 of the Land Acquisition Act and in this case the said notification was published on 24.08.2005. The appellant in order to discharge the burden of proving Issue Nos. 7 and 8 produced sale-deed dated 9.07.2007 (Ex. A-3), sale-deed dated 12.7.2007 (Ex.A-4), sale-deed dated 27.6.2007 (Ex.A-5) and sale-deed dated 20.6.2007 (Ex.A-6). All these sale-deeds are not relevant as the same do not precede, the notification under Section 4 of the Land Acquisition Act. It is settled principle of law that the transactions which take place subsequent to the Notification under Section 4(1) of the Land Acquisition Act are not considered proper for determination of compensation and in this regard reference may be made to the case of Land Acquisition Collector vs. Ch. Muhammad Ali (1979 CLC 523). Besides the afore-stated reasons for not accepting the above said sale-deeds, we further add that the appellant did not take any step to prove the contents of these documentary evidence. It is to be noted that merely by tendering a document in evidence, it gets no evidentiary value unless its contents are proved according to law and for this purpose reference may be made to the case of Hyderabad Development Authority through M.D. Civic Center Hyderabad vs. Abdul Majeed and others (PLD 2002 SC 84). Now the only evidence which is left for consideration is oral statement of the witnesses. We are afraid that oral evidence is not sufficient as in the land acquisition cases it is a consistent view of the Hon'ble Supreme Court of Pakistan that me bald statements of witnesses produced by land owner are not sufficient to accept the claim for a higher price of acquired land. In this regard reliance may be made to the case of Abdul Sattar vs. Land Acquisition Collector Highway Department and others (2010 SCMR 1523). In view of above, the appellant failed to discharge the burden of proving Issue Nos. 7 and 8 and, therefore, findings to this effect recorded by the learned trial Court are reversed.

8. For the reasons stated above, we are of the view that the appellant has failed to show that the compensation fixed by the Land Acquisition Collector is illegal or inadequate. Accordingly, we dismiss RFA No. 176/2011 and accept RFA No. 284/2011 and set aside the judgment and decree dated 31.5.2011 passed by the learned Senior Civil Judge, Multan and upheld the award of the Land Acquisition Collector. No order as to costs.

(R.A.) RFA dismissed

**2013 C L D 885**
**[Lahore]**
**Before Shahid Waheed, J**
**Messrs SPRINT ENERGY (PVT.) LIMITED through Advisor----Appellant**
**Versus**
**AHSAAN ULLAH and 2 others----Respondents**

First Appeal from Order No.262 of 2012, heard on 17th October, 2012.

**Arbitration Act (X of 1940)---**

----S. 34---Civil Procedure Code (V of 1908), O. VII, R. 11---Stay of proceedings in presence of an arbitration agreement between the parties---"Step in proceedings"---Scope---Suit for recovery---Defendant had filed application for rejection of plaint under Order VII, R.11, C.P.C. and thereafter made application under S. 34 of the Arbitration Act, 1940 for stay of proceedings---Said application under S.34 of the Arbitration Act, 1940 was rejected on the ground that after making application under O.VII, Rule 11, C.P.C. the defendant could not request stay on legal proceedings under S. 34 of Arbitration Act, 1940---Validity---Criterion to decide whether an act constituted a step in proceedings was whether an application was made to the court on summons or orally and whether the act was such as would indicate that party was acquiescing to the method adopted by the other side of having the dispute decided by court---Intention of statute was that defendant who wanted to take advantage of an arbitration clause must without any ado, and before submitting to the jurisdiction of the court; inform the court in unequivocal terms that he was going to insist upon implementation of the arbitration clause---Defendant would disentitle himself from protection of S.34 of Arbitration Act, 1940 if he did not take such stand before filing a written statement and such situation was not different if he takes steps in proceedings before raising an objection---Defendant had taken steps in the proceedings before moving application under S.34 of the Arbitration Act, 1940 and therefore Trial Court had rightly rejected his application for stay in proceedings---Appeal was dismissed in circumstances.

Director Housing, A.G's Branch, Rawalpindi v. Messrs Makhdum Consultants Engineers and Architects 1997 SCMR 988; ACB (Pvt.) Ltd. v. Ups Worldwide Forwarding Inc. 2007 MLD 1520; Pakistan Telecommunication Corporation Ltd. v. Dr. Waqar Hussain Chaudhary PLD 2007 Lah. 678; Aftab Khalil and 5 others v. Shaukat Hussain 2008 CLC 1592 and Mrs. Rubby Hameedullah and 3 others v. Dr. Arif and 4 others 2010 YLR 3331 ref.

Industrija Masina-i-Traktora v. Bank of Omen Ltd. 1992 MLD 2245; M/s. Cepcon (Pvt.) Ltd. v. Messrs Rizwan Builders Ltd. 1990 MLD 2027; Hyderabad Municipal Corporation v. Messrs Columbia Enterprises 1990 CLC 47; Middle East Trading

Co. v. The New National Mills Ltd. AIR 1960 Bom. 292; Vaisyaraju Subramanyam Raju v. Vaisyaraju Chandramauly Raju and others AIR 1987 Ori. 23; The Province of the Punjab v. Messrs Irfan & Co. PLD 1956 Lah. 442; New Bengal Shipping Company v. Eric Lancaster Stump PLD 1952 Dacca 22; Subal Chandra Bhur v. Md. Ibrahim and another AIR 1943 Cal. 484; Uzin Export Import Enterprises v. M. Iftikhar & Company Ltd. PLD 1986 Kar. 1; G.M. Pfaff A.G. v. Sartaj Engineering Co. Ltd., Lahore and 3 others PLD 1970 Lah. 184; N.-W.F.P. through Collector, Mardan and 2 others v Faiz Muhammad PLD 1984 Pesh. 180 and Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners PLD 1981 SC 553 rel.

Shamshad Ullah Cheema for Appellant.
Tariq Mehmood Sipra for Respondents.
Date of hearing: 17th October, 2012.

## JUDGMENT

**SHAHID WAHEED, J.**---Challenge in this appeal is to order dated 15-3-2012 whereby the appellant's application under section 34 of the Arbitration Act, 1940 was dismissed.

2. Briefly the facts giving rise to this appeal are that on 14-6-2007 a lease deed/agreement to lease land for setting up and operation of CNG-cum-LPG-cum-Petrol Station was executed between the appellant and respondent. Thereafter, some differences arose between the parties and resultantly on 27-9-2010 the respondent instituted a suit for recovery of rent and damages amounting to Rs.11,075,000 against the appellant. In response to summons, the appellant entered appearance before the learned trial Court. On 30-7-2011 the appellant filed an application under Order VII, Rule 11, C.P.C. for rejection of the plaint. The respondents resisted this application by filing a reply. Subsequently, the appellant filed an application under section 34 of the Arbitration Act, 1940 for staying proceedings of the suit. The respondents also contested this application by filing a reply. The learned trial Court after affording opportunity of hearing to the parties to the suit, dismissed the above said two applications vide consolidated order dated 15-3-2012. Hence, this appeal.

3. Learned counsel for the appellant submits that in view of the agreement which contains an arbitration clause, proceedings before the learned trial Court were liable to be stayed; that filing of application under Order VII, Rule 11, C.P.C. does not amount to taking further steps in proceedings; and, that the learned trial Court without appreciating the record erroneously dismissed the application. In support of his contentions the learned counsel for the appellant made reference to the cases of Director Housing, A.G's. Branch, Rawalpindi v. Messrs Makhdum Consultants Engineers and Architects (1997 SCMR 988), ACB (Pvt.) Ltd. v. Ups Worldwide

Forwarding Inc. (2007 MLD 1520), Pakistan Telecommunication Corporation Ltd. v. Dr. Waqar Hussain Chaudhary (PLD 2007 Lahore 678), Aftab Khalil and 5 others v. Shaukat Hussain (2008 CLC 1592) and Mrs. Rubby Hameedullah and 3 others v. Dr. Arif and 4 others (2010 YLR 3331). Conversely, the learned counsel for the respondents vehemently opposes this appeal and submits that the learned trial Court rightly rejected the application under section 34 of the Arbitration Act, 1940. Learned counsel for the respondent further submits that by filing the application under Order VII, Rule 11, C.P.C., the appellant took steps in the proceedings and, therefore, application under section 34 of the Arbitration Act could not be filed.

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

5. It is settled principle of law that when a person applies under section 34 of the Arbitration Act, 1940 the following condition must be fulfilled:

(i) The proceedings must have commenced by a party to an arbitration agreement against any other party to the agreement;

(ii) The legal proceedings, which is sought to be stayed must be in respect of a matter agreed to be referred;

(iii) The applicant for stay must be a party to the legal proceeding;

(iv) The applicant must have taken no steps in the proceeding after appearance.

(v) The applicant must satisfy that only the applicant was at the time when the proceedings were commenced, ready and willing to do everything necessary for the proper conduct of the arbitration; and

(vi) The Court must also be satisfied that there was no sufficient reasons why the matter should not be referred to arbitration.

Unless the Court is satisfied on all the above said conditions, it cannot grant stay order, In this regard reference may be made to the cases of Industrija Masina-i-Traktora v. Bank of Omen Ltd. 1992 MLD 2245, M/s. Cepcon (Pvt.) Ltd. v. Messrs Rizwan Builders Ltd. (1990 MLD 2027, Hyderabad Municipal Corporation v. Messrs Columbia Enterprises (1990 CLC 47), Middle East Trading Co. v. The New National Mills Ltd. (AIR 1960 Bombay 292) and Vaisyaraju Subramanyam Raju v. Vaisyaraju Chandramauly Raju and others (AIR 1987 Ori. 23). In the instant case admittedly an agreement dated 14-6-2007 containing an arbitration clause was executed between the parties. The respondents in the plaint have alleged that the appellant breached the terms and conditions of the above said agreement and this

violation gave rise to a cause of action for instituting a suit for recovery of rent and damages amounting to Rs.11,075,000. The respondents appeared before the learned trial Court and firstly filed an application under Order VII, Rule 11, C.P.C. for rejection of plaint and thereafter filed an application under section 34 of the Arbitration Act, 1940 for staying the proceedings of the suit. Now, a question arises as to whether after filing an application under Order VII, Rule 11, C.P.C., the appellant could file an application under section 34 of the Arbitration Act, 1940 for staying the proceedings in the suit. The criterion to decide whether an act constitute step in the proceedings is (a) whether an application was made to the court on summons or orally; and, (b) whether the act was such as would indicate that the party was acquiescing in the method adopted by the other side of having the dispute decided by the court. This view finds support from The Province of the Punjab v. Messrs Irfan & Co. (PLD 1956 Lahore 442), New Bengal Shipping Company v. Eric Lancaster Stump (PLD 1952 Dacca 22) and Subal Chandra Bhur v. Md. Ibrahim and another (AIR 1943 Calcutta 484). In other words the intention of the statute is that the defendant who wants to take advantage of an arbitration clause must without any ado and before submitting to the jurisdiction of the Court inform the Court in unequivocal terms that he is going to insist upon the implementation of the arbitration clause. A defendant disentitles himself to the protection of section 34 of the Arbitration Act, 1940 if he does not take this stand before filing a written statement. The situation is also not different if he takes any other steps in the proceedings before taking the objection. In this regard I find fortification from Uzin Export Import Enterprises v. M. Iftikhar & Company Ltd. (PLD 1986 Karachi 1), G.M. Pfaff A.G. v. Sartaj Engineering Co. Ltd., Lahore and 3 others (PLD 1970 Lahore 184), N.-W.F.P. through Collector, Mardan and 2 others v. Faiz Muhammad (PLD 1984 Peshawar 180) and Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners (PLD 1981 SC 553). The facts of the instant case show that the appellant had taken the steps in proceedings. No reason has been assigned as to what were the circumstances which prevented the appellant from moving the application under section 34 of the Arbitration Act, 1940 at the earliest stage of the proceedings. It is not the case of the appellant that he had not received the copy of the plaint and he was unaware of the subject-matter of the suit. In fact, the application moved by the appellant under Order VII, Rule 11, C.P.C. wherein the appellant had submitted that the plaint of the respondent be rejected is "a step further" in the proceedings. The learned trial Court, therefore, rightly dismissed the application of the appellant filed under section 34 of the Arbitration Act, 1940.

6. In view of above this appeal lacks merit and is dismissed with no order as to cost.

KMZ/S-121/L

Appeal dismissed.

**2013 C L D 522**
**[Lahore]**
**Before Shahid Waheed, J**
**FARMERS' EQUITY PRIVATE LIMITED (FEP) through Chief Executive and 3 others---Appellants**
**Versus**
**MEHBOOB ALAM---Respondent**

F.A.O. No.255 of 2004, decided on 26th November, 2012.

**(a) Arbitration Act (X of 1940)---**

----Ss. 34, 14 & 17---Civil Procedure Code (V of 1908), O. XXIII, R. 3----Suit for recovery---Application of defendant for stay of proceedings in suit in presence of an arbitration agreement between the parties was dismissed---Said arbitration agreement was entered into by the parties after the date of institution of the suit---Effect---Suit after institution was subsequently referred by parties to arbitration without leave of the court through an agreement which was dated after institution of suit---Section 34 of the Arbitration Act, 1940 was restricted to cases in which the suit had been instituted after agreement to refer to arbitration---Procedure for making reference to arbitration in a pending suit was provided in Ss.21 to 25 of the Arbitration Act, 1940---Reference to arbitration and award procured in a pending suit without intervention of the court were a nullity and such award could not be made rule of the court in accordance with Ss.14 and 17 of the Arbitration Act, 1940-----No bar existed on parties to get their case decided by mutual agreement at any time prior to final adjudication under provisions of O.XXIII, Rule 3, C.P.C. under which existence of a lawful agreement was one of the essential pre-requisites for the applicability of said provision---Arbitration agreement without orders of a court in pending suit being departure from mandatory provisions of Ss.21 to 25 of the Arbitration Act, 1940 could not be categorized as a lawful agreement and was not enforceable---Application under S.34 of the Arbitration Act, 1940 was therefore rightly dismissed by Trial Court---Appeal was dismissed.

Peruri Suryanarayan & Co. v. Gullapudi China Narsingham and others (4 IC 133) and Vyankatesh Mahadev v. Ramachandara Krishna (27 IC 46) rel.

**(b) Arbitration Act (X of 1940)---**

----Ss. 21, 22, 23, 24 & 25---Arbitration agreement entered into in a pending suit without leave of the court---Validity---Arbitration agreement without orders of a court in a pending suit being departure from mandatory provisions of Ss.21 to 25 of the Arbitration Act, 1940 could not be categorized to be lawful agreement and was not enforceable.

Sahibzada Mahboob Ali for Appellants.
Nemo for Respondent.
Date of hearing: 26th November, 2012.

**JUDGMENT**

**SHAHID WAHEED, J.---**The appellant, through this appeal under section 39 of the Arbitration Act, 1940 ("the Act") has called in question order dated 24-11-2004 passed by the learned Civil Judge 1st Class, Multan whereby an application filed by the appellant under section 34 of the Act for staying the proceedings of the suit was dismissed.

2. Briefly, the facts of the case are that the respondent on 7-1-2000 instituted a suit for recovery of Rs.3,744,695 against the appellant. In response to summons, the appellant entered appearance before the learned trial Court and filed an application under section 34 of the Act for staying the proceedings of the suit on the plea that parties to the suit through an agreement dated 27-1-2000 had decided to refer the matter in issue to arbitration.

The respondent, despite availing opportunities, did not submit reply to the above said application. The learned trial Court vide order dated 25-5-2000 struck off the right of the respondent to submit written reply of the above said application. However, the respondent opposed this application during the course of arguments. The learned trial Court vide order dated 24-11-2004 dismissed the application filed under section 34 of the Act.

Hence, this appeal.

3. Learned counsel for the appellant in support of this appeal submits that notwithstanding the pendency, of the suit it was open to, the parties to enter into an agreement to arbitrate privately, without leave of the court, and to proceed to have

that private reference to arbitration or the resulting award converted into an independent decree of the Court.

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

5. The respondent on 7-1-2000 brought a suit against the appellant for recovery of Rs.3,744,695 which was subsequently referred by them to arbitration, without leave of the court, through an agreement dated 27-1-2000. Now a question arises as to whether on the basis of agreement dated 27-1-2000 the proceedings of the suit could be stayed under section 34 of the Act. In my view section 34 of the Act is restricted to cases in which the suit complained of has been instituted after the agreement to refer to arbitration. The procedure for making reference to arbitration in a pending suit is provided in the Act. If the parties want to get their suit decided through arbitration, they must resort to the provisions of sections 21 to 25 of the Act. Reference to arbitration and an award procured in a pending suit without intervention of the court, are nullity and such an award cannot be made rule of the court in accordance with the provisions of sections 14 and 17 of the Act. However, an award procured without recourse to the provisions of sections 21 to 25 of the Act are saved by section 47 of the Act from being altogether a nullity, provided the requirements of the proviso to section 47 are complied with.

The proviso confers power on the court to take into consideration the award obtained, other than through the procedure prescribed in the Act as the compromise or adjustment of the suit, if all the parties to the award give consent thereto. There is no bar on the parties to get their case decided by mutual agreement at any time prior to the final adjudication. Under Order XXIII, Rule 3, C.P.C., if the parties enter into a lawful agreement or compromise adjusting their suits wholly or partly, and the court is satisfied of such adjustment, it is bound to record such compromise and pass a decree in accordance therewith. Thus, in case of a valid adjustment in a pending suit through compromise of the parties, the court cannot pass a decree except in accordance with the terms of the compromise. As per the language of Rule 3 of Order XXIII, C.P.C. existence of lawful agreement is one of the essential pre-requisite for applicability of this provision. An arbitration agreement without the orders of the court in a pending suit, being a departure from the mandatory provisions of sections 21 to 25 of the Act cannot be categorized as a lawful agreement.

Such an agreement is not enforceable in law and, therefore, application under section 34 of the Act to stay the proceedings of the suit must fail. In this regard reference may be made to the case of Perttri Sttryanaravan & Co. v. Gullapudi China Narsingham and others (4 IC 133) and Vyankatesh Mahadev v. Ramachandara Krishna (27 IC 46).

6. In view of above, I find no illegality in the order passed by the learned trial Court and resultantly this appeal is dismissed with no order as to cost.

KMZ/F-41/L Appeal dismissed.

**PLJ 2013 Lahore 289**
**Present: Shahid Waheed, J.**
**SH. MUKHTAR AHMAD, etc.--Petitioners**
**versus**
**MUHAMMAD SALEEM BUTT, etc.--Respondents**

C.R. No. 2687 of 2011, heard on 18.3.2013.

**(i) Civil Procedure Code, 1908 (V of 1908)--**
----O. V, R. 17--Ex-parte proceeding--Substituted service of summons was not valid--Service could be affected personally, by registered post, through authorized agent or an male member of Family--Validity--Where serving officer, after using all due and reasonable diligence, cannot find defendant and there is no person on whom service can be made, serving office shall affix a copy of summons on other door or some other conspicuous part of house and shall then return original to Court from which it was issued, with report endorsed stating that he has so affixed the copy and name and address of the person by whom house was identified and in whose presence copy was affixed--No resort to such ordinary ways of service of summons on petitioners was at all made--Substituted service was bad in law. [P. 292] A

**Civil Procedure Code, 1908 (V of 1908)--**
----O. V, R. 20--Limitation Act, (IX of 1908)--S. 5--Ex-parte proceedings--Application for condonation of delay in filing application for setting aside ex-parte order--Publication of summons was not made--Service of summons be effected--Order for affecting substituted service of petitioners by means of publication of proclamation in newspaper loses aura of validity and consequently substituted service cannot be treated as effective for purpose of proceeding ex-parte against them--Trial Court by considering substituted service of petitioners without justifiable legal basis committed material irregularity--Summons, could not be said to have been served upon the petitioners--Terminus quo for filing application for setting aside ex-parte proceedings was date of acquisition of knowledge of the order--Application filed by petitioners was well within time. [Pp. 292 & 293] B
1979 SCMR 85 & 2006 MLD 963, ref.
Mr. Muhammad Nasir Zahid, Advocate for Petitioners.
Mr. Muhammad Khalid Sajjad Khan, Advocate for Respondent No. 1.
Mian Jamil Ahmad, Advocate for Respondent No. 2.
Date of hearing: 18.3.2013.

**JUDGMENT**
The petitioners through this civil revision under Section 115, CPC have called in question the order dated 04.06.2011 passed by the learned Civil Judge, 1st Class, Faisalabad, whereby their two applications; one for recalling of order dated

24.01.2007 through which ex-parte proceedings were initiated against them; and, second under Section 5 of the Limitation Act seeking condonation of delay were dismissed.

2. Briefly, the facts of the case are that Muhammad Saleem Bhatti (Respondent No. 1) instituted a suit against Pervez Ahmed (Respondent No. 2) for possession of the suit property through specific performance of agreement to sell dated 18.07.2003. During pendency of the suit Respondent No. 1/plaintiff filed an application under Order I, Rule 10, CPC for impleading Ijaz Ahmed (Respondent No. 3) and the legal heirs of Muhammad Yasin(the present petitioners) as defendants in the suit. Respondent No. 2, Pervaiz Ahmed, resisted this application by filing a reply. The learned trial Court vide order dated 15.06.2006 allowed the application and impleaded Ijaz Ahmed and the present petitioners as Defendants No. 2 & 3-a to 3-g respectively in the suit. Thereafter, the learned trial Court vide order dated 14.07.2006 issued summons to the newly added defendants through registered post A.D. and adjourned the case to 19.09.2006. Respondent No. 1/plaintiff did not deposit the process fee and resultantly on 19.09.2006 the learned trial Court again issued summons to the petitioners and Ijaz Ahmed through registered post A.D. and fixed the case for 19.10.2006. The service of summons could not be effected due to incomplete address. Notwithstanding the above report of the Process Server, the learned trial Court, vide order dated 02.11.2006 directed that the service of summons on the petitioners and Respondent No. 3 be effected by publication in Daily Express. Consequent upon publication of summons, the learned trial Court initiated ex parte proceedings against the petitioners vide order dated 24.01.2007.

3. After getting knowledge of ex parte proceedings, the petitioners on 18.01.2011 filed an application before the learned trial Court for setting aside order dated 24.01.2007 on the ground that they had not received any notice or summons through any mode. The petitioners also filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the application for setting aside the ex parte order. Respondent No. 1, Muhammad Saleem Bhatti, resisted the application by filing reply to the application. The learned trial Court vide order dated 04.06.2011 dismissed both the applications; hence this petition.

4. The question involved in this petition is as to whether the ex. Parte proceedings initiated against the petitioners vide order dated 24.01.2007 was valid in the eye of law. The perusal of the order sheet maintained by the learned trial Court shows that the petitioners alongwith Respondent No. 3 were impleaded as defendants in the suit filed by Respondent No. 1 vide order dated 15.06.2006. After filing of amended plaint by Respondent No. 1, the learned trial Court vide order dated 14.07.2006 issued summons to the petitioners and Respondent No. 3 through registered post, acknowledgement due, and adjourned the case to 19.09.2006. The Respondent No. 1/plaintiff did not deposit the process fee and resultantly the learned trial Court vide order dated 19.09.2006 again issued summons to the petitioners through registered

post A.D. On the next date of hearing, the Process Server submitted report that service could not be effected due to incomplete address. The learned trial Court, without getting complete address of the newly added defendants/petitioners and giving any reason, passed order dated 02.11.2006 for effecting service of summons on the petitioners by publication in "Daily Express". On receipt of publication of proclamation the learned trial Court initiated ex parte proceedings against the petitioners vide order dated 24.01.2007. The order impugned in this petition unfolds another startling fact that substituted service of summons was effected by publication in Daily Soorat-e-Haal instead of Daily Express. This flaw also escaped from the notice of the learned trial Court while initiating ex-parte proceedings against the petitioners vide order dated 24.01.2007. The order dated 02.11.2006 and substituted service of summons was not valid for the following reasons: Firstly, Rule 20 of Order V, CPC lays down that when the Court is satisfied that there is reason to believe that "the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way", the Court may order that the substituted service may be effected on him in the manner as the Court thinks fit. In this context, the ordinary way in which the service of the summons could be effected on the defendant has reference to the provisions contained in Rules 9 to 17 of Order V, CPC. Under these provisions the service could be effected on the defendant personally, by registered post, through his authorized agent, or on a male member of his family in accordance with these provisions. It is specifically laid down in Rule 17 that where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no person on whom service can be made, the serving office shall affix, a copy of the summons on the outer door or some other conspicuous part of the house and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed. It is clearly borne out from the record of the instant case that no resort to these ordinary ways of service of the summons on the defendant/present petitioners was at all made. In these circumstances, the substituted service was bad in law and this view finds support from the case of Mrs. Nargis Latif vs. Mrs. Feroz Afaq Ahmad Khan (2001 SCMR 99) and Syed Muhammad Anwar vs. Sheikh Abdul Haq (1985 SCMR 1228). Secondly, the Plaintiff/Respondent No. 1 obtained order from the learned trial Court for effecting substituted service by willful suppression of petitioners'/defendant's correct addresses and thus as per principle laid down by the Honourable Supreme Court of Pakistan in the case of Muhammad Aslam vs. Addl. District Judge, Rawalpindi etc. (1979 SCMR 85) played fraud on the learned trial Court. Thirdly, in the absence of issuance of summons at correct addresses, order of substituted service as per principle laid down in the case of Muhammad Younis and 4 others vs. Additional District Judge, Jhelum and 2 others (2006 MLD 963) was nullity in the eye of law. Fourthly, the publication of summons was not made as per order dated 02.11.2006. The learned trial Court

directed that the service of summons be effected by publication in Daily Express whereas it was published in Daily Soorat-e-Haal. Thus, the order for effecting substituted servicey of the petitioners by means of publication of proclamation in the newspaper loses the aura of validity and consequently the substituted service cannot be treated as effective for the purpose of proceeding ex parte against them. The learned trial Court by ordering substituted service of the petitioners without justifiable legal basis committed material irregularity. The summons could not be said to have been served upon the petitioners. Therefore, the terminus a quo for filing application for setting aside ex parte proceedings was the date of acquisition of knowledge of the order. It is the case of the petitioners that they came to know about the ex parte proceedings three days ago before filing the application. Thus, in these circumstances the application filed by the petitioners was well within time.

5. In view of above, this petition is allowed; order dated 04.06.2011 passed by the learned Civil Judge, 1st Class, Faisalabad, is set aside and resultantly, the application field by the petitioners for recalling of order dated 24.01.2007 whereby ex parte proceedings were initiated against them, is accepted as prayed for. No order as to costs.

(R.A.) Petition allowed

**PLJ 2013 Lahore 298**
**Present: Shahid Waheed, J.**
**Dr. ZAHRA HASSAN--Petitioners**
**versus**
**GOVT. OF PUNJAB, etc.--Respondents**

W.P. No. 9956 of 2007, heard on 13.3.2013.

**Constitution of Pakistan, 1973--**

----Art. 199--Notification No. SO (South) 910/R. 185--Constitutional petition--Financial benefits--Obituary notification--Family members of civil servant who died on or after 10-11-2004--Question of--Whether petitioner might claim financial benefits under Notification--Applicability of notification--Case was sent to Chief Minister for approval of financial assistance--Challenge to--Neither summary was submitted to Chief Minister nor he passed any order for grant of financial benefit u/Notification to widow of deceased employee--Approval of C.M. was not required for grant of financial benefits to family of a civil servant who died during service--Govt. of Punjab had failed to bring on record any fact on basis of which deceased servant might be distinguished--Notification being violative of Art. 25 of Constitution was not sustainable in eyes of law and Constitution--Petition was allowed. [P. 303] A

Mr. Muhammad Aurangzeb, Advocate for Petitioner.
Mr. Shahid Mubeen, Addl. A.G. alongwith Mr. Ijaz Farrukh, Senior Law Officer, Health Department for Respondents.
Date of hearing: 13.3.2013.

**JUDGMENT**

Petitioner, Dr. Zahra Hassan widow of Dr. Sibt-e-Hassan, ex-Senior Demonstrator BS-18, Pharmacology Department, Punjab Medical College, Faisalabad has filed this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 seeking direction to the respondents for grant of following financial benefits:

(a) Payment of four months salary (last pay drawn and allowances) in addition to other benefits in pursuance of Finance Department's Letter No. FD.1/3-2/99 dated 1.7.2002.

(b) Sanction of financial assistance to the tune of Rs. 800,000/- (Eight hundred thousand only) in pursuance of Finance Department's Letter No. FD.SR. 1/3-10/2004 dated 10.11.2004 in addition to other benefits admissible under the rules.

2. Briefly the facts of the case are that Dr. Sibt-e-Hassan, ex-Senior Demonstrator, Punjab Medical College, Faisalabad died on 29.8.2004 and his obituary notification was issued on 18.1.2005. The Secretary Health, Government

of the Punjab vide order No. SO (South) 910/R/85 dated 23.4.2005 accorded sanction to the grant of 180 days leave encashment in respect of Dr. Sibt-e-Hassan under Revised Leave Rules, 1981. The petitioner Being widow of Dr. Sibt-e-Hassan moved an application for grant of financial benefits in terms of Finance Department's Letter No. F.D.1/3-3/99 dated 1.7.2002 ("Notification, 2002") and Finance Department's Letter No. F.D.SR. 1/3-10/2004 dated 10.11.2004 ("Notification 2004"). In response to above said application, the Health Department, Government of the Punjab vide Letter No. SO(South) 910/R/85 dated 7.7.2005 asked the Principal, Punjab Medical College, Faisalabad to provide the Succession Certificate and No Marriage Certificate in respect of the petitioner. The Principal, Punjab Medical College, Faisalabad vide Letter No. PT/705/10837/PMC/2005 dated 30.7.2005 supplied the afore-stated documents to the Secretary Health, Government of the Punjab; and, thereafter vide Letter No. PT/705/2844/PMC/2006 dated 21.2.2006 requested the Secretary Health for the sanction of financial benefits to the petitioner. The Health Department, Government of the Punjab, vide Letter No. SO (South) 910/R/85 dated 20.5.2006 informed the petitioner that her request for grant of financial assistance under Notification, 2004 was considered and rejected as Dr. Sibt-e-Hassan was died on 28.9.2004 while Notification, 2004 was issued on 10.11.2004. In these circumstances, the petitioner firstly on 23.6.2006 by relying upon the precedent of Order No. SO(AMI)2-59/86 dated 29.1.2005 whereby widow of Dr. Altaf Hussain, (late), Assistant Professor of Physiology, Punjab Medical College, Faisalabad was granted financial assistance, moved an application before the Chief Minister, Government of the Punjab and requested for the grant of financial assistance under Notification, 2004; and, secondly, through proper channel filed an application dated 28.6.2006 for grant of financial benefit, that is, four months salary (last pay drawn and allowances) under Notification, 2002. The second application was recommended by the Principal, Punjab Medical College, Faisalabad vide Endorsement No. PT-705/9072/PMC/06 dated 3.7.2006 and forwarded to the Secretary Health for necessary sanction. The petitioner on 31.7.2007 also sent reminder/ application to the Secretary Health for grant of benefits under Notification, 2002 but all in vain. Being aggrieved, the petitioner has filed the instant petition.

3. In response to notice issued by this Court, the Health Department, Government of the Punjab, has filed report and para-wise comments wherein it has been stated that Government of the Punjab vide order dated 29.8.2007 has issued sanction for grant of four months salary as per Notification, 2002 to the petitioner. However, with regard to financial benefit under Notification, 2004 it was stated that the same was available to family members of a civil servant who died on or after 10.11.2004. It was also explained that case of Dr. Altaf Hussain was distinguishable as he during service suffered Neuro disease and due to which his case for invalidation was in pipeline; in the meantime he died on 11.10.2004; and, therefore, the case being already in process was sent to Chief Minister for approval for grant of financial assistance and accordingly it was sanctioned vide order dated 29.1.2005.

4. After perusing report and para-wise comments, this Court vide order dated 6.6.2008 directed the departmental representative, who was present in Court, to submit the case of the petitioner before the Chief Minister in line with the case of Dr. Altaf Hussain because the petitioner's grievance seemed to be justified. The case was adjourned for the decision on the summary to be submitted by the department before the Chief Minister. The respondent department did not comply with the above said order and resultantly the petitioner filed contempt petition (i.e. Crl. Org. 772-W/2010) before this Court wherein notice was issued to the Secretary Health. Pursuant to the notice issued in above stated contempt petition, a summary containing proposal for not applying Notification, 2004 with retrospective effect was put up before the Chief Minister and the same was accordingly approved. The petitioner was informed about the decision of the Chief Minister vide Letter No. SO (South) 910/R/85 dated 12.1.2011. Consequent upon the decision of the Chief Minister, the petitioner filed an application under Order VI Rule 17, CPC (i.e. CM. No. 1 of 2011) before this Court seeking permission to amend the petition and to challenge the validity of letter dated 12.1.2011. This application was allowed vide order dated 18.5.2011. Thereafter, vide order dated 5.7.2012 the respondents were directed to produce the relevant record of Dr. Sibt-e-Hassan and Dr. Altaf Hussain. In compliance with orders dated 5.7.2012 and 16.11.2012 the respondents submitted additional reply and placed on record a copy of summary put up before the Chief Minister.

5. The perusal of record, available in this file, and the summary submitted to the Chief Minister reveals that the Health Department, Government of the Punjab has sanctioned: (i) vide Order No. SO (South) 910/R/85 dated 23.4.2005 180 days leave encashment in respect of Dr. Sibt-e-Hassan under Revised Leave Rules, 1981; and, (ii) in pursuance of Notification 2002 four months salary (last pay drawn and allowances) vide Order No. SO (North)910/R/85 dated 29.8.2007 in favour of the petitioner. Confronted with above said two orders, the learned counsel for the petitioner has submitted that although the Health Department, Government of the Punjab has sanctioned the financial benefits under Notification, 2002 yet the payment has not so far been made. In reply thereto the learned Addl. Advocate General, Punjab assisted by Mr. Ejaz Farrukh, Senior Law Officer, Health Department, has submitted that the payment under the above said two orders would be made to the petitioner. Thus, the issue to the extent of grant of benefits under Notification, 2002 stands settled.

6. Now, sole point which requires determination by this Court is as to whether the petitioner may claim financial benefits under Notification, 2004. It is the case of the petitioner that the respondents have already extended facility of Notification, 2004 to the family of Dr. Altaf Hussain (late), Assistant Professor of Physiology, Punjab Medical College, Faisalabad, who died on 11.10.2004 and, therefore, she is also entitled to get the benefit of Notification, 2004. Conversely learned Additional Advocate General has canvassed that Notification, 2004 cannot

be applied retrospectively as husband of the petitioner had died on 29.8.2004 i.e. before issuance of above said notification. I am afraid the contention canvassed by the learned Addl. A.G has no force. The recital of Notification, 2004 unfolds that it was issued because Government of Punjab felt need to provide umbrella cover to all families of civil servants who expire during service so that they may meet the financial problems that crop up after the death of earning hand. This notification is indeed a beneficial notification. It is well settled principle of law that all notifications are applied prospectively and not retrospectively but beneficial notification which seeks to confer certain rights can only be interpreted to apply retrospectively. This principle was recognized by the Hon'ble Supreme Court of Pakistan in case of M/s Army Welfare Susar Mills Ltd. and others v. Federation of Pakistan and others (1992 SCMR 1652) wherein it was held as follows:--

"It seems to be well-settled proposition of law that a notification which purports to impair an existing or vested right or imposes a new liability or obligation, cannot operate retrospectively in the absence of legal sanction, but the converse i.e. a notification which confers benefit cannot operate retrospectively, does not seem to be correct proposition of law."

The aforesaid judgment was followed by Full Bench of the apex Court in the case of Federation of Pakistan and others vs. Shaukat Ali Mian and others (PLD 1999 SC 1026) and relevant extract thereof reads as under:

"Reference may also be made to the case of Messers Army Welfare Sugar Mills Limited and others v. Federation of Pakistan and others 1992 SCMR 1652, in which it has been held that a notification adversely affecting the right of any person cannot operate retrospectively but if the same confers any benefit, it can be made applicable retrospectively."

Thereafter the Hon'ble Supreme Court in the case of Anoud Power General Limited and others Vs. Federation of Pakistan and others (PLD 2001 SC 340) held as follows:

"At this juncture another important aspect of the retrospectivity of notification may also be noted that if the notification has been used for the benefit of the subject then it can be made operative retrospectively but if its operation is to the disadvantage of a party who is the subject of the notification then it would operate prospectively."

The aforesaid view was reiterated by the Hon'ble Supreme Court of Pakistan in the case of Government of Pakistan Vs. M/s. Village Development Organization (PTCL 2005 CL. 138). In view of above stated principle laid down by the Hon'ble Supreme Court of Pakistan, the Notification, 2004 can be applied to the case of Dr. Sibt-e-Hassan and the Financial assistance thereunder can be extended to the petitioner.

7. There is yet another angle to address the question of applicability of Notification, 2004 to the case of the petitioner. The petitioner for getting the benefits of Notification, 2004 has invoked fundamental right guaranteed under Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 which contemplates that all citizens are equal before law and are entitled to equal protection of law. Learned

counsel for the petitioner has contended that both Dr. Sibt-e-Hassan and Dr. Altaf Hussain died before the issuance of Notification, 2004; date of death of Dr. Sibt-e-Hassan and Dr. Altaf Hussain is 29.8.2004 and 11.10.2004 respectively whereas date of issuance of Notification, 2004 is 10.11.2004; and, the government has extended benefit of Notification, 2004 to Dr. Altaf Hussain but denied to Dr. Sibt-e-Hassan which is discriminatory. Conversely, the learned Addl. Advocate General by making reference to the report and para-wsie comments submitted that Dr. Altaf Hussain during service suffered Neuro disease and due to which his case for invalidation was in pipeline; in the meantime he died on 11.10.2004; and, therefore the case being already in process was sent to the Chief Minister for approval for grant of financial assistance which was sanctioned vide order dated 29.1.2005. The record does not bear out the contention canvassed by the learned Addl. Advocate General. The Secretary Health in his additional reply (compliance report) has stated that "original file of the case of Dr. Altaf Hussain is not available as it was sent to the Central Record Room of S & GAD alongwith other weeding files at the time of clearance of encroachments from the corridors of the Health Department's building and the same has not been traced back from the Central Record Room of S&GAD. Therefore, approval of the then Chief Minister on the case could not be traced out despite best efforts to locate the file". Thereafter, the Secretary Health on the basis of "institutional memory" submitted summary to the Chief Minsiter for rejecting the petitioner's application for grant of financial benefits under Notification, 2004. This shows that the Health Department firstly made an attempt to mislead this Court by concealing or mis-stating the facts; and, secondly pulled the wool over the eyes of the Chief Minister by stating incorrect facts in the summary. This conduct cannot be appreciated on any cannon of morality and justice. This indeed constitutes, misfeasance and malfeasance, The public servants or departments should help and not to thwart the grant to the people of their rights. The facts stated in the report and para-wsie comments, additional reply (compliance report) and summary for Chief Minister stand negated from the contents of order No. SO(AMI) 2-59/86 dated 29.01.2005 whereby financial benefits in terms of Notification 2004 were extended to the widow of Dr. Altaf Hussain. Order dated 29.1.2005 reads as under:--

"Sanction is hereby accorded to the grant of financial assistance to the tune of Rs. 8,00,000/- in respect of widow of Dr. Altaf Hussain (Late), Assistant Professor of Physiology, Punjab Medical College, Faisalabad who died on 11.10.2004 during his service, in pursuance of Finance Department's Letter No. FD.SR. 1/3-10/2004 dated 10.11.2004, in addition to other benefits admissible to his family under the rules.
2. Expenditure involved will be met out of the existing budget grant of Punjab Medical College, Faisalabad."

The examination of above said order shows that neither a summary was submitted to the Chief Minister nor he passed any order for the grant of financial benefit under Notification, 2004 to the widow of Dr.Altaf Hussain. Had the Chief Minister passed

any order, then this fact, as was done in the case of the petitioner vide Letter No. SO.(SOUTH) 910/11/85 dated 12.01.2011, should have been mentioned in the order. Moreover, as per contents of Notification, 2004 the approval of Chief Minister is not required for the grant of financial benefits to the family of a civil servant who dies during service. Thus, the respondents have failed to bring on record any fact on the basis of which the case of Dr. Altaf Hussain, may be distinguished. In fact the case of the petitioner and that of the widow of Dr. Altaf Hussain are at par and, therefore, impugned Letter No. SO (SOUTH) 910/R/85 dated 12.01.2011 being violative of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 is not sustainable in the eye of law and the Constitution.

9. In view of above, this petition is allowed Letter No. SO (South) 910/R/85 dated 12.1.2011 issued by the Health Department, Government of the Punjab is set aside and declared to have been passed without lawful authority and of no legal effect; and respondents are directed to make payment of financial assistance to the petitioner in pursuance of Finance Department's Letter No. FD. 1/3-2/99 dated 1.7.2002 and Finance Department's Letter No. FD.SR. 1/3-10/2004 dated 10.11.2004 within a period of two weeks from receipt of certified copy of this order.

(R.A.) Petition allowed

**PLJ 2013 Lahore 307**
**Present: Shahid Waheed, J.**
**M. SHAUKAT HAYAT--Petitioner**
**versus**
**FAZAL MAHMOOD--Respondent**

C.R. No. 2266 of 2004, heard on 7.3.2013.

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

----S. 115--Civil revision--Suit for recovery on basis of oral agreement was decreed--Transaction by producing independent witnesses--Suit was dismissed by First Appellate Court--Conduct of affairs relating to financial transaction, as pleaded was not natural--Question of--Whether Appellate Court was justified in reversing findings of trial Court--Determination--Validity--It is now well established that contract can be in writing as well as oral, and that oral agreement was also enforceable as written agreement provided it fulfills all requirements of a valid contract--Giving of Qarz-e-Hasnah for six months did not appeal to logic as it is matter of common experience that when master/employer lends money to his servant as Qarz-e-Hasnah then ordinarily amount was deducted from salary of employee when total salary was Rs. 800/- pm. and he was not in a position to repay loan in lump sum--If petitioner had made an effort to make payment in presence of witnesses then he would have obtained a receipt from respondent--All facts cost doubt on claim of petitioner--In view of nature of relationship between petitioner and respondent and conduct of parties, First Appellate Court rightly dismissed the suit as petitioner had failed to establish oral agreement on basis of which he claimed recovery from respondent--Petition was dismissed. [Pp. 309, 310 & 311] A, C, D & E

**Oral Agreement--**

----It is also well settled that oral agreement requires for its proof clearest and most satisfactory evidence. [P. 309] B

Mr. Ikram Ullah and Mr. Dost Muhammad Kahoot, Advocates for Petitioner.
Proceeded Ex-parte for Respondent.
Date of hearing: 7.3.2013.

**JUDGMENT**

Petitioner, Muhammad Shaukat Hayat, through this civil revision under Section 115, CPC has called in question the judgment and decree dated 12.6.2004 passed by the learned District Judge, Sargodha, who while setting aside the judgment and decree dated 12.01.2004 passed by the learned Civil Judge Shahpur, dismissed the suit for recovery of Rs.24,800/- filed by him against the respondent.

2. The case, as set out by the petitioner, was that the respondent being his employee asked for Qarz-e-Hasanah of Rs.35,000/- for construction of house. The petitioner paid Rs.24,800/- to the respondent in presence of Muhammad Riaz (PW-2), Khan Muhammad (PW-3) and Muhammad Nawaz on 10.6.2000 at 9.00 a.m at his dera. The respondent had promised to repay the amount within six months. After expiry of six months, when the petitioner demanded his money, the respondent further sought extension of three months. Later on, the respondent refused to repay the amount. The petitioner, therefore, filed a suit for recovery of Rs.24,800/- against the respondent, who in response to summons, entered appearance before the learned trial Court and contested the suit by filing a written statement. The respondent in his written statement asserted that he had been working with the petitioner for ten months and after ten months when he demanded his salary the petitioner firstly got registered a criminal case against him under Section 506, PPC; and thereafter instituted the instant false case as he had never received any loan from him. On pleadings of the parties learned trial Court framed the following issues:--

1. Whether the plaintiff is entitled to recover Rs.24800/- from the defendant on the grounds mentioned in the plaint? OPP
2. Relief

After recording evidence the learned trial Court vide judgment and decree dated 12.01.2004 decreed the suit in favour of the petitioner and against the respondent. Feeling aggrieved, the respondent preferred an appeal before the learned District Judge who accepted the same and dismissed the suit filed by the petitioner. Hence, this petition.

3. Learned counsel for the petitioner in support of instant petition has submitted that the judgment and decree passed by the learned District Judge suffers from misreading and non-reading of evidence available on record and, therefore, it is liable to be set aside; and, that the petitioner by producing witnesses before whom the amount was paid to the respondent had established his claim for recovery of suit amount but this fact was not properly appreciated by the learned District Judge while passing the impugned judgment and decree.

4. Notices were issued to the respondent but despite service he did not turn up to contest this petition and, therefore, he is proceeded against ex-parte.

5. I have heard the learned counsel for the petitioner and perused the record appended with this petition.

6. It is the case of the petitioner that the respondent in the presence of Muhammad Riaz (PW-2), Khan Muhammad (PW-3) and Muhammad Nawaz borrowed Rs.24800/- as Qarz-e-Hasana from him. The learned trial Court decreed the suit in favour of the petitioner on the ground that he had proved the transaction by producing two independent witnesses. The learned District Judge reversed the findings of the trial Court in respect of Issue No. 1 and

dismissed the suit for the reason that conduct of affairs relating to financial transaction, as pleaded, was not natural. The only question which falls for determination in the present petition is as to whether the District Judge was justified in reversing the findings of the trial Court on Issue No. 1. As the judgment of the two Courts below are at variance I have, respectfully following the dictum of Hon'ble Supreme Court in the case of Madan Gopal v. Maran Bepori (PLD 1969 S.C 617), compared the two judgments for their comparative merits and perused the evidence in order to find out as to whether the view taken by the District Judge is valid.

7. The petitioner instituted the suit for recovery of amount on the basis of oral agreement. It is now well established that the contract can be in writing as well as oral; and, that oral agreement is also enforceable as written agreement provided it fulfills all requirements of a valid contract. Reliance in this regard is placed on the case of Bashir Ahmad v. Muhammad Yousaf (1993 SCMR 183). It is also well settled that oral agreement requires for its proof clearest and most satisfactory evidence. The question of sufficiency and insufficiency of proof of an oral contract came up for consideration before the Hon'ble Supreme Court in the case of Ch. Muhammad Hussain and another v Hidayat Ali and 6 others (NLR 1981 SCJ 469) wherein it was held that the subject matter of the controversy, the conduct of the parties, nature of relationship and experience of the parties are all relevant facts for determining the credibility of oral evidence on such matter. Following is the relevant portion of the said reported case:--

"11. As regards the oral evidence and its effect and credibility, the learned counsel is not correct in insisting that oral evidence should be tested for its own worth and should not be related to the contemporaneous human conduct of affairs concerning matter in issue. Voluminous oral evidence may have little, weight where documents are ordinarily required to be prepared or are usually prepared and no satisfactory explanation for departure from the practice is forthcoming. Courts were correct in assuming that in case of agricultural land and transactions spread over a long period and involving huge amounts there should have been some evidence in the nature of writing receipt or acknowledgment to evidence the transactions. In giving effect to such a standard the Courts were not laying down the absolute rule that there could be no oral contract or that an oral contract wherever existing could be upset on such conjectural grounds or that oral evidence carries no weight. The conduct of the parties, the subject-matter of the controversy, the nature of the relationship and experiences of the parties and their handling of the matter, all are relevant for determining the credibility of oral evidence on such matters."

The petitioner in support of the assertions made in the plaint appeared before the learned trial Court as PW-1. During the course of evidence the petitioner admitted that the respondent served as his employee for 10 months and left the job on 20.4.2001; that he got the case registered against the respondent under Section 506,

PPC; that he had not obtained any receipt or writing from the respondent while giving Rs.24800/- as Qarz-e-Hasnah; and, that salary of the respondent was Rs.800/- per month alongwith one maund wheat. The statements of other witnesses also support the version of the petitioner. In the light of statements of PWs and aforesaid principle laid down by the Hon'ble Supreme Court of Pakistan in the case of Ch. Muhammad Hussain (supra), I am inclined to agree with the findings recorded by the learned District Judge that in the given circumstances giving of Qarz-e-Hasnah by the petitioner to the respondent only for six months did not appeal to logic as it is a matter of common experience that when master/employer lends money to his servant/employee as Qarz-e-Hasnah then ordinarily the amount is deducted/adjusted from the salary of the employee particularly when total salary of the respondent was Rs.800/- per month and he was not in a position to repay the loan in lump sum. There is yet another awkward aspect of the case. The petitioner has asserted in the plaint and also during the course of evidence that he gave a sum of Rs.24800/- to the respondent in the presence of witnesses i.e PW-2 and PW-3. If the petitioner had made an effort to make the payment in presence of two witnesses then he should have also obtained a receipt from the respondent. In this perspective the learned District Judge has rightly dismissed the suit as the Hon'ble Supreme Court in the case of Muhammad Hussain (supra) has held that oral evidence may have little weight where documents are ordinarily required to be prepared or are usually prepared and no satisfactory explanation for departure from the parties is forthcoming. All the aforesaid facts cast doubt on the claim of the petitioner. Thus, in view of the nature of relationship between the petitioner and the respondent; and, conduct of the parties the learned District Judge rightly dismissed the suit as the petitioner had failed to establish oral agreement on the basis of which he claimed recovery of Rs.24800/- from the respondent.

8. This petition has no merits and is dismissed leaving the parties to bear their own cost.

(R.A.) Petition dismissed

**2013 Y L R 1121**
**[Lahore]**
**Before Shahid Waheed, J**
**RASOOL BIBI and others---Petitioners**
**Versus**
**ZENAB BIBI and others---Respondents**

Civil Revision No.2540 of 2012, decided on 12th October, 2012.

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

----O. XXXIX, R. 1 & 2---Specific Relief Act (I of 1877) S. 12---Suit for specific performance of agreement to sell immovable property---Temporary injunction, grant of---Delay---Effect---Delay of seven years by the plaintiffs/ applicants cast an aspiration on their conduct---In order to seek a temporary injunction, a party had to be vigilant and should approach the court without loss of time to show its bona fide---Delay in such matters normally disentitled a party from seeking relief of injunction---Revision was dismissed.

M. Y. Corporation (Pvt.) Ltd. v. Messrs Ram Developers and 2 others PLD 2003 Kar. 222 rel.
Ch. Jamil Ahmad Sandhu for Petitioners.
Sardar Muhammad Khalil for Respondents.
Date of hearing: 12th October, 2012.

**JUDGMENT**

**SHAHID WAHEED, J.---**The petitioners, through this Civil Revision under section 115, C.P.C., have called in question order dated 15-6-2012 passed by learned Addl. District Judge, Gujranwala, whereby interim injunction was refused.

2. Briefly, the facts of the case are that the petitioners instituted a suit against the respondents for specific performance of agreement to sell dated 3-6-1991. The petitioners along with the suit also filed an application for grant of temporary injunction. The respondents entered appearance before the learned trial Court and contested the suit by filing a written statement. The respondents also resisted the application filed under Order XXXIX, Rule I and 2, C.P.C. by filing the reply. The learned trial Court after granting opportunity of hearing to the parties dismissed the application vide order dated 9-1-2012. Feeling aggrieved, the petitioners preferred an appeal before the learned Addl. District Judge but the same was dismissed vide order dated 15-6-2012. Hence, this petition.

3. Learned counsel for the petitioners in support of this petition submits that the orders passed by the learned courts below are against the facts and law; that the learned courts below by misreading and non-reading of the documents available on record erroneously declined interim injunction. Conversely, the learned counsel for the respondents vehemently opposes this petition and supports the orders passed by the courts below.

4. 1 have heard the learned counsel for the parties and perused the record.

5. The petitioners for the specific performance of agreement to sell dated 30-6-1991 instituted the suit against respondents on 15-10-2011. The perusal of agreement to sell reveals that the same was executed during the pendency of some litigation. It was agreed between the parties to the agreement that sale-deed would be executed after the decision of litigation. The petitioners, in Paragraph No.3 of the plaint, have stated that the Board of Revenue, Punjab decided the case on 2-10-2003. Despite above said decision of the Board of Revenue, the petitioners waited till 2010. The delay of seven years casts an aspersion on the conduct of the petitioners. It is a settled principle of law that in order to seek injunction, a party has to be vigilant and should approach the Court without loss of time to show its bona fide. The delay in such matters normally disentitles the party from seeking relief of injunction. In this regard reference may be made to the case of M. Y. CORPORATION (Pvt.) Ltd. v. Messrs RAM DEVELOPERS and 2 others (PLD 2003 Karachi 222). The petitioners have, therefore, failed to disclose a prima facie case in their favour which is an essential ingredient for grant of temporary injunction. The contentions raised by the learned counsel for the petitioners has no force as the learned courts below after appreciating the documents available on record have rightly declined interim injunction.

6. This civil revision lacks merit and is accordingly dismissed with no order as to cost.

KMZ/R-39/L Petition dismissed.

**PLJ 2013 Lahore 357**
**Present: Shahid Waheed, J.**
**Major (R) M. JAVED AKHTAR--Appellant**
**versus**
**Mst. MUMTAZ AKMAL, etc.--Respondents**

FAO No. 178 of 2013, decided on 27.3.2013.

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

----O. XLIII, R. 1--Dismissal of suit for non-prosecution--Applications one for restoration of suit and second for grant of interim injunction till restoration of suit--Dismissal of application for grant of interim injunction on ground that suit was not pending--Validity--Interim injunction can only be granted in a pending case and Court Court not grant an injunction after suit had been dismissed in default. [P. 358] A

AIR 1924 Oudh 345, ref.
Mr. Iqtidar-ul-Hassan Hashmi, Advocate for Appellant.
Date of hearing: 27.3.2013.

**ORDER**

Appellant, Major (R) Muhammad Javed Akhtar, through this appeal under Order XLIII, Rule 1, CPC has called in question the order dated 27.2.2013 passed by the learned Civil Judge, 1st Class, whereby his application for grant of interim injunction was dismissed.

2. Briefly the facts of the case are that the appellant instituted a suit for specific performance of agreement to sell dated 26.7.2000 against the respondents. The respondents contested the suit by filing a written statement. The learned Trial Court vide order dated 16.2.2013 dismissed the suit for non-prosecution. On 18.2.2013 the appellant filed an application before the learned trial Court for restoration of the suit. The appellant also filed an application for grant of Interim injunction till the restoration of suit. The learned trial Court vide order dated 27.2.2013 dismissed the application for grant of interim injunction. Hence, this appeal.

3. Learned counsel contends that the application of the appellant for restoration of suit is pending before the trial Court and there is every likelihood of its success and in these circumstances refusal of injunction would adversely affect the rights of the appellant.

4. I have heard the learned counsel for the appellant and perused the record appended with this appeal.

5. Consequent upon dismissal of the suit for non-prosecution by the learned trial Court vide order dated 16.2.2013, the appellant filed two applications, i.e, one, for restoration of the suit; and, second for grant of interim injunction till the restoration of the suit. The learned trial Court dismissed the application for grant of interim injunction on the ground that suit was not pending. The order passed by the learned trial Court is unexceptionable for the reason that interim injunction can only be granted in a pending case and a Court cannot grant an injunction after the suit has been dismissed in default. This view finds support from the judgment rendered in the case of Ram Sarup and others v. King Emperor (AIR 1924 Oudh 345) and relevant extract thereof reads as under:

"One aspect of the matter which does not appear to have been emphasized or considered is the fact that the Subordinate Judge's order was passed after the suit had once been dismissed and before it had been restored to the file. There was, therefore, no suit pending at the time before the Court and it had no jurisdiction to pass any orders. I am of opinion that the injunction granted by the Subordinate Judge was void ab initio and having been made without jurisdiction it can, therefore, be no bar to the release of the property."

6. This appeal being devoid of any merit is dismissed in limine.

(R.A.) Appeal dismissed

**PLJ 2013 Lahore 364**
**[Multan Bench Multan]**
**Present: Shahid Waheed, J.**
**INAM-UL-HAQ--Petitioner**
**versus**
**MUHAMMAD ALI SHAHEEN and another--Respondents**

W.P. No. 11336 of 2011, heard on 4.12.2012.

**Punjab Rented Premises Act, 2009--**

----Ss. 22(2) & 28(2)--Constitution of Pakistan, 1973, Art. 199--Constitutional Petition--Application for eviction of tenant from rented premises--Written reply was patently beyond period of 10 days--Application for leave to contest ejection petition--If practice of entertaining time barred petition then it would defeat spirit of legislation--Question of maintainability--Interlocutory order--Impugned order was interlocutory and, therefore, same cannot be challenged by way of constitutional petition would amount negate provisions of S. 28(2) of Punjab Rented Premises Act which do not provide for an appeal against interlocutory order--Tribunal had passed the order in exercise of jurisdiction which was not vested in it under mandatory provisions of S. 22(2) of Act, and, therefore, principles of law can be assailed before High Court by invoking Art. 199 of Constitution--Petition was accepted. [Pp. 366 & 367] A & C

**Constitution of Pakistan, 1973--**

----Arts. 199 & 203--Constitutional Petition--Scope of High Court--Powers--Interlocutory order--Principle of--Principle of non-interference in interlocutory orders of the Courts below by High Court is a matter of rule and refusal is an exception. [P. 366] B

Ch. Muhammad Arshad, Advocate for Petitioner.
Ch. Muhammad Afzal Jat, Advocate for Respondents.
Date of hearing: 4.12.2012.

**JUDGMENT**

Petitioner, Inam-ul-Haq, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has called in question the order dated 30.7.2011 passed by the learned Rent Controller whereby petitioner's application under Section 22(6) of the Punjab Rented Premises Act, 2009 was dismissed.

2. Briefly the facts of the case are that the petitioner filed an application for eviction of the Respondent No. 1 from the rented premises on the ground of default in payment of rent and expiry of tenancy period. The learned Rent Tribunal issued

notice to Respondent No. 1. The Respondent No. 1 on 07.07.2011 through counsel entered appearance before the learned Rent Tribunal and sought time for submissions of written reply. On 26.7.2011, the Respondent No. 1 submitted written reply to the ejectment petition. Simultaneously, on the same date the petitioner also filed an application under Section 22(6) of the Punjab Rented Premises Act, 2009 for passing final order as Respondent No. 1/ tenant failed to file application for leave to contest within the stipulated time. The learned Tribunal vide order dated 30.7.2011 dismissed the application. Hence, this petition.

3. Learned counsel for the petitioner submits that Respondent No. 1 under Section 22(2) of the Punjab Rented Premises Act, 2009 was bound to file an application for leave to contest within a period of 10 days of his first appearance in the learned Rent Tribunal. In the instant case, the Respondent No. 1 entered appearance on 7.7.2011 and filed written reply on 26.7.2011 i.e. after a lapse of 10 days and, therefore, in these circumstances the Rent Tribunal had no option but to pass final order as it could neither condone delay nor entertain time-barred reply or application for leave to contest the ejectment petition. Conversely, the learned counsel for Respondent No. 1 submits that no notice in the prescribed form was received by the Respondent No. 1/tenant and, therefore, on first appearance it was the duty of the learned Rent Tribunal to inform the tenant to file application for leave to contest within 10 days. He further urges that the learned Rent Tribunal did not pass any speaking order to the above effect and, therefore, the order dated 30.7.2011 passed by the learned Rent Tribunal is valid in all respects. Learned counsel for the Respondent No. 1 also contends that in view of Section 28(2) of the Punjab Rented Premises Act, 2009 the instant petition is not maintainable as the order impugned therein is an interlocutory order passed by the Rent Tribunal.

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

5. The petitioner being a landlord filed an application under the provisions of the Punjab Rented Premises Act, 2009 for the eviction of Respondent No. 1/tenant from the rented premises. According to Section 22(2) of the Punjab Rented Premises Act, 2009 a tenant is required to file an application for leave to contest within a period of 10 days from the date of first appearance in the Rent Tribunal. The perusal of the order-sheet of Rent Tribunal (Annex.B-1) shows that the Respondent No. 1 for the first time appeared before the learned Rent Tribunal on 7.7.2011. Malik Waqas Bashir, Advocate filed power of attorney on behalf of Respondent No. 1 and sought time for filing written reply. The case was accordingly adjourned to 13.7.2011. The Respondent No. 1 did not submit reply on 13.7.2011 and resultantly the case was adjourned to 20.7.2011. Thereafter, the Respondent No. 1 on. 26.7.2011, filed a written reply to the ejectment application. The written reply filed by Respondent No. 1 was patently beyond the period of 10 days as prescribed in Section 22 (2) of the Punjab Rented Premises Act, 2009. This Court in the case of Tayyab Hussain Vs. Rent Controller, Gujrat and others (PLD

2012 Lah. 41) has held that the Rent Tribunal does not enjoy any jurisdiction to condone the time for filing application for leave to contest. Thus, the learned Rent Controller exercised jurisdiction in entertaining written reply (or application for leave to contest ejection petition) which is not vested in it under mandatory provisions of the Statute. For the sake of emphasis, the learned Rent Controller exercised jurisdiction in entertaining written reply (or application for leave to contest ejection petition) which is not vested in it under mandatory provisions of the Statute. For the sake of emphasis, I reiterate the observations recorded in the above cited precedent, that if the practice of entertaining time-barred petition under Section 22(2) of the Punjab Rented Premises Act, 2009 is not curbed, then it would defeat the spirit of legislation.

6. Now, I advert to the objection raised by the learned counsel for the Respondent No. 1 qua the maintainability of the instant petition. Learned counsel for Respondent No. 1 submits that the order impugned in this petition is interlocutory and, therefore, the same cannot be challenged by way of constitutional petition as allowing such an order to be impugned by way of constitutional petition would amount to negate the provisions of Section 28(2) of the Punjab Rented Premises Act, 2009 which do not provide for an appeal against an interlocutory order. It is correct that interlocutory order under Section 28(2) is not amenable to appeal but if the same is arbitrary or capricious or against the well-settled proposition of law, this Court is bound to interfere with the same in order to obviate miscarriage of justice. The principle of non-interference in interlocutory orders of the Courts below by this Court is a matter of rule and refusal is an exception. The analysis of the various precedents on the scope of the High Court's powers under Articles 199 and 203 gives the following principles:--

(a) Interlocutory orders, passed by the Courts subordinate to the High Court, against which remedy of appeal or revision has been excluded are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court;

(b) Certiorari, under Article 199 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate Court is found to have acted (i) without jurisdiction--by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction--by overstepping or crossing the limits of jurisdiction or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice;

(c) Supervisory jurisdiction under Article 203 of the Constitution is exercised for keeping the subordinate Courts within the boundaries of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though

available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction; and

(d) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (1) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

I have already held that the learned Rent Tribunal has passed the impugned order in exercise of jurisdiction which was not vested in it under the mandatory provisions of Section 22(2) of the Punjab Rented Premises Act, 2009 and, therefore, the same in view of above stated principles of law can be assailed before this Court by invoking Article 199 of the Constitution of Islamic republic of Pakistan, 1973. Thus, the objection raised by the learned counsel for Respondent No. 1 is without any substance and the same is over-ruled.

7. In view of above, this petition is accepted by setting aside order dated 30.7.2011 passed by the learned Rent Tribunal and the same is declared to have been passed without lawful authority and of no legal effect. The learned Special Judge Rent/Rent Tribunal is directed to proceed with the matter and pass an order under Section 22(6) of the Punjab Rented Promises Act, 2009.

(R.A.) Petition accepted

**PLJ 2013 Lahore 402**
**Present: Shahid Waheed, J.**
**MATLOOB HUSSAIN--Petitioner**
**Versus**
**M.B.R., etc.--Respondents**

W.P. No. 14620 of 2013, decided on 11.6.2013.

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

----O. XXIII, R. 1--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Unconditionally withdrawn of petition--Tenor of order--Not to seek permission to file a fresh petition and had withdrawn unconditionally--Under Order 23, Rule 1 of CPC, suit can be withdrawn at any time whenever plaintiff desires and it is not possible for Court to compel plaintiff to continue a suit--Principles embodied in Order 23 Rule 1, CPC are applicable to constitutional petition as proceeding u/Art. 199 of Constitution relating to civil matters are civil proceedings--Petitioner was precluded to institute instant petition in view of unconditional withdrawal of earlier petition involving the same subject matter--Petition was dismissed. [P. 405] A, B & C

PLD 1968 Pesh. 134, PLD 1971 Lah. 395, PLD 1970 SC 1 & 1989 SCMR 995, ref.
Mr. Muhammad Ashraf Pasha, Advocate for Petitioner.
Date of hearing: 11.6.2013.

**ORDER**

Respondent No. 5, Namdar Khan, had filed an application under Section 135 of the Land Revenue Act, 1967 before the Tehsildar/ Respondent No. 4 for partition of jointly owned landed property against 23 persons including the present petitioner, Matloob Hussain. The Tehsildar/AC-I(Respondent No. 4) vide order dated 28.9.2004 approved the "Naqsha Jeem". The petitioner alongwith 8 others, feeling aggrieved by order dated 28.9.2004, preferred an appeal under Section 161 read with Section 142(ii) of the Land Revenue Act, 1967, before the District Officer (Revenue)/Collector (Respondent No. 3) which was dismissed vide order dated 12.7.2005 (Annex. C). Thereafter, the petitioner alongwith others filed an appeal under Section 161 of Land Revenue Act, 1967 before the Executive District Officer (Revenue)/Respondent No. 2 and the same was also dismissed vide order dated 16.2.2007. The petitioner assailed the order dated 16.2.2007 before the Board of Revenue, Punjab, through a revision petition under Section 164 of the Land

Revenue Act, 1967. Learned Member (Judicial-V), Board of Revenue, Punjab vide order dated 2.4.2007 dismissed the revision (i.e. ROR No. 639-07) filed by the petitioner. Finally, the petitioner moved a review petition before the learned Member (Judicial-V), Board of Revenue, Punjab. The review petition (i.e. Review Petition No. 116-07) filed by the petitioner was also dismissed vide order dated 9.10.2008. The petitioner being dis-satisfied with the afore-stated orders moved this Court through W.P. No. 9019-13 which was dismissed as withdrawn vide order dated 15.4.2013. Now, the petitioner has filed the petition in hand for assailing orders dated 28.9.2004 and 12.7.2005, passed by the Tehsildar/AC-I and Executive District Officer (Revenue) respectively; and orders dated 2.4.2007 and 9.10.2008, passed by the Board of Revenue Punjab.

2. The matter directly and substantially in issue in the present petition is the same matter which was directly and substantially in issue in the former petition, that is, W.P. No. 9019-13. The earlier petition was withdrawn unconditionally from this Court vide order dated 15.4.2013. In this context, at the outset of hearing, I confronted the learned counsel for the petitioner with the bar contained in Order XXIII, Rule 1, CPC and asked as to how, the instant petition is maintainable. In response to Court query, learned counsel for the petitioner has submitted that consequent upon the dismissal of Review Petition No. 116-07 by the Board of Revenue, parties to the petition agreed to resolve the dispute through arbitration and in consequence thereof an arbitrator was appointed who after hearing the parties announced award on 2.11.2012. At the time of hearing of earlier petition, i.e. W.P. No. 9019-13, copy of award was not available and, therefore, the same was withdrawn for the time being. He has further submitted that the petitioner after obtaining a copy of the award has filed the instant petition; which is maintainable.

3. I am afraid the contention raised by the learned counsel for the petitioner has no force. The petitioner in earlier petition i.e. W.P. No. 9019-13 made the following prayer:--

"It is, therefore, most respectfully prayed that this writ petition may kindly be allowed and the impugned orders dated 28.9.2004, 12.7.2005 passed by the EDO and DO(Revenue) and orders dated 2.4.2007 and 9.10.2008 passed by the Board of Revenue, Punjab may kindly be set aside, in the interest of justice.

It is also prayed that meanwhile, operation of the impugned orders may kindly be suspended and status quo regarding the possession of the parties may kindly be ordered to be maintained, in the interest of justice.

Any other relief which this Hon'ble Court deems fit and appropriate under the aforementioned facts and circumstances of the case may also be granted to the petitioner".

Above said petition was dismissed as withdrawn vide order dated 15.4.2013 which reads as under:--

"After arguing the case at some length, learned counsel for the petitioner requests to withdraw this writ petition. Therefore, the same is dismissed as withdrawn."
Now, the petitioner has filed the instant petition with following prayer:--

"It is, therefore, most respectfully prayed that this writ petition may kindly be allowed and the impugned orders dated 28.9.2004, 12.7.2005 passed by the EDO and DO(Revenue) and orders dated 2.4.2007 and 9.10.2008 passed by the Board of Revenue, Punjab may kindly be set aside, in the interest of justice.

It is also prayed that meanwhile, operation of the impugned orders may kindly be suspended and status quo regarding the possession of the parties may kindly be ordered to be maintained, in the interest of justice.

Any other relief which this Hon'ble Court deems fit and appropriate under the aforementioned facts and circumstances of the case may also be granted to the petitioner".

The afore-stated facts evince that subject matter of both the petitions is same; prayer of W.P. No. 9019-13 and prayer made in the petition in hand is verbatim; and, that tenor of order dated 15.4.2013 shows that the petitioner's counsel did not seek permission to the a fresh petition and had withdrawn W.P. No. 9019-13 unconditionally. Under Order XXIII, Rule 1, CPC a suit can be withdrawn at any time whenever plaintiff desires and it is not, possible for the Court to compel plaintiff to continue a suit as was held in the case of "Karim Gull and another vs. Shehzad Gull and others" (PLD 1968 Peshawar 134), "Malik Mumtaz Ali vs. Pakistan through Secretary, Refugee and Works, Government of Pakistan, Rawalpindi and three others" (PLD 1971 Lah 395). The principles embodied in Order XXIII, Rule 1, CPC are applicable to a constitutional petition as proceedings under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 relating

to civil matters are civil proceedings in view of judgment of their Lordships of the Supreme Court of Pakistan in "Hussain Bukhsh vs. Settlement Commissioner and others" (PLD 1970 SC 1), "Muhammad vs. Addl. Secretary Government of NWFP Home and Tribal Affairs Department and 8 others" (1989 SCMR 995). Thus, I hold that the petitioner is precluded to institute present petition in view of unconditional withdrawal of the earlier petition involving the same subject matter.

4. This petition is, therefore, dismissed as being incompetent.

(R.A.) Petition dismissed

**PLJ 2013 Lahore 412**
**Present: Shahid Waheed, J.**
**MUHAMMAD SHAFIQ--Petitioner**
**versus**
**SUI GAS, etc.--Respondents**

W.P. No. 10748 of 2013, heard on 11.6.2013.

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

----O. XXXIX, Rr. 1 & 2--Permanent injunction--Restore gas supply to petitioner's premises subject to payment of monthly gas consumption charges--Violation of principle of natural justice--Valid ground for assailing revisional order--It is an elementary principle of natural justice that no party can be bound by an order passed behind his back--Principle of natural justice is implied in all provisions of, CPC an order which affected a party was to be passed only after notice to him--This is a clear violation of principle of natural justice and depicts that Distt. Judge had exercised jurisdiction illegally and with material irregularity. [Pp. 413 & 414] A & B

Mr. Muhammad Imran, Advocate for Petitioner.
Rana Zia-ul-Islam Manj, Advocate for Respondents.
Date of hearing: 11.6.2013.

**JUDGMENT**

Petitioner, Muhammad Shafiq, feeling aggrieved by Gas Bill for the month of December, 2011 amounting to Rs.387,900/- instituted a suit for declaration with permanent injunction against the respondents before the learned Civil Judge, Lahore. In response to summons the respondents entered appearance before the learned trial Court and contested the suit by filing written statement. The learned trial Court while disposing of petitioner's application under Order XXXIX, Rules 1 & 2, CPC vide order dated 8.3.2013, directed the respondents to restore gas supply to the petitioner's premises subject to payment of monthly gas consumption charges. Feeling aggrieved by order dated 8.3.2013, the Sui Northern Gas Pipe Lines

(Respondent No. 1) filed a revision petition under Section 115, CPC. The learned Addl. District Judge, Lahore vide orders dated 9.4.2013 disposed of the revision and modified the order of learned trial Court in the following terms:--

"The impugned order prima facie is defective on this score. Hence is modified that the respondent must deposit the consumption, liability to the tune of Rs. 1,93,404/- under protest with the Sui Gas Department and then his restoration of connection be made, according to the direction passed in the impugned order and the amount of Rs. 1,87,756/- levied on the tempering of Meter is also a liability which is not acceptable to respondent, on this score the respondent must amend his pleadings according to new grounds, available to him relating with the bill of December, 2012 as explained by the Sui Gas department and thus the learned trial Court may proceed further on the subject. If any grievance is still available to the respondent side then learned trial Court will procure his version in writing before itself and after giving opportunity to the Sui Gas Department, for hearing on the subject will pass an order. So any aspect of the matter which is not attended by the Court may be re addressed."

Through the petition in hand, the petitioner has called in question the order dated 9.4.2013, passed by the learned Addl. District Judge.

2. Since a short question is involved, this petition is heard today as a pacca matter.

3. Learned counsel for the petitioner has urged a sole ground that the learned Addl. District Judge, Lahore without issuing any notice and affording opportunity of hearing to the petitioner could not modify the order dated 8.3.2013, passed by the learned trial Court. Conversely, learned counsel for the respondents though admits that the learned Addl. District Judge has passed the impugned order without issuing any notice to the petitioner yet submits that this irregularity does not vitiate the impugned order.

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

5. Violation of principle of natural justice is a valid ground for assailing a revisional order passed by the learned Addl. District Judge before this Court under

Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. It is an elementary principle of natural justice that no party can be bound by an order passed behind his back. Principle of natural justice is implied in all provisions of Civil Procedure Code, that an order which affects a party is to be passed only after notice to him. In this regard it would be apposite to cite following extract from the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of "Commissioner of income Tax, East Pakistan vs. Saeedur Rehman" (PLD 1964 SC 410):--

"We don't think the mere absence of a provision as to notice can override the principle of natural justice that an order affecting the rights of a party cannot be passed without an opportunity of hearing to that arty. A reference to provision in other statute will show that the existence of a provision of notice as to one proceeding has not been accepted as an argument against the need of notice in the case of proceeding with respect to which there is no express provision of notice. Under the Criminal Procedure Code there is a distinct provision in the case of an appeal for notice of hearing to the appellant, but there is no such provision in the case of a revision petition in the High Court. It cannot be urged, however, that the right of hearing in a revision petition has thereby been excluded. In the Civil Procedure Code similarly there is a provision in Order XLI, Rule 22 directing notice of the hearing of appeal to be given to the appellant and, there is no such provision with respect to a proceeding under Section 115, CPC, yet it cannot be said that it is not necessary to hear the parties affected in a proceeding under Section 115, CPC. The fact that the proceedings are judicial or quasi-judicial in nature is sufficient to entitle a party to a hearing in the absence of a specific provision to the contrary".

In the instant case, the learned Addl. District Judge, Lahore has passed the impugned order without issuing notice to the petitioner. This is a clear violation of the principle of natural justice and depicts that the learned Addl. District Judge has exercised the jurisdiction illegally and with material irregularity. Thus, the order impugned in this petition being illegal is not sustainable in the eye of law.

6. Without going in other questions raised in this petition, I am inclined to allow this petition on the basis of aforesaid preliminary substantial question of law raised by the petitioner. The impugned order dated 9.4.2013 passed by the learned Addl. District Judge, Lahore is set aside and declared to have been passed without lawful authority and of no legal effect. The learned Addl. District Judge, Lahore is directed to decide the revision petition afresh on merits and after affording opportunity of hearing to the parties to the revision petition. Parties are directed to appear before the learned Addl. District Judge, Lahore on 27.6.2013.

(R.A.) Petition allowed

**PLJ 2013 Lahore 415**
**Present: Shahid Waheed, J.**
**MUHAMMAD SIDDIQUE--Petitioner**
**versus**
**DIVISIONAL FOREST OFFICER, OKARA--Respondent**

W.P. No. 1089 of 2011, heard on 30.5.2013.

**Constitution of Pakistan, 1973--**

----Art. 199--Punjab Employees Efficiency, Discipline and Accountability Act, 2006--Scope--Ss. 21 & 2(n)--Punjab Civil Service Pension Rules, 1963--R. 1.8--Show cause notice--Pension for retired employee--Proceeding under PEEDA Act, might be initiated against retired employee--Sanctioned pension cannot initiate proceedings--Question of--Whether D.F.O. after retirement of petitioner could initiate proceeding--Right to effect recovery of disputed amount--Validity--It is well established principle that when an authority passes an order which was within its competence it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other rule and validity of impugned order would be judged on consideration of its substance and not of its form--Court must ascribe the act of public servant to an actual existing authority under which it would have validity rather than to one under which it would be void--High Court can entertain instant petition as orders/notices impugned were void ab initio. [Pp. 420 & 424] A & C

**Punjab Employees Efficiency, Discipline and Accountability Act, 2006--**

----Ss. 2(b)(ii) & 19--Constitution of Pakistan, 1973--Art. 199--Appeal to Punjab Service Tribunal--Remedy of appeal--Sanction of pension--Lapse of four years--Proceeding under PEEDA Act may be initiated against retired employee of government during his service or within one year of his retirement and finalized not later than two years of retirement--Validity--Only a person in government service or who was a member of civil service of province or who holds a civil post in connection with affairs of province or any employee serving in any Court or tribunal being aggrieved by an order passed u/S. 16 or 17 might--Preferred an appeal before Punjab Service Tribunal--Petitioner being retired person does not fall within definition of employee given in S. 2(h) and therefore, had no remedy of appeal--PEEDA Act was not applicable to petitioner and respondent by initiating proceedings against petitioner went out of law and exercised a jurisdiction not vested in him by law--It is settled principle of law that High Court might y control action of an administrative or executive officer by an appropriate order. [P. 423] B
Dr. Ehsan-ul-Haq Khan, Advocate for Petitioners.
Mr. Shahid Mubeen, Addl. A.G. for Respondent No. 1. Date of hearing: 30.5.2013.

## JUDGMENT

The petitioner, Muhammad Siddique, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has called in question the show-cause Notice No. 1582/EC dated 22.12.2010 issued by the respondent under the provisions of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 and Notice No. 998/AC dated 31.12.2010 for depositing Rs.2550/- in the Government Treasury.

2. It has been stated in the petition that the petitioner after having rendered service of 37 years 5 months and 11 days stood retired on 14.5.2004 as Forest Guard from the Forestry, Wildlife and Fisheries Department, Government of the Punjab and the Competent Authority released his pension vide Pension Payment Order dated 11.06.2004; that consequent upon sanction of pension and after a lapse of about four years, the respondent, under the provisions of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 (PEEDA) issued a notice dated 22.12.2010 whereby the petitioner was called upon to show-cause as to why one or more of the penalties as prescribed in Section 4 of the PEEDA be not imposed in respect of the allegation set out therein; that on 31.12.2010 the respondent issued another Notice No. 998/AC whereby the petitioner was asked to deposit Rs. 2550/- in the Government treasury; and, that the above said notices are void as the same have been issued without lawful authority and jurisdiction.

3. In response to notice issued by this Court the respondent has submitted parawise comments in which with respect to show-cause notice dated 22.12.2010 it has been stated that petitioner while posted at Renala Forest Range got registered FIR No. 548/2002 dated 17.12.2002 at Police Station Saddar Renalakhurd, in respect of theft of trees worth valuing Rs. 70,000/- which was filed by the Court on 16.10.2006 due to non-prosecution by the petitioner. The Audit Party conducted the audit of the year 2003-04 and raised audit objection vide para No. 5.6.4/2003-04 about the above said government loss. In pursuance of above audit objection a show-cause notice dated 22.12.2010 has been issued to the petitioner. As regards recovery notice dated 31.12.2010, the respondent in his comments has submitted that the petitioner during service issued the damage report (i.e. forest case No. 199/2002-03) but he did not adopt any legal action in this regard and this inaction caused loss of Rs. 2550/-to the Government and resultantly in pursuance of Audit Para No. 14/2002-03 the proceedings were initiated under PEEDA and finally vide Order No. 160/OFD dated 24.6.2010 recovery of Rs. 2550/- was imposed on the petitioner.

4. The instant petition, with the concurrence of the learned counsel for the parties, is heard today as pacca matter.

5. It has been canvassed with vehemence by the learned counsel for the petitioner that the respondent after having sanctioned the petitioner's pension cannot initiate proceedings against the petitioner under PEEDA and, thus, the notices impugned in this petition have been issued without lawful authority and jurisdiction. Learned Addl. Advocate General controverts the above plea and submits that provisions of PEEDA are applicable to retired employees of government and, therefore, the notices, impugned in this petition, are valid. The question which requires determination in this petition is as to whether the respondent after the retirement of the petitioner could initiate proceedings under PEEDA and impose penalty upon him? The answer to this question is available in Section 1 and 21 of the PEEDA which read as under:--

"1. Short title, extent, commencement and application:
(1) This Act may be called the Punjab Employees Efficiency, Discipline and Accountability Act, 2006.
(2) It extends to the whole of the Punjab.
(3) It shall come into force at once.
(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."
Section 21 of PEEDA is also relevant and the same reads as under:
"Proceedings under this Act.--Subject to this Act, all proceedings initiated against the employees having retired or in service, shall be governed by the provisions of this Act and the rules made thereunder:
Provided that in case of retired employee, the proceedings so initiated against him shall be finalized not later than two years of his retirement.
(2) The competent authority may by an order in writing, impose one or more penalties specified in clause (c) of Section 4, if the charge or charges are proved against the retired employee."

The afore-cited provisions evince that proceedings under PEEDA may be initiated against a retired employee of government provided the same are: (i) initiated against him during his service or within one year of his retirement; and, (ii) finalized not later than two years of his retirement. The time lag inserted in the above referred provision of law is manifestly intended to safeguard the interest of the pensioners so that the sword of Democles should not hang upon them for an indefinite period. It is an admitted fact that the petitioner stood retired as Forest Guard on 14.5.2004; the pension was sanctioned on 11.6.2004; and, the proceedings under PEEDA were initiated after a lapse of about four years, from the date of retirement, against the petitioner. In these attending circumstances the provisions of PEEDA were not applicable to the petitioner as neither the proceedings under PEEDA were initiated

against him during his service nor within one year of his retirement. Thus, due to lapse of time the proceedings under the PEEDA could not be initiated against the petitioner and resultantly no punishment could be inflicted thereunder.

6. Learned Addl. Advocate General, Punjab by relying upon Notification No. FD(M-REC)2-18/2001 (Advice) dated 19.11.2001 issued by the Finance Department, Government of the Punjab has contended that cases where any audit para is pending against the retiring government servant the pension for such employee is not withheld and the same is released after obtaining an undertaking on the stamp paper from the retiring government servant to the effect that in case the recovery is established at any stage against him then he will be liable to pay the amount of recovery. He submitted that in pursuance of above said notification the petitioner also executed an undertaking and made himself liable for any arrears against him; and, thus notwithstanding the lapse of four years the respondent in pursuance of Audit Paras was well within his right to effect recovery of disputed amount from the petitioner. The Notification relied upon by the learned Addl. Advocate General reads as under:--

"No:FD(M-Rec)2-18/2001(Advice)
GOVERNMENT OF THE PUNJAB
FINANCE DEPARTMENT
November 19, 2001
To,
All Administrative Secretaries,
Government of the Punjab.
Subj: GRANT OF NDC TO RETIRING GOVERNMENT SERVANTS INVOLVED IN MISAPPROPRIATION/EXBEZZLEMENT & IRREGULARITIES ETC.
Reference subject cited above.
2. The instructions issued by Finance Department vide No. FD(M-11)-10/98-2000(P), dated 11.7.2000 provide guide lines to the departments that the government losses pointed out in the audit paras should be finalized well before the retirement of the employee concerned. Further to ensure that No Demand Certificate should not be issued to officials involved in audit para/observation in connection with the financial irregularities.
2. It has been observed that amount mentioned in the audit para relating to the retiring government servants is with-held from commuted pension of retired government servant till the settlement of audit para. The D.G. Civil Audit has also mentioned that with-holding of pension case of an employee for clearance of audit para/report relating to his tenure of posting, is unfair unless the personal involvement of an employee is established.
3. It is, therefore, clarified that in cases where any audit para is pending against the retiring government servants the pension for such employees may not be with-held and an undertaking on the stamp paper may be obtained from the retiring

government servants that in case the recovery is established at any stage against the individual then he will be liable to pay the amount of recovery.

Sd/-
(Karim Bakhsh Abid)
Addl. Finance Secy. (Monitoring)."

A bare perusal of the above said notification reveals that in respect of issuance of No Demand Certificate (NDC) for the purpose of release of pension the following guidelines have been provided to the Government Departments:

(i) the Government losses pointed out in the audit paras should be finalized well before the retirement of an employee;

(ii) No Demand Certificate should not be issued to officials involved in audit para/observation in connection with the financial irregularities; and

(iii) where any audit para is pending against the retiring government servant the pension for such an employee may not be withheld and an undertaking on the stamp paper may be obtained from the retiring government servant that in case a recovery is established at any stage against the individual then he will be liable to pay the amount of recovery.

In the case in hand, no audit para in respect of financial irregularities was pending against the petitioner at the time of his retirement and, therefore, No Demand Certificate (NDC) was issued for the sanction of pension. Needless to observe here that allegations on the basis of which impugned notices have been issued neither pertain to misappropriation/embezzlement and financial irregularities nor the same can be attributed to the petitioner as they relate to departmental inaction/slackness/negligence for the reason that after retirement of the petitioner, it was the duty of his successor to pursue the criminal cases i.e. FIR No. 548/2002; and, forest case No. 199/2002-03. Without delving into the issue as to whether the allegations levelled against the petitioner constitute "misconduct"' within the contemplation of Section 2(n) of PEEDA, it is suffice to say that the respondent by absolving the successor incumbent and relying upon the above said notification dated 19.11.2001 could not saddle the petitioner with the responsibility/ losses which were determined after the sanction of his pension.

7. It is well established principle that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other rule, and the validity of the impugned order should be judged on a consideration of its substance and not of its form. The principle is that the Court must ascribe the act of a public servant to an actual existing authority under which it would have validity rather than to one under which it would be void. (See "P. Balakotaiah Vs. Union of India and others" AIR 1958 SC 232 at p. 236). Being conscious of above said principle of law, I asked the learned Addl. Advocate General to cite any provision of law under which disciplinary proceedings could be initiated and penalty could be imposed on the petitioner. In response to above query, learned Addl. Advocate

General referred Rule 1.8 of the Punjab Civil Service Pension Rules, 1963. It is necessary to set out in extenso Rule. 1.8 which reads as under:
"1.8 (a) Good conduct is an implied condition of every kind of pension. Government may withhold or withdraw a pension or any part of it if the pensioner be convicted of serious crime or be found to have been guilty of grave misconduct either during or after the completion of his service, provided that before any order to this effect is issued, (the pension sanctioning authority shall give full opportunity of to the pensioner to vindicate his position).
(b) Government reserves to themselves the right of recovery from the pension of Government pensioner on account of losses found in judicial or departmental proceedings to have been caused to Government by the negligence, or fraud of such Government pensioner during his service, provided that such departmental proceedings shall not be instituted after more than a year from the date of retirement of the Government pensioner.
(Note: If the departmental proceedings are not completed within one year after retirement of the government servant, he may be allowed to draw up to 80% or less of full pension so as to ensure that government loss in full is recovered from the balance. In the case of judicial proceedings, judgment of the Court may be awaited. If the proceedings are delayed beyond one year after retirement, reduced pension may be allowed as in the case of pensioners facing departmental proceedings.}
(c) In case the amount of pension granted to a government servant be afterwards found to be in excess of that to which he is entitled under the rules, he shall be called upon to refund such excess."

A plain reading of both clauses (a) and (b) of above cited rule would however, make it at once clear that each clause is a self-contained and independent provision designed to cover two entirely different situations. Under clause (a) maintenance of "good conduct" is made an inseparable condition for the grant or continuance of pension to a government servant and the government reserves to itself plenary power to withhold or withdraw a pension or any part thereof if the pensioner is convicted for serious crime or found guilty of grave misconduct whether during or after completion of his service. Admittedly clause (a) is not attracted to the facts of instant case as the petitioner has neither been convicted for serious crime nor found guilty of grave misconduct during or after completion of his service. Clause (b) of Rule 1.8, however, empowers the government to order recovery from the pension of the whole or any part of any pecuniary loss caused to the government if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct or negligence during his service. This clause also does not rescue the respondent as neither the petitioner during his service was found, in judicial or departmental proceedings, guilty of causing losses due to his negligence or fraud nor any departmental proceedings were initiated against the petitioner within a year from the date of his retirement and this view finds support from the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of The Government of NWFP through Secretary of the Government NWFP Communication and Works

Department, Peshawar Vs. Muhammad Said Khan and another (PLD 1973 SC 514) and relevant extract whereof reads as under:

"It must now be taken as well-settled that a person who enters Government service has also something to look forward after his retirement, to what are called retirement benefits, grant of pension being the most valuable of such benefits. It is equally well-settled that pension like salary of a civil servant is no longer a bounty but is a right acquired after putting in satisfactory service for the prescribed minimum period. A fortiori, it cannot be reduced or refused arbitrarily except to the extent and in the manner provided in the relevant rules. Conversely full pension admissible under the rules is not be given as a matter of course unless the service rendered has been duly approved (See Art. 470, Civil Service Regulations). It is equally well settled that if the service has not been thoroughly satisfactory, the authority sanctioning the pension is empowered under the said Article to make such reduction in the amount as it may deem proper. This power is however exercisable only before pension is actually sanctioned."

8. The learned Addl. Advocate General also raised an objection regarding the maintainability of this petition. In this context he submitted that the respondent under the provisions of PEEDA passed an Order No. 16O/OFD dated 24.06.2010 and imposed a penalty of recovery of Rs.2550/-; that the Notice No. 998/AC was issued for the implementation of above said order; and, that against order dated 24.6.2010 the petitioner had the remedy of appeal under Section 19 of the PEEDA before the Punjab Service Tribunal. The objection raised by the learned Addl. Advocate General requires appraisal of Section 19 of PEEDA which reads as under:

"19. Appeal before Punjab Service Tribunal.--(1) Notwithstanding anything contained in any other law for the time being in force, any employee aggrieved by any final order passed under Section 16 or Section 17 may, within thirty days from the date of communication of the order, prefer an appeal to the Punjab Service Tribunal established under the Punjab Service Tribunals Act, 1974 (Pb. Act, IX of 1974).
(2) If a decision on a departmental appeal or review petition, as the case may be, filed under Section 16 is not received within a period of sixty days of filing thereof, the affected employee may file an appeal in the Punjab Service Tribunal within a period of thirty days of the expiry of the aforesaid period, whereafter, the authority with whom the department appeal or review is pending, shall not take any further action."
The reading of above said Section 19 unfolds that any employee aggrieved by any final order under Section 16 or Section 17 may, within thirty days from the date of communication of the order, prefer an appeal to the Punjab Service Tribunal. The word "employee" has been defined in Section 2(h) of the PEEDA and the same is reproduced below for facility of reference:

"(h) "employee" means a person:--

(i) in the employment of a corporation, corporate body, autonomous body, authority, statutory body or any other organization or institution set up, established, owned, managed or controlled by the Government, by or under any law for the time being in force or a body or organization in which the Government has a controlling share or interest and includes the chairman and the chief executive and the holder of any other office therein; and

(ii) In government service or who is a member of a civil service of the province or who holds a civil post in connection with the affairs of the province or any employee serving in any Court or tribunal set up or established by the Government, but does not include a Judge of the High Court or any Court subordinate to the High Court, or any employee of such Courts;"

The cumulative reading of Section 19 and Section 2(h)(ii) leads to irresistible conclusion that only a person in government service or who is a member of a civil service of the province or who holds a civil post in connection with the affairs of the province or any employee serving in any Court or tribunal being aggrieved by an order passed under Section 16 or Section 17 may prefer an appeal before the Punjab Service Tribunal. The petitioner being a retired person does not fall within the definition of "employee" given in Section 2(h) and, therefore, had no remedy of appeal as canvassed by the learned Addl. Advocate General. In the case in hand, as stated above, the PEEDA was not applicable to the petitioner and, therefore, the respondent by initiating the proceedings thereunder against the petitioner went out of the law and exercised a jurisdiction not vested in him by law. It is settled principle of law that the High Court may control action of an administrative or executive officer by an appropriate order if he:

(a) goes out of law, i.e. exercises jurisdiction not vested in him by law;

(b) wrongly denies or omits to exercise a jurisdiction;

(c) where the law under which he acts prescribes the manner in which he is to act, materially departs from that law.

Thus this Court can entertain this petition as the orders/notices impugned therein are void ab initio.

9. In view of above, this petition is accepted and the impugned show-cause Notice No. 1582/EC dated 22.12.2010 and Notice No. 998/AC dated 31.12.2010, both issued by the respondent, are set aside and declared to have been issued without lawful authority and of no legal effect.

(R.A.) Petition accepted

**PLJ 2013 Lahore 424**
**Present: Shahid Waheed, J.**
**Syed MUSHTAQ HUSSAIN BUKHARI--Petitioner**
**versus**
**PEPCO, etc.--Respondents**

W.P. No. 7539 of 2013, heard on 29.5.2013.

**Judicial Review--**

----Scope of--Reappraise and review material touching question of performance--It is true that judicial review of matters that fall in realm of contracts is also available before superior Courts but scope of any such review is not all pervasive--It does not extend to Court substituting its view for that taken by decision making authority--Judicial review is not so much with correctness of ultimate decision as it is with decision making process unless of course decision itself is so perverse or irrational or in such outrageous defiance of logic that person taking decision can be said to have taken leave senses. [Pp. 427 & 429] A & B
AIR 2010 SC 463 & 2013 SCMR 455, rel.

**Constitution of Pakistan, 1973--**

----Art. 199--Constitutional Petition--Service contract was terminated--Sought for issuance of direction for regularizations of service--There is no doubt that if a person is employed on contract basis and if terms of employment provide manner of termination of his service, same can be terminated in terms thereof--Authority in exercise of condition of service was terminated the services of petitioner without any stigma--Petitioner having entered into contract of service had not vested right to seek regularization of his employment, which was discretionary with the master--Master is well with his right to retain or dispense with service of an employee on basis of satisfactory or performance--Petitioner after having accepted conditions of service had no locus standi to file constitutional petition seeking writs of prohibition and mandamus to authority to refrain from terminating his service and to retain on his existing post on regular basis--Petition was dismissed. [P. 427] C & H
2005 SCMR 642, PLD 2010 SC 841, 2011 PLC (CS) 623 & 2013 SCMR 304, rel.

**Master and Servant--**

----Rules of PEPCO--Non-statutory--Relationship between petitioner and company was of master and servant--If master rightfully ends the contract, there can be no complaint--If master wrongfully ends contract, then servant can pursue a claim for damages--So, even if master wrongfully dismisses servant in breach of contract, employment was effectively terminated. [P. 428] D

**Constitution of Pakistan, 1973—**

----Art. 199--Constitutional petition--Writ of mandamus--Service contract was terminated--Prayed for issuance of direction for regularizations of his service--Question of--Whether termination of contractual appointment stands vitiated by any legal infirmity to call for interference--Maintainability of writ of mandamus--Validity--It is also well settled principle of law that contract employee cannot file a writ petition to seek redress in respect of grievance relating to terms and conditions of service--Appointment of petitioner was contractual in nature and there is no statutory obligation as between company and petitioner--Any duty or obligation falling upon public servant out of contract entered into by him as such public servant cannot be enforced by machinery of a writ under Art. 199 of Constitution--Petition was dismissed. [P. 429] E, F & G

PLD 1962 SC 108, 1984 CLC 2168 & 1987 MLD 153, rel.
Mr. Khalid Khan, Advocate for Petitioner.
Mr. Muhammad Ilyas Khan, Advocate for Respondent No. 1.
Mr. Salman Mansoor, Advocate for Respondent No. 2.
Date of hearing: 29.5.2013.

**JUDGMENT**

The Petitioner, Syed Mushtaq Hussain Bukhari, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has called in question the notice dated 28th February, 2013 whereby his service contract has been terminated; and, prayed for the issuance of direction to the respondents for regularizations of his service as Director Finance of the Multan Electric Power Company (MEPCO).

2. Briefly the facts of the case are that the Chief Executive Officer, Pakistan Electric Power Company (PEPCO), through an advertisement, which appeared in daily Dawn dated 21st July, 2003, invited applications for appointment to the post of Finance Director in Hyderabad Electric Supply Company (HESCO) and the Multan Electric Power Company (MEPCO) on contract basis. The petitioner being Fellow of Chartered Accountancy (FCA) ventured his application for the post of Finance Director in MEPCO. The petitioner was found suitable and, therefore, the Chief Executive Officer PEPCO vide Letter No. 2684-86/PEPCO/CEO/DDA/PF-138 dated 30th October, 2003 ("Offer Letter") offered him the position of Finance Director (MEPCO) on contract basis for a period of two years. The petitioner after accepting the terms and conditions of the Offer Letter assumed the charge of the said post. The tenure of petitioner's appointment-contract was extended from time to time; and, finally in pursuance of terms and conditions contained in the Offer Letter, a Notice No. 19158-63 CE/MEPCO/EA-I/PF-53 dated 28th February, 2013

("Termination Letter") was served upon the petitioner whereby his services stood terminated with effect from 31st March, 2013.

3. Learned counsel for the petitioner through the instant petition has asked for an order in the nature of mandamus under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 for quashing the Termination Letter on the plea that the same is unreasonable, violative of rules, policy and law applicable thereto.

4. The question which requires determination by this Court is as to whether the termination of contractual appointment stands vitiated by any legal infirmity to call for interference under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. This question has to be answered in two distinct parts. The first part relates to the aspect whether the Termination Letter issued by the respondent-Company is amenable to judicial review and if so what is the scope of such review. The second part of the question is whether on the standards of judicial review applicable to it, the Termination Letter is seen to be suffering from any legal infirmity. At the outset it is pertinent to mention that there is no challenge before this Court as to the competence of the authority that issued the Termination Letter. What is contended on behalf of the petitioner is that the respondent-company did not act fairly and objectively in taking the decision to terminate the contract. It is contended that the decision to terminate the contractual employment is not a fair and reasonable decision having regard to the fact that the petitioner had performed well during his tenure; and, the requirement of the Company to have Director Finance continues to subsist. In substance, the contention urged on behalf of the petitioner is that this Court should reappraise and review the material touching the question of performance of the petitioner as Director Finance. I am afraid this cannot be done by this Court. It is true that judicial review of matters that fall in the realm of contracts is also available before the superior Courts, but the scope of any such review is not all pervasive. It does not extend to the Court substituting its own view for that taken by the decision-making authority. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision-making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses. In this regard reference may be made to the cases of "State of Maharashtra vs. Prakas Prahlad Patil" (AIR 2010 SC 463) and "Dr. Akhtar Hussain Khan and others vs. Federation of Pakistan and others" (2012 SCMR 455).

5. The services of the petitioner were governed by the terms and conditions of Offer Letter dated 30.10.2003 which, inter alia, contained the following condition:

"This contract may be terminated by either party giving the other party one month's notice or one month's salary in lieu thereof Notwithstanding the foregoing your services can be terminated by Chairman PEPCO and / or Chairman/ Chief

Executive Officer of MEPCO without any notice if you are found guilty of dishonesty, misconduct negligence, indiscipline or breach of trust."

There is no doubt that if a person is employed on contract basis and if the terms of employment provide the manner of termination of his services, the same can be terminated in terms thereof. In the case in hand the competent authority in exercise of above referred condition of service has terminated the services of the petitioner without any stigma. Thus the termination letter, impugned in this petition, in view of the principle laid down by the Hon'ble Supreme Court in the cases The Secretary, Government of the Punjab, through Secretary Health Department, Lahore and others v. Riaz ul Haq (1997 SCMR 1552) and Agha Salim Khurshid and another v. Federation of Pakistan and others (1998 SCMR 1930) does not suffer from any infirmity.

6. The PEPCO is a Government owned Management Company which has been established to manage re-structuring of WAPDA and corporatization, and, commercialization of its Generation, Transmission and Distribution Companies. The Hon'ble Supreme Court of Pakistan in the case of Brig (R) Sakhi Marian, CEO, PESCO, Peshawar v. Managing Director PEPCO, Lahore and others (2009 SCMR 708) has held that rules of PEPCO are non-statutory. Thus, the relationship between the petitioner and respondent-company is of master and servant. If the master rightfully ends the contract, there can be no complaint. If the master wrongfully ends the contract, then the servant can pursue a claim for damages. So, even if the master wrongfully dismisses the servant in breach of the contract, the employment is effectively terminated. Jenkins, L.J., in his dissenting judgment, in Vine vs. National Dock Labour Board [(1956)1 AER 1], which was approved in appeal by the House of Lords in 1956(3) AER 939 stated:

"In the ordinary course of master and servant, however, the repudiation or the wrongful dismissal puts an end to the contract, and a claim for damages arise. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more".

Similarly, in Ridge v. Balowin (1963) 2 WLR 935, Lord Reid said in his speech:

"The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence; it depends on whether the facts empowering at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under same statutory

or other restrictions as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them?

As a consequence, if an employee is dismissed in breach of a contractual requirement, he may recover damages and cannot claim re-instatement, whatever hardship he suffers as a result of his dismissal. In this regard reliance may be placed on Addis v. Gramophone Co. Ltd (1909) AC 488, Vide Collier v. Sunday Referee Publishing Co. Ltd., [1940(4) AII.E.R. 234] Rogan-Gardiner v. Woolworths Ltd. (2010) WASC 290), Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs v. Muhammad Azam Chattha (2013 SCMR 120)

7. It is also well settled principle of law that a contract employee cannot file a writ petition to seek redress in respect of grievance relating to terms and conditions of service. The reason is that a writ of mandamus may be granted only in a case where there is statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. In the present case, the appointment of the petitioner as Director Finance is contractual in nature and there is no statutory obligation as between the respondent-company and the petitioner. In my view, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. This view finds support from the case of M/s. Momin Motor Company vs Regional Transportation Authority Dacca and others" (PLD 1962 S.C 108) wherein Hon'ble Supreme Court has held contractual rights are not enforceable by recourse to writ jurisdiction; Major (R) Khalil ur Rehman v. Overseas Pakistan Foundation and others (1984 CLC 2168) wherein it was observed that contractual obligation and liabilities relating to a service matter cannot be enforced by resort to writ jurisdiction; and M. A Rashid v. Province of Punjab and 2 others (1987 MLD 153) wherein it was held that the constitutional jurisdiction cannot be exercised in respect of petitioner whose services have been terminated in accordance with terms of his contract.

8. As regards prayer for issuance of direction to the respondents for regularization of service of the petitioner as Director Finance, it is suffice to say that the petitioner having entered into contract of service has no vested right to seek regularization of his employment, which is discretionary with the Master. The Master is well within his right to retain or dispense with services of an employee on the basis of

satisfactory or otherwise performance. As per settled principle of law, the petitioner after having accepted the conditions of service has no locus standi to file constitutional petition seeking writs of prohibition and mandamus to authority to refrain from terminating his services and to retain him on his existing post on regular basis. In this regard reliance may be placed on the cases of "Government of Balochistan,
Department of Health through Secretary, Civil Secretariat, Quetta v. Dr. Zahid a Kakar and 43 others (2005 SCMR 642), Abid Iqbal Hafiz and others v. Secretary, Public Prosecution Department, Government of the Punjab, Lahore and others" (PLD 2010 S.C 841), "Pakistan Telecommunication Co. Ltd through Chairman vs. Iqbal Nasir and others" (2011 PLC (CS) 623) and HRC No. 44517-K/2010 regarding Regularization of the contract Employees of Zakat Department (2013 SCMR 304).

9. This petition sans merit and is accordingly dismissed.

(R.A.) Petition dismissed

**PLJ 2013 Lahore 430**
**Present: Shahid Waheed, J.**
**NAEEM TARIQ--Petitioner**
**versus**
**RPO SHEIKHUPURA, etc.--Respondents**

W.P. No. 14783 of 2013, decided on 13.6.2013.

**Constitution of Pakistan, 1973--**

----Art. 199--Punjab Police (Efficiency & Discipline) Rules, 1975--Scope--Constitutional Petition--Disciplinary proceedings--Right to assail legality of impugned order before High Court--Validity--Departmental proceedings were initiated against sub-inspector under provisions of Punjab Police (Efficiency and Discipline) Rules, 1975 which did not confer any right on complainant to assail legality of any order passed by competent authority--Purpose of disciplinary proceedings was to examine desirability of a civil servant to continue in service and such any order passed in pursuance thereof does not injure rights of complaint--Petition was dismissed. [P. 431] A
Mr. Muhammad Ahsan Farooq, Advocate for Petitioner.
Date of hearing: 13.6.2013.

**ORDER**

The petitioner, Naeem Tariq, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has called in question the Order No. 1686-89/PA dated 20.2.2013 passed by the District Police Officer, Nankana Sahib, whereby Ghulam Rasool, Sub Inspector has been exonerated from the charges.

2. The petitioner filed an application before the Regional Police Officer, Sheikhupura Range (Respondent No. 1) for initiation of departmental disciplinary proceedings against Ghulam Rasool, Sub Inspector. Pursuant to above said application, the disciplinary proceedings were initiated against Ghulam Rasool, S.I. under the provisions of the Punjab Police (Efficiency & Discipline) Rules, 1975. After holding regular inquiry, the District Police Officer, Nankana Sahib vide Order No. 1686-89/PA dated 20.2.2013 exonerated Ghulam Rasool, Sub Inspector from the charges. Hence this petition.

3. At the outset of hearing, I asked the learned counsel about the locus-standi of the petitioner to file the instant petition against the order dated 20.2.2013 whereby Ghulam Rasool, Sub Inspector has been exonerated from the charges. In response to the query, he submitted that being a complainant of the disciplinary

proceedings, the petitioner has a right to assail the legality of the impugned order before this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

4. I am afraid the contention raised by the learned counsel for the petitioner has no force. Although the departmental disciplinary proceedings were initiated against Ghulam Rasool, Sub Inspector on the complaint of the petitioner, yet he has no right to file the instant petition before this Court for assailing the legality of the impugned order dated 20.2.2013. The order in the nature of mandamus may be issued: (i) in favour of a person who establishes a legal right in himself; and, (ii) against a person who has a legal duty to perform but has failed and/or neglected to do so. In this regard guidance may be had from the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Hafiz Hamd Ullah versus Saif Ullah Khan and other' (PLD 2007 SC 52). The legal right is one which flows from a statute. In the instant case, the departmental proceedings were initiated against Ghulam Rasool, Sub Inspector, under the provisions of Punjab Police (Efficiency & Discipline) Rules, 1975 which do not confer any right on the complainant to assail the legality of any order passed by the Competent Authority. The purpose of disciplinary proceedings is to examine the desirability of a civil servant to continue in service and, thus, any order passed in pursuance thereof does not injure the rights of complainant.

5. The petitioner has no locus standi to file the petition, therefore, the same is dismissed in limine.

(R.A.) Petition dismissed

**PLJ 2013 Lahore 432**
**Present: Shahid Waheed, J.**
**FAQIR MUHAMMAD etc.--Petitioners**
**versus**
**MUHAMMAD ASHRAF--Respondent**

C.R. No. 1950 of 2010, heard on 17.6.2013.

**Punjab Preemption Act, 1991 (IX of 1991)--**
----S. 13--Civil Procedure Code, (V of 1908) S. 115--Civil revision--Suit for possession through preemption, decreed--Appeal was dismissed--Challenge to--Talb-e-muwathibat was not performed--Detail of making talb-e-muwathibat--Principle of law--Question of--Whether he had fulfilled requirement of talbs--Determination--It is well settled that mentioning of date, place, time and name of witnesses regarding talb-e-muwathibat in suit for preemption is sine qua non--Assertions made in plaint statement of plaintiff and statement of prosecution witness showed contradiction with regard to time of making talb-e-muwathibat and lead to conclusion that plaintiff did not make talb-e-muwathibat in accordance with S. 13 of Punjab Preemption Act--Findings of Courts below were reversed as same suffer from misreading and non-reading of evidence available on record--Plaintiff was held not entitled to a decree as prayed for--Petition was allowed. [Pp. 434 & 435] A & B

2010 SCMR 1087, ref.
Mr. Salah-ud-Din Siddiqui, Advocate for Petitioners.
Mr. Zubda-tul-Hussain, Advocate for Respondent.
Date of hearing: 17.6.2013.

**JUDGMENT**

Challenge in this Civil Revision Petition under Section 115, CPC is to the judgment and decree dated 20.4.2010 passed by the learned Additional District Judge, Jaranwala who affirmed the judgment and decree dated 02.04.2009 passed by the learned Civil Judge 1st Class, Jaranwala, whereby the suit filed by the predecessor-in-interest of respondents for possession through Pre-emption was decreed.

2. Briefly, the facts of the case are that the suit land was purchased by the petitioners from Mehtab Bibi, Muhammad Ali, Muhammad Siddique, Muhammad Rafique and Muhammad Bashir for a consideration of Rs.900,000/- vide registered sale deed No. 150/1136 dated 14.1.2003. As per plaint, Muhammad Ashraf (respondent/ plaintiff) came to know about the above said sale on 20.1.2003 at 05.00 p.m. when he came back from Okara, through

Abdul Rasheed (PW-3) in the presence of Muhammad Latif and Muhammad Bilal; that on coming to know about the sale, the respondent/plaintiff immediately made declaration that he would exercise the right of pre-emption in respect of the suit land; that the sale price was actually Rs.600,000/- and, that on 23.01.2003 notice of Talb-e-Ishad were sent to the petitioners. The respondent/plaintiff on 8.5.2003 filed suit for possession through pre-emption which was contested by the petitioners by filing written statement. On divergent pleadings of the parties, the learned trial Court framed the following issues:--

1. Whether the plaintiff has superior right of pre-emption over the suit property? OPP
2. Whether the plaintiff has fulfilled the requirement of Talbs? OPP.
3. Whether the actual price of the suit land is Rs.6,00,000/- and the sale price mentioned in the registered deed i.e. 9,00,000/- is fictitious? OPP.
4. Whether the plaintiff is entitled to a decree is prayed for? OPP.
5. Whether the suit is not maintainable in its present form? OPD.
6. Whether the suit is time barred? OPD.
7. Whether the plaintiff is estopped by his words and conduct to file the instant suit? OPD.
8. Whether the suit is baseless, false and frivolous, hence, the defendants are entitled for the recovery of special costs? OPD
9. Relief.

3. Parties to the suit in respect of their respective claims produced oral as well documentary evidence before the learned trial Court. After recording evidence, the learned trial Court decreed the suit vide judgment and decree dated 02.04.2009. Feeling aggrieved, the petitioners preferred an appeal before the learned Additional District Judge, Jaranwala and the same was dismissed vide judgment and decree dated 20.4.2010. Hence, this petition.

4. Learned counsel for the petitioners in support of this petition has submitted that judgments and decrees of the Courts below suffer from misreading and non-reading of evidence available on record; and that the respondent-plaintiff did not make Talb-e-Muwathibat in accordance with Section 13 of the Punjab Pre-emption Act and evidence to this effect was not properly considered by the Courts below while passing the impugned judgments and decrees.

5. Conversely learned counsel for the respondents-plaintiff vehemently opposes this petition and submits that the respondent-plaintiff made Talbs in accordance with law and, therefore, the suit was rightly decreed by the Courts below. He further contended that mere difference of time stated by the witnesses with regard to the making of Talbs is a natural variation due to lapse of time and would not be fatal to pre-emption cause. In this regard, he relied upon `Abdul Latif alias Muhammad Latif alias Babu versus Dil Mir and others' (2010 SCMR 1087).

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

7. The pivotal issue in the instant case was Issue No. 2 whereby the respondent-plaintiff was required to prove as to whether he had fulfilled the requirement of Talbs. It is now well settled that mentioning of date, place, time and name of witnesses regarding Talb-e-Muwathibat in a suit or preemption is sine-qua-non. The respondent-plaintiff, being conscious of the above said principle of law, stated the details of making Talb-e-Muwathibat in para 5 of the plaint which read as under:--

"یہ کہ بیع متدعویہ + مشفوعہ کا علم مدعی کو مورخہ 20.1.2003 کو بوقت 5:00 بجے شام اوکاڑہ سے چک نمبر 77/RB گھر پہنچا تو اسی دوران محمد لطیف ولد عطا محمد، (2) محمد بلال ولد رحیم بخش جملہ ذات ارائیں ملنے کیلئے آگئے اور میرے پاس گھر بیٹھے ہوئے تھے کہ عبدالرشید ولد علی محمد ذات ارائیں سکنہ دیہہ نے آ کر بتایا کہ مسماۃ مہتاب بی بی بیوہ (2) محمد علی، (3) محمد صدیق، (4) محمد رفیق (5) محمد بشیر پسران محمد شفیع سے مدعا الیہ نے مدعی سے چوری چھپے اراضی متدعویہ + مشفوعہ بذریعہ رجسٹری نمبر 1136 مورخہ 11.1.2003 بالعوض مبلغ 6 لاکھ روپے میں خریدی ہے اور رجسٹری پر فرضی قیمت مبلغ 9 لاکھ روپے تحریر کروائی ہے اور اراضی کی اصل قیمت بھی مبلغ 6 لاکھ روپے سے زائد نہ ہے۔ مدعی کے حق شفع کو نقصان پہنچانے کیلئے فرضی قیمت تحریر کروائی گئی ہے۔ مدعی نے فوری طور پر اعلان شفع کیا اور کہا کہ میں اس اراضی پر دعویٰ حق شفع دائر کروں گا۔ اراضی مشفوعہ میرے مشترکہ کھاتہ میں ہے۔ کھال پانی راستہ گزرگاہ اور وٹ بنہ مشترکہ ہے۔ مدعی کا حق شفع ہر طرح سے فائق تر ہے۔ اراضی متدعویہ مدعی سے چوری اور خفیہ طور پر رجسٹری ہوئی ہے۔ مدعی کو اراضی کی ضرورت ہے۔ اراضی مشفوعہ کی بیع ہونے سے مدعی کو نقصان ہے۔"

In order to prove the assertions made in the above cited paragraph, the respondent-plaintiff appeared before the learned trial Court as PW-2. The respondent-plaintiff in his examination-in-chief stated as follows:--

''مجھے بیع کا علم مورخہ 20.1.2003 کو ہوا۔ اس وقت 5:00 بجے شام تھے۔ اس وقت میرے پاس لطیف اور بلال بیٹھے تھے۔ عبدالرشید نے آ کر بتایا کہ اراضی فروخت ہو رہی ہے۔ میں نے اعلان شفع کیا۔''

However, during the course of cross-examination, the respondent-plaintiff made the following statement:--

''میرے پاس گواہان 7:00 بجے آئے تھے۔ عبدالرشید ان کے 15 منٹ بعد آ گیا تھا۔ بوقت آمد عبدالرشید محمد لطیف ولد عطا محمد + بلال ولد رحیم بخش بیٹھے تھے۔ ہم ایک گھنٹہ تک مشورہ کرتے رہے۔ پھر ہم مورخہ 23.1.2003 کو مدعا الیہ کے پاس گئے۔''

The petitioner in support of his contentions also produced Abdul Rasheed as PW-3 who in his examination-in-chief stated as follows:--

''بیان کیا کہ مورخہ 20.1.2003 کو بوقت 7:00 بجے شام کا وقت تھا۔ میں اشرف کے گھر گیا۔ وہاں محمد لطیف، محمد بلال اور اشرف بیٹھے تھے۔ میں نے کہا کہ محمد اشرف تمہارے بھائیوں اور والدہ نے اراضی فروخت کر دی ہے۔''

The above said witness during his cross-examination stated as follows:--

''میں مربع سے آ رہا تھا۔ جب میں چوک پر پہنچا تو مجھے بیع متدعویہ کا علم ہوا۔ بزار میں باتیں ہو رہی تھیں۔ جب میں بازار سے گزر رہا تھا تو اس وقت 6:30 بجے کا وقت تھا تو میں 7:30 بجے اشرف کے گھر گیا۔ اشرف کے گھر بلال ولد رحیم بخش + محمد اشرف ولد شفیع محمد + محمد لطیف ولد عطا محمد گھر میں تھے۔''

In view of the above peculiar facts of the instant case and the above contradictory statements, the reliance of learned counsel for the respondents on the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of `Abdul Latif alias Muhammad Latif alias Babu versus Dil Mir and others' (2010 SCMR 1087) is inapt. The Hon'ble Supreme Court in a recent Judgment rendered in the case of Shahid Mehmood Vs. Sharafat Ali (C.P. No. 2210-L/2012 decided on 11.3.2013) has held that principle laid down in the case of Abdul Latif would not apply to the case of vital discrepancies and contradictions. The assertions made in the plaint; the statement of the plaintiff/respondent; and, statement of Abdul Rasheed (PW-3) clearly show contradiction with regard to time of making Talb-e-Muwathibat and lead me to the conclusion that the plaintiff/respondent did not make Talb-e-Muwathibat in accordance with Section 13 of the Punjab Pre-emption Act, 1991. Thus, findings of the Courts below in respect of Issue No. 2 are reversed as the same suffer from misreading and non-reading of evidence available on record. Resultantly the respondent-plaintiff is held not entitled to a decree as prayed for. In view of above, there is no need to discuss other issues.

8. In the light of foregoing discussion, this petition is allowed, the judgments and decrees of the Courts below are set aside and resultantly suit of the respondent-plaintiff is dismissed with no order as to costs. (R.A.) Petition allowed

**2013 C L C 1392**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD HUSSAIN and 2 others----Petitioners**
**Versus**
**WALAYAT ALI and 2 others----Respondents**

Civil Revision No.842 of 2003, heard on 19th June, 2013.

**Punjab Pre-emption Act (I of 1913)---**

----S. 28 ---Pre-emption suit---Maintainability---Rival pre-emptors---Suit for pre-emption filed by a pre-emptor without impleading the rival pre-emptor in his suit in violation of S.28 of Punjab Pre-emption Act, 1913---Effect---Such suit shall not be thrown out as being collusive or not maintainable.

Zahoor Alam and others v. Fazal Hussain and others 1991 SCMR 763 rel.
Sh. Naveed Shehryar for Petitioners.
Shaigan Ijaz Chadhar for Respondents.
Date of hearing: 19th June, 2013.

**JUDGMENT**

**SHAHID WAHEED, J.---** The petitioners, through this Civil Revision Petition under section 115, C.P.C., have called in question the order dated 8-4-2003 passed by the learned Additional District Judge, Mandi Bahauddin whereby their application under section 12(2), C.P.C. for setting aside the decree dated 2-2-1982 was dismissed.

2. Briefly the facts of the case are that the land measuring 46 Kanals, 5 Marlas situated in the area of village Dogal was owned by Ghulam Akbar son of Sardara resident of village Dogal. In respect of this land Mst. Zohra Bibi, predecessor-in-interest of respondent No.3, filed a suit for declaration against Ghulam Akbar which was decreed on 16-3-1971. The decree dated 16-3-1971 was incorporated in the Revenue Record vide Mutation No.504 dated 6-5-1979 in favour of Mst. Zohra. The father of the present petitioner namely Mirza on 14-3-1977 filed a suit for possession through pre-emption in respect of decree dated 16-3-1971. Walayat Ali (respondent No.1) and Muhammad Ali (respondent No.2) also filed a

suit for possession through pre-emption in respect of the above said land claiming their superior right of pre-emption. The suit filed by respondents Nos.1 and 2 was dismissed on 6-7-1980. Being aggrieved, the respondents Nos.1 and 2 filed an appeal which was accepted and as a consequence thereof the suit was ex parte decreed vide judgment dated 2-2-1982. Later on, Mst. Zohra filed an application for recalling of ex parte judgment and decree dated 2-2-1982 but it was dismissed as withdrawn vide order dated 4-12-1986. However, the suit filed by the father of the petitioner, Mirza, was contested by Mst. Zohra. In the meantime Ghulam Haidar, real brother of the vendor Akbar, also filed a suit for possession through pre-emption in respect of the suit-land. The suits filed by Mirza and Ghulam Haidar were consolidated. The learned Trial Court vide judgment and decree dated 9-3-1985 decreed the suit filed by Mirza and dismissed the suit filed by Ghulam Haidar. Thereafter the petitioners filed an application under section 12(2), C.P.C. for setting aside the judgment and decree dated 2-2-1982. This petition was contested by respondent through their written reply. On divergent pleadings of the parties, the learned District Judge framed issues and called upon the parties to produce evidence in support of their respective claims. After recording evidence the learned District Judge, Gujrat vide order dated 6-2-1992 dismissed the application filed by the petitioners. Feeling aggrieved, the petitioners filed Civil Revision No.968 of 1992 before this Court. The above said civil revision was accepted by this Court vide order dated 28-10-2002 and the case was remanded to the learned District Judge, Mandi, Bahauddin for re-decision of petitioner's application under section 12(2), C.P.C. on the basis of evidence available on record. Consequent upon remand, the learned District Judge, Mandi Bahauddin, vide order dated 8-4-2003 again dismissed the application filed by the petitioners under section 12(2), C.P.C. Hence, this petition.

3. Learned counsel for the petitioners, in support of instant petition, has submitted that judgment and decree dated 2-2-1982 in favour of respondents Nos.1 and 2 was void as the same was obtained collusively, without impleading the petitioners in the suit and in violation of section 28 of the Punjab Pre-emption Act, 1913. Conversely, learned counsel for the respondents vehemently opposes this petition and submits that the petitioners in their application

filed under section 12(2), C.P.C. have not disclosed the details of fraud; that non-impleading of the petitioners by respondents No. 1 and 2 in their suit was not fatal; and, that non-compliance of the provision of section 28 of the Punjab Pre-emption Act, 1913 does not vitiate the judgment and decree dated 2-2-1982.

4. 1 have heard the learned counsel for the parties and perused the record.

5. The issue involved in this petition is as to whether the non-impleading of the petitioners in the suit filed by respondents Nos.1 and 2 for possession of the suit-land through pre-emption renders the decree dated 2-2-1982 as nullity in terms of section 28 of the Punjab Pre-emption Act, 1913. It is settled principle of law that suit filed by the pre- emptor without impleading the rival pre-emptor in his suit in violation of section 28 of the Punjab Pre-emption Act, 1913 shall not be thrown out as being collusive or not maintainable. The same is the rationale of the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Zahoor Alam and others v. Fazal Hussain and others (1991 SCMR 763) and relevant extract thereof reads as under:---

"It has been held in Mahmood Khan v. Khan Muhammad PLD 1973 Lahore 806 that "there is no gainsaying the fact that Muhammad Asif's decree having been obtained in disregard of the provisions of section 28 of the Punjab Pre-emption Act, is not binding on Mahmood Khan, but as has been rightly pointed out by counsel for the respondents, with reference to Ghulam Tayyib v. Shahro Khan PLD 1962 BJ 1 such decree is not a nullity and Mahmood Khan shall have to prove his superior right as against the vendees and Muhammad Asif, in his own suit, in which Muhammad Asif has been impleaded as a party". In the case of Ghulam Tayyib, it was further observed that "the effect of the imperative provisions of section 28, Punjab Pre-emption Act is that if one of the suits is decided in the absence of the plaintiff in the other suit, the decision cannot be binding on that plaintiff."

In Muhammad Akram Khan v. Kaniz Fatima PLD 1952 Lahore 489; it was held that "two pre-emption suits instituted one after the other without each impleading his rival pre-emptor as a party in the suit, one of them got a consent decree in his

favour while the suit of the other was pending as against the other pre-emptor whose suit was pending and the latter, in the circumstances, was entitled to a decree for the whole of the property sought to be pre-empted."

In view of principle laid down by the Hon'ble Supreme Court of Pakistan in the above referred judgments I am not inclined to interfere with the order passed by the learned District Judge, Mandi Bahauddin.

6. In view of above, this petition lacks merit and is accordingly dismissed with no order as to cost.

MWA/M-183/L Petition dismissed.

**PLJ 2013 Lahore 620**
**[Multan Bench Multan]**
**Present: Shahid Waheed, J.**
**MUHAMMAD SHAHID--Petitioner**
**versus**
**ADDITIONAL DISTRICT JUDGE, SAHIWAL and 6 others--Respondents**

C.M. Nos. 2449 & 2450 of 2013 in W.P. No. 13696 of 2010, decided on 29.4.2013.

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

----O. III, R. 4(5)--Appointment of pleader--Making an application or presentation of suit or appeal--Pleader was engaged for purpose of pleading only not plead unless he had filed in Court a memorandum of appearance signed by himself--Validity--If any pleader engaged to plead on behalf of any party by any other pleader who had been duly appointed to act in Court on behalf of such party. [P. 624] A
PLJ 1999 SC 839 & AIR 1960 Mys 217, rel.

**Document--**

----Construction of document appointing an agent is different from construction of a wakalatnama appointing counsel. [P. 625] C

**Duty of Advocate--**

----Nature of duty and relationship with public and Court--Tripartite relationship--One with public another with Court and third with client. [P. 626] D

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

----O. III, R. 4--Power given through wakalatnama--Bar of--Application while appointing as his counsel had authorized him to engage any other counsel to act in his place or in collaboration with him and had authorized such other counsel to exercise same authority which had been conferred on engaged counsel--Validity--There is no bar on pleader duly authorized by a party under wakalatnama to engage another pleader without any written instrument to plead case on his behalf--When a counsel had been authorized under a wakalatnama to represent his client, junior or associate of the counsel can be permitted with out any authority in writing to appear

on behalf of counsel representing client as and when counsel himself is not in a position to appear--In instant case, a young Advocate had contested case on behalf of applicant and pleaded all the grounds which were available for assailing vires of ejectment order--Applicant in instant application had not urged any ground of mala fide or collusion or fraud. [Pp. 625, 626 & 627] B, E & I

**Power to plead--**

----Scope--Pleader however would not had power to compromise a case, withdraw a case or do any other act which may compromise interest of his client. [P. 626] F

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

----S. 12(2) & O. III, R. 4--Appointment of pleader--Neither applicant nor counsel of applicant ever authorized or appointed on other counsel to argue case--Question of order passed by Court--Advocate of applicant had no authorized or appointed another counsel to plead cause of applicant yet to prove assertion he had not placed on record any affidavit--Validity--In absence of such affidavit of counsel plea cannot be believed--Since applicant had failed to bring on record affidavit of counsel denying his association, it will be presumed that in view of Order III, Rule 4, CPC and powered conferred on principal counsel through wakalatnama being authorized was competent to appear before High Court and plea the cause of applicant--Matter was not only expedient but in interest of speedy delivery of justice that young lawyers who work with pleaders duly authorized by clients were permitted to appear in matters--Necessary for speedy disposal of cases and as an encouragement to younger professionals who were in formative years of practice--Judges also have duty to ensure that interest of parties were not permitted to be compromised--Contentions raised for petitioner was not a case of misrepresentation within contemplation of S. 12(2), CPC--Application was dismissed. [P. 627] G, H, J & K

Syed Muhammad Ali Gillani, Advocate for Applicant.
Date of hearing: 29.4.2013.

**ORDER**

This order shall govern C.M. Nos. 2449-13 and 2450-13 in W.P. No. 13696-10, C.M. Nos. 2451-13 and 2452-13 in W.P. No. 13697-10, C.M. Nos. 2453-13 and 2454-13 in W.P. No. 13698-10, C.M. No. 2455-13 and 2456-13 in W.P. No. 13699-

10, C.M. Nos. 2457-13 and 2458-13 in W.P. No. 13700-10, C.M. Nos. 2459-13 and 2460 in W.P. No. 13701-10, CM. Nos. 2461-13 and 2462-13 in W.P. No. 13702-10, C.M. Nos. 2463-13 and 2464-13 in W.P. No. 13703-10 as common questions of law and facts are involved therein.

2. This is an application under Section 12(2), CPC for recalling of order dated 10.12.2012 whereby petition filed by the applicant under Article 199 of the Constitution of Islamic Republic of Pakistan. 1973 ("writ petition") against the ejectment order dated 14.1.2010 passed by the Rent Tribunal, Sahiwal and also against order dated 13.11.2010 passed by the learned Addl. District Judge, Sahiwal was dismissed.

3. The Respondents No. 3 to 7 on 11.9.2009 filed an application under Section 19 of the Punjab Rented Premises Ordinance, 2007 (now Act, 2009) for the eviction of the applicant from the rented premises on the ground of default in making payment of rent. The learned Rent Tribunal vide order and decree dated 14.1.2010 declined the application for leave to contest and directed the applicant to vacate the rented premises. Being aggrieved, the applicant filed an appeal before the learned Addl. District Judge and the same was dismissed vide judgment and decree dated 13.11.2010. The applicant, being dissatisfied, filed writ petition before this Court and assailed the aforestated orders. The writ petition was dismissed in limine by this Court vide order dated 24.1.2011. The applicant assailed the order dated 24.1.2011 before the Hon'ble Supreme Court of Pakistan through Civil Appeal Nos.150 to 157 of 2011 which were allowed vide order dated 24.5.2011 and the matter was remanded to this Court for fresh decision after summoning the record of the Rent Tribunal as well as the Appellate Court. In compliance with the order dated 24.5.2011 passed by the Hon'ble Supreme Court of Pakistan the record of the Courts below was summoned. After hearing arguments canvassed by Mr. Muhammad Masood Bilal. Advocate, who appeared on behalf of the applicant, and learned counsel for the respondents the writ petition was dismissed by this Court vide judgment dated 10.12.2012.

4. The applicant has filed the instant application under Section 12(2), CPC read with Section 151, CPC for recalling of judgment dated 10.12.2012 on the ground that the same was obtained through misrepresentation. Learned counsel for the applicant submits that the applicant had engaged Ch. Abdul Sattar Goraya, Advocate as his counsel and had never appointed Mr. Muhammad Masood Bilal, Advocate; that neither the applicant nor counsel of the applicant Ch.

Abdul Sattar Goraya, Advocate ever authorized or appointed Mr. Muhammad Masood Bilal, Advocate to argue the case on 10.12.2012 before this Court; and, that no opportunity of hearing due to above misrepresentation was given to the applicant and, therefore, judgment dated 10.12.2012 is liable to be recalled.

5. I have heard the learned counsel for the applicant and examined the record.

6. The applicant through writ petition had called in question the orders passed by the learned Courts below whereby he was directed to vacate the rented premises. Perusal of record reveals that the applicant for pleading his cause before this Court had engaged Ch. Abdul Sattar Goraya, Advocate but on 10.12.2012, Mr. Muhammad Masood Bilal, Advocate appeared on behalf of the applicant and argued the case. This Court after affording opportunity of hearing to Mr. Muhammad Masood Bilal, Advocate and learned counsel for the respondents dismissed the writ petition. It is the ease of the applicant that he had engaged Ch. Abdul Sattar Goraya, Advocate, and not Mr. Muhammad Masood Bilal, Advocate and thus the judgment dated 10.12.2012 was obtained through misrepresentation and for this reason the same stands vitiated. The questions which arise for determination in this application are: (i) whether Mr. Muhammad Masood Bilal, Advocate could appear on behalf of the applicant and argue the matter; and, (ii) whether pleading the cause of applicant by Mr. Muhammad Masood Bilal, Advocate before this Court constitute misrepresentation within the contemplation of Section 12(2), CPC for setting aside judgment dated 10.12.2012 passed by this Court? In this context reference may be made to Order III, Rule 4, CPC which reads as under:--

"4. Appointment of pleader.--(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court or until the client or the pleader dies, or until all proceedings in the sit are ended so far as regards the client.

(3) For purposes of sub-rule (2) an application for review of judgment, an application under Section 144 or Section 152 of this Code, any appeal from any

decree or order in the suit any application or act, for the purpose of obtaining copies of documents or return of document produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.
(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating--

(a) the names of the parties to the suit,
(b) the name of the party for whom he appears, and
(c) the name of the person by whom he is authorized to appear:

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.
The word "act" occurring in sub-rule (1) to Rule 4 ante refers to the taking of steps to lay the case before the Court, as for instance, making an application or presentation of a suit or appeal. However, under sub-Rule (5) of Rule 4 it is provided that a pleader who has been engaged for the purpose of pleading only shall not plead unless he has filed in Court a memorandum of appearance signed by himself and stating the names of the parties etc. but under the proviso the filing in the Court a memorandum of appearance is not required, if any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party. In this regard reliance may be placed on the case of Mst. Nawaz Bibi and 3 others Vs. Ch. Allah Ditta and others (PLJ 1999 SC 839) and Sakrappa Neelappa Vs. Shidramappa Gangappa Katti and others (AIR 1960 Mys, 217).

7. In the case before me the applicant while appointing Mr. Abdul Sattar Goraya as his counsel had authorized him to engage any other counsel to act in his place or in collaboration with him and had authorized such other counsel to exercise the same authority which had been conferred on Mr. Abdul Sattar Goraya. Relevant recitals in the wakalatnama read as under:

"اور بصورت ضرورت صاحب موصوف کو یہ بھی اختیار ہو گا کہ مقدمہ ہذا کو یا اسکے کسی جز کو کاروائ کے یا بصورت اپیل کسی دوسرے وکیل یا بیرسٹر کو اپنے بجاۓ یا ابنے ہمراہ مقرر کریں اور ایسے مشیر قانون کو بھی ہرا مر میں وھی اور ایسے ھی اختیارات حاصل ہوں گے جیسے صاحب موصوف کو حاصل ہیں"

Before proceeding further it is germane to state here that the construction of a document appointing an agent is different from the construction of a wakalatnama appointing counsel. In the case of an agent the document would be construed strictly and the agent would have only such powers as are conferred expressly or by necessary implication. In the case of counsel the rule is otherwise because there we are dealing with a profession where well-known rules have crystallized through usage. It is at par with a trade where the usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. In Matthews Vs. Munster (1887) 20 QB 141, Lord Esher M.R. said:

"This state of things raises the question of the relationship between counsel and his client, which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and have never adopted that phraseology, which seems to me to be misleading. No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority undertaken to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duly of counsel is to advise his client out of Court and to act for him in Court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client."

It has been held in the case of Chendgan Souri Nayakam Vs. A.N. Menon (AIR 1968 Ker. 213) that counsel is not a mere agent of the client and it would be clear if we look at the nature of his duties and relationship with the public and the Court. The counsel has a tripartite relationship; one with the public; another with the Court, and the third with his client. That is a unique feature. Other professions or callings may include one or two of these relationships but no other has the triple duty. Counsel's duty to the public is unique in that he has to accept all work from all clients in Courts in which he holds himself out as practicing, however unattractive the case or the client. In Rondel's case (1967) 1 Q.B. 443 Lord Denning MR. stated:

"It is a mistake to suppose that he is the mouthpiece of his client to say what he wants or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly make a charge of fraud, that is without evidence to support it. He must produce all the relevant authorities, even though that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions for his client, if they conflict with his duty to the Court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline."

8. On a perusal of the provisions of Order III, Rule 4, CPC, set out hereinabove, as also the power given through "Wakalatnama", this Court is of the opinion that there is no bar on a Pleader duly authorized by a party under "Wakalatnama" to engage another pleader without any written instrument to plead the case on his behalf. The power to "plead" would include within its scope and ambit, the right to examine witnesses, to conduct admission & denial, to seek adjournments and address arguments, etc. as may be authorized. Such Pleader however would not have the power to compromise a case, withdraw a case or do any other act which may compromise the interest of his client. Although it has been asserted in the instant application that Ch. Abdul Sattar Goraya, Advocate had not authorized or appointed Mr. Muhammad Masood Bilal, Advocate to plead cause of the applicant before this Court yet to prove this assertion he has not placed on record any affidavit or certificate of Ch. Abdul Sattar Goraya, Advocate. In the absence of such affidavit/certificate of Ch. Abdul Sattar Goraya, Advocate, plea raised in the application cannot be believed. Since the applicant has failed to bring on record the affidavit/certificate of Ch. Abdul Sattar Goraya, Advocate denying his association with Mr. Muhammad Masood Bilal, Advocate, it will be presumed that Mr. Muhammad Masood Bilal Advocate in view of Order III, Rule 4, CPC and power conferred on the principal counsel through "Wakalatmana" being authorized was competent to appear before this Court and plead the cause of the applicant. The bald assertions in the application cannot be accepted as otherwise it would jeopardize the system of administration of justice. In procedural matters it is not only expedient but also in the interest of speedy delivery of justice that young lawyers who work with pleaders duly authorized by clients are permitted to appear in matters. This is necessary for speedy disposal of cases and also as an

encouragement to the younger professionals who are in the initial/formative years of practice. Judges also have a duty to ensure such young pleaders and lawyers who enter the portals of Courts are permitted to learn but at the same time to ensure that the interest of parties are not permitted to be compromised. In view of Order III, Rule 4, CPC. I am of the opinion that when a counsel has been authorized under a Wakalatnama to represent his client, the junior or associate of the said counsel can be permitted without any authority in writing to appear on behalf of the counsel representing the said client as and when the counsel himself is not in a position to appear. In the instant case. Mr. Muhammad Masood Bilal, a young Advocate had contested the case on behalf of the applicant and pleaded all the grounds which were available to him for assailing the vires of ejectment order. The applicant in the instant application has not urged any ground of mala fide or collusion or fraud against Mr. Muhammad Bilal Masood, Advocate. The applicant has also not questioned the legal acumen or competency of Mr. Muhammad Bilal Masood. Advocate in pleading his cause before this Court. In these attending circumstances. I am not pursuaded to agree with the contentions raised by the learned counsel for the petitioner as this is not a case of misrepresentation within the contemplation of Section 12(2), CPC. Before parting I am constrained to observe here that the application in hand lacks bona fide and it appears that the applicant has conceived this frivolous application so as to multiply the litigation and thereby to avoid or complicate the execution of ejectment order which is statedly pending in the Executing Court.

9. This application sans merit and is accordingly dismissed.

C.M.No. 2450-13

10. This is an application for staying operation of the ejectment order. Since C.M.No. 2449-13 has been dismissed, this application has become infructuous and is accordingly disposed of.

(R.A.) Application dismissed

**PLJ 2013 Lahore 649**
**Present: Shahid Waheed, J.**
**CH. ZULFIQAR ALI--Petitioner**
**versus**
**ADDITIONAL DISTRICT JUDGE, DEPALPUR etc.--Respondents**

W.P. No. 22986 of 2012, decided on 17.9.2012.

**Transfer of Property Act, 1882 (IV of 1882)--**

----S. 52--Civil Procedure Code, (V of 1908), O. I, R. 10--Application for impleadment as defendant--Property was purchased during pendency of suit without seeking leave of Court, hence he being transferee pendente lite without leave of Court cannot, as of right seek impleadment as a party in a pending suit--Validity--It is true that when application for joinder based on transfer pendente lite is made, transferee should ordinarily be joined as party to enable him to protect his interest--Trial Court had assigned cogent reasons for rejecting such joinder stating that suit was long pending since 1992 and was fixed for final arguments and prima facie action of alienation did not appear to be bona fide--Held: No absolute rule that transferee pendente lite without leave of Court should in all cases be allowed to joint and contest pending suit--Trial Court had rightly exercised its discretion in rejecting application for impleadment of transferee pendente lite as party to suit and for amendment of pleading--Petition was dismissed. [P. 651] A, B & C

Mr. Shahid Masood Khan, Advocate for Petitioner.
Date of hearing: 17.9.2012.

**ORDER**

Petitioner, Ch. Zulfqar Ali, through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has called in question order dated 21.6.2012 passed by the learned Additional District Judge, Depalpur, who affirmed order dated 27.10.2011 passed by the learned Civil Judge 1st

Class, Depalpur, whereby the petitioner's application under Order I Rule 10, CPC was dismissed.

2. Briefly stated facts of the case are that the petitioner filed an application under Order I, Rule 10, CPC for his impleadment, as defendant in the suit for declaration ("the suit") instituted by Mst. Sakina Bibi (Respondent No. 3) whereby she called in question the general power of attorney and the deeds through which her property ("the suit property") was transferred to different persons including Allah Baksh (Defendant No. 5/Respondent No. 8). It is maintained in the application that the petitioner purchased a piece of land out of the suit property through an agreement to sell dated 22.5.2008, from Sher Muhammad (Respondent No. 10) one of the legal heirs of Allah Bakhsh (Respondent No. 8/Defendant No. 5). This application was resisted by Respondent No. 3. Learned Trial Court after affording opportunity of hearing to the parties dismissed the application vide order dated 27.10.2011. Feeling aggrieved, the petitioner filed revision before the learned Additional District Judge, Depalpur, and the same was dismissed vide order dated 21.6.2012. Hence, this petition.

3. Learned counsel for the petitioner submits that the petitioner is a necessary party to the suit, as his rights are directly affected by the proceedings of the suit and, therefore, his application under Order I, Rule 10, CPC for impleadment, as defendant in the suit, should have been allowed; and, that in order to avoid multiplicity of litigation the petitioner should have been allowed to be impleaded as defendant in the suit.

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

5. Mst. Sakina Bibi on 13.7.1992 instituted the suit for declaration calling in question general power of attorney dated 24.1.1979 allegedly executed in favour of her husband; and, also transfer deeds in respect of suit property executed by her husband in favour of different persons including Allah Bakhsh, (Respondent No. 8). Husband of Sakina Bibi and all subsequent transferees including Allah Baksh are

defendants in the suit. It is pertinent to mention here that the husband of Mst. Sakina Bibi out of the suit land transferred land measuring 130 kanals 8 marlas vide Exchange Deed No. 1600 dated 27.5.1980 to Allah Bakhsh (Respondent No. 8) and from this land Sher Muhammad, (Respondent No. 10), who is one of the legal heirs of Allah Bakhsh sold property measuring 63 kanals 13 marlas ("the property") to the petitioner vide agreement to sell dated 22.5.2008. It is clear that the present petitioner purchased the property during pendency of the suit and without seeking leave of the Court as required by Section 52 of the Transfer of Property Act. The petitioner being a transferee pendente lite without leave of the Court cannot, as of right, seek impleadment as a party in the suit which is pending since, 1992. It is true that when the application for joinder based on transfer pendente lite is made, the transferee should ordinarily be joined as party to enable him to protect his interest. But in the instant case, the trial Court has assigned cogent reasons for rejecting such joinder stating that the suit is long pending since 1992 and is fixed for final arguments and prima facie the action of the alienation does not appear to be bona fide. The trial Court saw an attempt on the part of the petitioner to complicate and delay the suit.

6. There is no absolute rule that transferee pendente lite without leave of the Court should in all cases be allowed to join and contest the pending suit. The father of Respondent No. 10 was Defendant No. 5 in the suit and, therefore, after his death Respondent No. 10, Sher Muhammad during the pendency of the suit was prohibited by the operation of Section 52 of the Transfer of Property Act to transfer the property in any way affecting rights of Respondent No. 3, (Mst. Sakina Bibi) except with order or authority of the Court. Admittedly, the authority or order of the Court was not obtained for alienation of the property in favour of the present petitioner. Therefore, the alienation obviously is hit by the doctrine of lis pendens. Under these circumstances, the petitioner cannot be considered to be either necessary or proper party to the suit. In this regard reference may be made

to Savinder Singh v Dalip Sing (1996) 5 SCC 539 and Narbada Devi Gupta v Birendra Kumar Jaiswal (AIR 2004 S.C 173).

7. In view of above, the learned trial Court has rightly exercised its discretion in rejecting the application for impleadment of the transferee pendente lite as party to the suit and for amendment of the pleadings. Consequently, this petition lucks merit and is accordingly dismissed in limine.

(R.A.) Petition dismissed

**PLJ 2013 Lahore 651**
**Present: Shahid Waheed, J.**
**MUHAMMAD SIDDIQUE--Petitioner**
**versus**
**M.B.R, etc.--Respondents**

W.P. No. 13870 of 2010, heard on 28.5.2013.

**West Pakistan Land Revenue Rules, 1968--**

----R. 17--West Pakistan Land Revenue Act, 1967, S. 36--Constitution of Pakistan, 1973--Art. 199--Constitutional petition--Appointment of lambardar--Orders passed by revenue department that respondent was found suitable person by revenue authorities--Findings to such effect cannot be substituted by High Court in exercise of constitutional jurisdiction--While making appointment as lambardar report of Tehsildar was not taken into consideration by revenue authorities--Validity--No provision of law or rule requires recommendation of lower revenue functionaries for appointment of lambardar, reports of lower revenue functionaries are not binding in character, no evidence in support of allegation stated in report had been placed on report and lastly, petitioner before Board of Revenue had recorded remarks against (co-applicant) and remark negates--Thus report of Tehsildar is of no significance and does not help the case of petitioner--No person can claim, as of right, to be appointed as lambardar even he satisfied all conditions--In such a case he cannot complaint that any wrong had been done for simple reason that he does not have any vested right--If there are more than one candidates contesting appointment to office of lambardar, the person aggrieved has a right to appeal and may as well move competent authority in Revenue--There is no on account of fact that he had any right vested in him but only for reason that statute provides for such a procedure which enables him to challenge the orders in appeal or revision--Principle which applies in adjudication of right cannot be invoked in matter of such kind where something is done in pursuance of any claim or a vested right but only to facilitate performance of administration function--E.D.O.R. after making comparative assessment of merit of each applicant for post of lambardar had appointed lambardar and thus orders impugned in instant petition do not warrant any interference by High Court--Petition was dismissed. [Pp. 655 & 656] A, B, C, D & E

2013 SCMR 363, PLD 1991 SC 531, 1971 SCMR 719, 1982 SCMR 202 & 1996 SCMR 1581, rel.
Mr. Ghulam Farid Snotra, Advocate for Petitioner.
Mr. Shahid Mubeen, Addl. A.G. for Respondent No. 1.
Mr. Abdul Sadiq Chaudhary, Advocate for Respondent No. 3.
Date of hearing: 28.5.2013.

## JUDGMENT

This order will govern W.P. No. 13870/2010 and W.P. No. 16041/2010 as orders impugned in both the petitions are same.

2. Briefly the facts of the case are that after the death of Muhammad Siddique son of Muhammad Ismail, Patti Lambardar of Chak No. 725/GB Tehsil Kamalia, District Toba Tek Singh the post of Lambardar fell vacant whereafter the District Officer (Revenue), Toba Tek Singh accorded approval for making a fresh appointment of Lambardar. In pursuance of the above said approval, applications were invited from the suitable candidates through Mushtri Munadi to fill up the post of Lambardar. The Tehsildar, Kamalia after examining the credentials of the candidates prepared a report dated 13.2.2008 and submitted the same to the Deputy District Officer (Revenue), Kamalia wherein he recommended that Muhammad Irshad/Respondent No. 3 be appointed as Lambardar. Saeed Ahmad (petitioner of W.P. No. 16041/2010) being aggrieved by the report dated 13.02.2008 filed an application dated 11.03.2008 before the Deputy District Officer (Revenue) with the prayer that a direction be issued to the Tehsildar for preparing a fresh report after affording an opportunity of hearing to all the candidates. The Deputy District Officer (Revenue) accepted the application and directed the Tehsildar to prepare a fresh report after recording the statements of all the applicants. In pursuance of the direction of the Deputy District Officer (Revenue), the Tehsildar, Kamalia after giving hearing to all the applicants prepared a report dated 5.6.2008 and recommended therein that Saeed Ahmad be appointed as Lambardar. The Tehsildar submitted the above said report to the Deputy District Officer (Revenue) who after endorsing the same forwarded it to the District Officer (Revenue) but he vide order dated 31.12.2008, appointed Muhammad Siddique son of Abdul Latif as Lambardar. Muhammad Irshad, Muhammad Sadiq and Saeed Ahmad, being aggrieved by order dated 31.12.2008 passed by the District Officer (Revenue), filed separate appeals before the Executive District Officer (Revenue), Toba Tek Singh. The Executive District Officer (Revenue) through a consolidated order dated 24.6.2009 set aside the order dated 31.12.2008 passed by the District Officer (Revenue) and appointed Muhammad Irshad/Respondent No. 3 as Lambardar of Chak No. 725/GB Tehsil Kamalia District Toba Tek Singh. Muhammad Siddique and Saeed Ahmad petitioners assailed the order dated 31.12.2008 through separate revision petitions under Section 164 of the Land Revenue Act, 1967 before the Board of Revenue, Punjab and the same were dismissed vide consolidated order dated 20.3.2010, hence this petition.

3. Learned counsel for the petitioner (Muhammad Siddique) in support of instant petition has contended that all the fora below have failed to apply their independent mind and have completely ignored the report of Tehsildar dated 5.6.2008 wherein it has categorically been stated that Muhammad Irshad has encroached upon the office

of Farming Society; has committed embezzlement while depositing the registration fee of mutations; is involved in harbouring criminals and thus was not suitable person for the post of Lambardar. He further contended that the impugned decisions are based on the rule of primogeniture as contained in Rule 19(2) of the Punjab Land Revenue Rules, 1968 which has been declared un-islamic by the Hon'ble Supreme Court of Pakistan in the case titled Maqbool Ahmad Qureshi Vs. Islamic Republic of Pakistan (PLD 1999 SC 484) and thus the orders impugned in this petition are liable to be set aside.

4. Learned counsel for Saeed Ahmad (petitioner of W.P. No. 16041/10) while adopting the arguments of learned counsel for Muhammad Siddique to the extent of character of Muhammad Irshad has contended that a preferential aspect of Saeed Ahmad was not properly appreciated by the Executive District Officer (Revenue) and Board of Revenue while making appointment of Lambardar.

5. Conversely, the learned counsel for Muhammad Irshad son of Muhammad Siddique has supported the orders passed by the Executive District Officer (Revenue) and the Board of Revenue, Punjab and submitted that Muhammad Irshad was found most suitable person by the Revenue Authorities and, therefore, findings to this effect cannot be substituted by this Court in exercise of constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973; and, that Muhammad Irshad fulfills all the criteria as laid down in Rule 17 of the Land Revenue Rules, 1968 and, therefore, has been rightly appointed as Lambardar.

6. I have heard the learned counsel for the parties and perused the record appended with this petition.

7. Lambardars are appointed under Section 36 of the West Pakistan Land Revenue Act, 1967 read with the West Pakistan Land Revenue Rules, 1968. The Competent Authority while making appointment of Lambardar under the above said provisions of law is under an obligation to consider: (i) hereditary claims (ii) extent of property in the estate (iii) services rendered to the Government (iv) character, ability and freedom from indebtedness; and (v) strength and importance to the community to which a candidate belongs. Being conscious of the requirements of the West Pakistan Land Revenue Rules, 1968 the Executive District Officer(Revenue) while passing the order dated 24.6.2009 made a comparative assessment of the applicants which is reproduced below for facility of reference:--

| S. | Descirption to be considered | Irshad Ahmad | Saeed Ahmad | Muhammad Siddique |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| 1. | Hereditary claim the | Nil | Elder son of Nil | Lambardar |
| 2. | Extent of property | 50 Kanals | 49 Kanals | 93 Kanals |
| 3. | Personal and Family services rendered to the Governnment. | | His father was Lambardar (ii) Appellant remained 11 years Sarbrah. | |
| 4. | Personal influence, character, ability and freedom from indebtedness etc. | | i) Matric ii) 49 years old iii) Good physique. | i) Middle ii) 32 years old iii) Clean record |
| | | | | i) Middle ii) 36 years old iii) Clean record |
| 5. | Strength and importance of community | Jat Graywal | Jat Saidow-Ana | |

The data of merits of the applicants tabulated above shows that appointment of Lambardar was not made on the rule of primogeniture, as canvassed by the learned counsel for the petitioner, but instead the Executive District Officer (Revenue) and the Board of Revenue after taking into consideration all the essential factors for the appointment of Lambardar and claim of each applicant passed the orders and appointed Muhammad Irshad as Lambardar of Chak No. 725/GB Tehsil Kamalia, District Toba Tek Singh. The other contention of the learned counsel for the petitioner is that while making appointment of Muhammad Irshad as Lambardar the report of Tehsildar dated 5.6.2008 was not taken into consideration by the Executive District Officer (Revenue) and the Board of Revenue. I am afraid this contention also has no force for the reason that: firstly, no provision of law or rule requires the recommendation of the lower revenue functionaries for appointment of Lambardar; secondly, the reports of the lower revenue functionaries are not binding in character; thirdly no evidence in support of the allegations stated in the report have been placed on record; and, fourthly, Muhammad Siddique in para 2 of his revision petition (ROR 1323/2009) before the Board of Revenue has recorded the remarks "Adam Record Yafia" against the name of Muhammad Irshad and this remark negates the contention of the learned counsel

for the petitioner. Thus, the report of Tehsildar dated 5.6.2008 is of no significance and does not help the case of the petitioner.

8. This Court has never substituted its view for that of the statutory functionaries particularly when it is the question of selection of Lambardar. The appointment of the Headman/Lambardar is for administrative purposes. No person can claim, as of right, to be appointed as Lambardar even he satisfies all the conditions which are laid down in Rule 17 of the Land Revenue Rules. He can still be ignored and in such a case he cannot complain that any wrong has been done for the simple reason that he does not have any vested right. In this regard reliance may be placed on Abdul Wahid Vs. The Member Board of Revenue Punjab, Lahore and others (1971 SCMR 719), Abdul Ghafoor Vs. The Member (Revenue) Board of Revenue and others (1982 SCMR 202), Muhammad Yousaf Vs. Member Board of Revenue and 4 others (1996 SCMR 1581) and M. Nazir Ahmad Vs. Muhammad Aslam and others (2013 SCMR 363). The Land Revenue Act is a self-contained Statute and if there are more than one candidates contesting appointment to the office of Lambardar, the person aggrieved has a right to appeal and may as well move the competent authority in Revenue. This is not on account of the fact that he had any right vested in him but only for the reason that the Statue provides for such a procedure which enables him to challenge the orders in appeal or revision. The Board of Revenue is the head of the revenue administration and is a controlling authority as per principle laid down in Haji Noorwar Jan Vs. Senior Member, Board of Revenue, NWFP Peshawar and 4 others (PLD 1991 SC 531). The point which they have to consider is the fitness or the competency of a person as a Lambardar and not that they are adjudicating on the rights of the parties in such matters because there is no such right involved. The principle which applies in the adjudication of right cannot be invoked in matters of this kind where something is done in pursuance of any claim or a vested right but only to facilitate the performance of administrative function. The constitutional jurisdiction of the High Court is circumscribed by Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. In this connection Article 199(1)(a)(ii) of the Constitution lays down that a High Court of a Province may, if it is satisfied that no other adequate remedy is provided by law, on an application of any aggrieved party, make an order declaring that any act done or proceeding taken in the Province by a person performing functions in connection with the affairs of the Centre, the Province or a Local Authority has been done or taken "without lawful authority and is of no legal effect". Under the law the most that the High Court can do is to simply pronounce the invalidity of the order and declare that it was "without lawful authority and is of

no legal effect". Beyond it, strictly speaking, the High Court has no jurisdiction to issue any other direction and substitute its own judgment in the matter. The Hon'ble Supreme Court of Pakistan in the case of M.Nazir Ahmad Vs. Muhammad Aslam and others (2013 SCMR 363) has held that the High Court while considering the case about the appointment of Lambardar is not supposed to sit as a Court of appeal, but only has to examine, if there is any jurisdictions error, in the orders passed by the Revenue hierarchy and whether such orders are patently against the express provisions of law or the law laid down by the superior Courts and/or perverse, arbitrary, capricious, illogical and against the record. In the instant case the petitioner has failed to point out any violation of law and also to demonstrate any perversity or arbitrariness in the order passed by the Executive District Officer (Revenue) and the Board of Revenue, Punjab. In fact the Executive District Officer (Revenue) after making comparative assessment of the merit of each applicant for the post of Lambardar has appointed Muhammad Irshad as Lambardar and thus orders impugned in this petition do not warrant any interference by this Court.

9. In view of above, this petition lacks merit and is accordingly dismissed.

(R.A.) Petition dismissed

**PLJ 2013 Lahore 660**
**Present: Shahid Waheed, J.**
**SHAKOOR--Petitioner**
**versus**
**POP, etc.--Respondents**

C.R. No. 2581 of 2012, heard on 25.9.2012.

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

----S. 107(d) & O. XLI, R. 27(1)(b)--Permission to produce additional evidence--During pendency of appeal, application for permission to produce additional evidence (1) Rapt Rozenamcha Waqiati, copy of Fard Nilam, Copy of register Haqdaran Zamin, copy of Khasra Girdwar and challan--Not disclosed any sufficient reasons for accepting application--Question of--Whether additional documents were essential for effective--Appellate Court can neither travel outside record of trial Court nor take evidence on appeal--S. 107(d) of CPC is an exception to general rule, and additional evidence can be taken only when conditions and limitation found to exist--Court is not bound under rule to permit additional evidence and parties are not entitled, as of right to admission of such evidence and matter is entirely in discretion of Court, which is of course to be exercised judiciously and sparingly. [P. 663] A

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

----O. XLI, R. 27--Scope of--Additional evidence--Rule 27 alone can be looked to for taking additional evidence and that Court has no jurisdiction to admit such evidence in case where Order 41, Rule 27, CPC does not apply. [P. 663] B

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

----O. XLI, R. 27--Production of additional evidence--Trial Court never refused to admit additional documents in evidence--Pronounce judgment--Validity--When appellate Court finds itself unable to pronounce judgment owing to lacuna or defect in evidence it might admit additional evidence but a party to appeal cannot be allowed to produce additional evidence so as to patch up weaker parts of its case or fill-up omission. [P. 664] C
PLD 1966 SC 684, PLD 1969 SC 58, 2004 SCMR 1049 & 2006 SCMR 1304, rel.

**Pronounce judgment--**

----Additional evidence--Ability to pronounce a judgment is to be understood as ability to pronounce a judgment satisfactory to mind of the Court delivering--It is only lacuna in evidence that will empower the Court to admit additional evidence. [P. 664] D

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

----Ss. 27 & 115 & O. XLI, R. 27--Civil revision--Suit for declaration claiming proprietary right--Application for permission to produce additional evidence--Not disclosed any sufficient reasons for accepting application u/Order 41, Rule 27, CPC--Question of--Whether additional documents are essential for effective adjudication of disputes--Discretion power--When First Appellate Court does not find necessity to allow application then, High Court in exercise of its revisional jurisdiction u/S. 115, CPC cannot interfere with such order when the whole appeal is not before the Court--It is only circumstances, when Appellate Court requires such evidence to pronounce judgment necessity to adduce additional evidence would arise and not in any other circumstance--Petition was dismissed. [P. 665] E

Mr. Muhammad Farooq Qureshi Chishti, Advocate for Petitioner.
Mr. Shahid Mubeen, Addl. A.G. for Respondents Nos. 1 to 3.
Rana Rashid Akram Khan, Advocate for Respondent No. 4.
Date of hearing: 25.9.2012.

**JUDGMENT**

Petitioner, Shakoor, through this civil revision has called in question the order dated 7.6.2012 passed by the learned District Judge, Toba Tek Singh, whereby the application filed by the petitioner under Order XLI, Rule 27, CPC for permission to produce additional evidence was dismissed.

2. Briefly the facts giving rise to this petition are that the petitioner instituted a suit for declaration claiming proprietary rights qua the disputed property and challenged the vires of order dated 8.2.1996 with regard to allotment made in favour of Respondent No. 4, order dated 22.7.2002 and order dated 16.6.2005 passed by the Member Board of Revenue. Learned Trial Court vide judgment and decree dated 6.5.2011 dismissed the suit with cost. Feeling aggrieved, the petitioner preferred an appeal before the learned District Judge, T.T.Singh. During the pendency of the appeal the petitioner moved an application under Order XLI, Rule 27, CPC for permission to produce additional evidence i.e (i) Rapt Rozenamcha Waqiati, (ii)

copy of Fard Nitam, (iii) copy of register Haqdaran Zamin, (iv) copy of Khasra Girdwari and (v) Challan. The respondents resisted this application by filing a reply. Learned District Judge after granting opportunity of hearing to the parties dismissed the application vide order dated 7.6.2012. Hence this petition.

3. Learned counsel for the petitioner in support of this petition submits that the learned lower Appellate Court has failed to apply its judicial mind while passing the impugned order dated 7.6.2012; that learned District Judge has exercised the jurisdiction arbitrarily, illegally and in violation of the principle laid down by the Hon'ble Supreme Courts of Pakistan in the cases of Zar Wali Shah v Yousaf Wali (1992 SCMR 1778) and Mst. Fazal Jan v Roshan Din and others (PLD 1992 S.C 811).

4. Conversely learned Additional Advocate General and learned counsel for Respondent No. 4 vehemently oppose this petition and support the order passed by the learned District Judge and contend that the petitioner has not disclosed any sufficient reasons for accepting the application under Order XLI, Rule 27, CPC.

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

6. Admittedly the petitioner instituted a suit for declaration on 2.11.2005 and the learned trial Court after granting ample opportunities to the parties dismissed the suit vide judgment and decree dated 6.5.2011. The petitioner during the pendency of appeal moved an application under Order XLI, Rule 27, CPC for permission to produce additional documentary evidence i.e (i) Rapt Rozenamcha Waqiati, (ii) copy of Fard Nilam, (iii) copy of register Uaqdaran Zamin, (iv) copy of Khasra Girdwari and (v) Challan ("the additional documents"). It is maintained in the application that the additional evidence is essential for effective adjudication of dispute between the parties. Learned counsel for the petitioner further submits that though the additional documents were available on the file of the learned trial Court yet inadvertently could not be got exhibited. The ground urged in the application and canvassed by the learned counsel for the petitioner for production of additional documents sans merit as it is settled principle of law that a party that had opportunity, but elected not to produce evidence, cannot be allowed to give evidence that could have been given in the Court below. In this regard assistance may be had from the case of State of U.P. v. Manbodhan Lal Srivastava (AIR 1957 S.C 912), Sher Baz Khan and other v. Mst. Malkani Sahibzadi Tiwana and others (PLD 2003 S.C 849), Mustafa Kamal and others v. Daud Khan and others (2009

SCMR 221). Now a question arises, whether the additional documents are essential for effective adjudication of the disputes between the parties and the same could be allowed by the learned District Judge by invoking expression "to enable it to pronounce judgment" as used in clause (b) of Rule 27 (1) of Order XLI, CPC. In order to address this issue I would like to refer to the scope of an application field under Order XLI, Rule 27, CPC. Section 107, CPC enables Appellate Court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order XLI, Rule 27, CPC. Principle to be observed ordinarily is that the Appellate Court can neither travel outside the record of the trial Court nor take evidence on appeal. However, Section 107 (d), CPC is an exception to the general rule, and additional evidence can be, taken only when the conditions and limitations laid down in the said rule are found to exist. The Court is not bound under the circumstances mentioned under the rule to permit additional evidence and parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the Court, which is, of course to be exercised judiciously and sparingly. Privy Council in the case of Kessowji Issur v. GIP Railways (1907) ILR 31 Bombay 381) while examining the scope of Order XLI, Rule 27, CPC has held that this rule alone can be looked to for taking additional evidence and that the Court has no jurisdiction to admit such evidence in cases where this rule does not apply. Order XLI, Rule 27, CPCenvisages certain circumstances when additional evidence can be addu ced. At this juncture it would be appropriate to reproduce Rule 27, CPC of Order 41 which read as under--

"27. Production of additional evidence in Appellate Court--(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral, or documentary, in the Appellate Court. But if--

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

In the instant case, it is not the case of the petitioner that the first situation is attracted because the learned trial Court never refused to admit the additional documents in evidence. In second circumstance, the Appellate Court may require

any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The expression "to enable it to pronounce judgment", has been subject to several decisions of superior Courts wherein it has been held that when Appellate Court finds itself unable to pronounce judgment owing to lacuna or defect in the evidence as it stands, it may admit additional evidence but a party to the appeal cannot be allowed to produce additional evidence so as to patch up the weaker parts of its case or fill up omission. In this regard reliance may be placed on the cases of M/s. Muhammad Siddiq Muhammad Umar and another v. The Austrialasi Bank Ltd. (PLD 1966 S.C 684), The Secretary of the Government of West Pakistan, Communication & Works and another v. Gulzar Muhammad (PLD 1969 S.C 58), M/s. Muhammad Siddiq Muhammad Umar and another v. The Australasia Bank Ltd), Muhammad Yousaf v. Mst. Maqsooda Anjum and others (2004 SCMR 1049) Muhammad Feroze and others v. Muhammad Jamaat Ali (2006 SCMR 1304). The ability to pronounce a judgment is to be understood as ability to pronounce a judgment satisfactory to the mind of the Court delivering it. It is only lacuna in the evidence that will empower the Court to admit additional evidence. This view finds support from the cases of Subba Naidu v. Ethirajammal and others (AIR 1916 M 966) Bur Singh v. Santa Singh and others (AIR 1938 Lahore 161), The Municipal Corporation of Greater Bombay v. Lal Pancham and others (AIR 1965 S.C 1008), and Qalandar v. Muhammad Zarian and another (1980 CLC 1417). But mere difficulty in coming to a decision is not sufficient for admission of evidence under Order XLI, Rule 27, CPC. The words "or for any other substantial cause" must be read with word "require" which is set out at the commencement of the provisions so that it is only where, for any other substantial cause, Appellate Court requires additional evidence. It is under these circumstances such power may be exercised. In this regard assistance may be had form Parsotim Thakur and others v. Lal Mohar Thakur and others (AIR 1931 PC 143), and Seth Kunjilal Manakchandji Bhawasar and others v. Shankar Nanuram (AIR 1943 Nag 289), Ghulam Farid and 12 others v. Gahroo and 12 others (1972 SCMR 372) Muhammad Lal v. Mohko (NLR 1988 SCJ 547), and

Muhammad Siddique v. Abdul Khaliq and 28 others (PLD 2000 SC (AJK) 20). In the instant case the learned lower Appellate Court after appreciating the evidence available on record has declined the permission to produce additional documents. The learned first Appellate Court has exercised its discretionary power judiciously and by expressing cogent reasons. Hence, when first Appellate Court does not find necessity to allow the application, then, High Court in exercise of its revisional jurisdiction under Section 115, CPC cannot interfere with such order, particularly when the whole appeal is not before the Court. It is only in the circumstances when the Appellate Court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstance. In these circumstances precedents cited by the learned counsel for the petitioner are distinguishable and do not help the arguments canvassed by him.

7. In view of above, this petition lacks merit and is accordingly dismissed with no order as to cost.

(R.A.) Petition dismissed

**2013 Y L R 2494**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD YOUSAF---Petitioner**
**Versus**
**MUHAMMAD SHAFI and another---Respondents**

Civil Revision No.522 of 2011, heard on 28th June, 2013.

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

---S. 30---Suit for pre-emption---Limitation---Sale deed was registered on 29-6-2001 while suit to pre-empt the same was filed on 29-10-2001---Period for filing suit for pre-emption was four months from the date of registration of sale-deed and first day was to be excluded while computing the same---Suit, therefore, was within time.

**(b) Punjab Pre-emption Act (IX of 1991)---**

----Ss. 13 & 31---Talbs, performance of---Requirements---Plaintiff had not stated the date and year of making of Talb-e-Muwathibat---Where a fact was required to be proved through oral evidence, same must be direct and of the primary source---Foundation of direct evidence in the case about the proof of the fact of Talb-e-Muwathibat was the person who had made the same---If pre-emptor in his examination-in-chief had neither stated nor explained with regard to Talb-e-Muwathibat i.e. date, month and year then statement of such facts by his witnesses could not be considered trustworthy and acceptable---Plaintiff's case was not that the Officer registering the sale-deed did not comply with the requirement of S. 31 of the Punjab Pre-emption Act, 1991---Section 31 of the Act did not contemplate personal notice but required public notice in respect of registration of sale-deed---Plaintiff had not led evidence qua the non-issuance of public notice by the registering authority and it would be presumed that he had due knowledge of the registration of sale-deed within two weeks from the issuance of public notice---Plaintiff sent notices of Talb-e-Ishhad on 11-9-2001 while sale-deed was registered on 29-6-2001---Talb-e-Ishhad was required to be made within two weeks of knowledge of sale---Plaintiff did not comply with the requirement of S. 13 (1) of the Punjab Pre-emption Act, 1991 and sent notices of Talb-e-Ishhad after prescribed period of time---Plaintiff had failed to make Talbs in accordance with law and right of pre-emption was not available to him---Revision was dismissed.

Talib Hussain and another v. Muhammad Sharif and 4 others 2000 CLC 323; Ghulam Muhammad v. Ghulam Hussain alias Hussain 2003 YLR 2560; Humayun

Naseer Cheema and 3 others v. Muhammad Saeed Akhtar and others 2007 CLC 819 and Haji Muhammad Usman through his legal heirs v. Muhammad Paryal 1987 CLC 552 rel.

**(c) Punjab Pre-emption Act (IX of 1991)---**

----S. 13---Talb-e-Ishhad, performance of--- Requirements--- Talb-e-Ishhad was required to be made by sending notice in writing attested by two truthful witnesses under registered cover acknowledgementdue to vendee within two weeks of knowledge of sale.

**(d) Punjab Pre-emption Act (IX of 1991)---**

----S. 30---West Pakistan General Clauses Act (VI of 1956), Ss. 8 & 2 (38)---Limitation Act (IX of 1908), Ss. 12 (1) & 29(2)(a)---Pre-emption suit---Limitation---Exclusion of time in legal proceedings---Scope---Period for filing suit for pre-emption was four months from the date of registration of sale-deed and first day was to be excluded while computing the same.

**(e) West Pakistan General Clauses Act (VI of 1956)---**

----S.2(32)---Month---Meaning---"Month"
should mean a month reckoned according to the British Calendar.

**(f) Words and phrases---**

----"Reckoned"---Meaning---"Reckoned" was equivalent to the term "calculated" or "counted".

**(g) Punjab Pre-emption Act (IX of 1991)---**

----S. 31---Notice for registration or attestation of sale-deed or mutation---Procedure--- Limitation--- Officer registering the sale-deed or attesting the mutation of sale was bound to give public notice with regard to such registration or attestation within two weeks---Notice should be deemed to have been sufficiently given if same was displayed on the main entrance of a mosque or on any other public place of the village or the place where the property was situated---Presumption of regularity was attached to all official acts---Section 31 of the Punjab Pre-emption Act, 1991 did not contemplate personal notice but required public notice in respect of registration of sale-deed.

Muhammad Irfan Malik for Petitioner.
Kh. Saeed-uz-Zafar for Respondents.
Date of hearing: 28th June, 2013.

## JUDGMENT

**SHAHID WAHEED, J.---**The petitioner, Muhammad Yousaf, through this Civil Revision Petition under section 115, C.P.C. has challenged the judgment and decree dated 21-10-2010 passed by the learned Addl. District Judge, Gujranwala who affirmed the judgment and decree dated 21-12-2009 passed by the learned Civil Judge Ist Class, Gujranwala whereby his suit for possession through pre-emption was dismissed.

2. Briefly, the facts of the case are that the suit property sold in favour of the respondents vide registered sale-deed dated 29-6-2001 (Exh.P5) was sought to be pre-empted by the petitioner on the ground of his being Shafi-Sharik, Shafi-Khalit and Shafi-Jar with the assertion that he had performed the requisite Talbs in accordance with law. The suit was contested by the respondents, inter alia, on the ground that the same was barred by limitation; and, that the petitioner had no preferential right nor performed Talbs in accordance with law. The learned Trial Court on divergent pleadings settled issues and called upon the parties to adduce evidence in support of their respective claims. The petitioner himself appeared before the learned Trial Court as P.W.3 and produced two supporting witnesses namely Qasim Ali (P.W.2) and Muhammad Nawaz (P.W.1). He also tendered documentary evidence. The respondents, however, could not produce any evidence and resultantly the learned Trial Court vide order dated 14-11-2009 by invoking the provision of Order XVII, Rule 3, C.P.C. closed the right of the respondents to produce evidence.

3. After recording evidence, the learned Trial Court decided Issue No. 1 (whether the plaintiff fulfilled the requirements of Talbs? OPP) against the petitioner and held that he had failed to make Talabs in accordance with law. Issue No. 2 (i.e. "Whether the disputed sale transaction was kept hidden by the defendants?") was decided against the respondents and in favour of the petitioner. The issue with regard to superior right of pre-emption was decided in favour of the petitioner. As regards the issue of sale amount, it was decided against the petitioner. Issue No. 5 (i.e. "whether the suit is within limitation?") was decided against the petitioner. The suit was dismissed by the learned trial Court vide judgment and decree dated 21-12-2009. Feeling aggrieved, the petitioner preferred an appeal before the learned Addl. District Judge. The learned Addl. District Judge reversed the findings of the learned trial Court with regard to issue No. 1 and held that the petitioner had fulfilled the requirements of Talbs. He, however, upheld the findings of the learned trial Court with respect to issue No. 5 and held that the suit was barred by time. In view of the

findings recorded in respect of issue No.5, the appeal of the petitioner was dismissed vide judgment and decree dated 21-10-2010. Hence, this petition.

4. Learned counsel for the petitioner contended that it was established on record that petitioner having superior right of pre-emption had made the Talbs in accordance with law. The only issue on the basis of which the petitioner has been non-suited is the issue of limitation. In this context he submitted that under section 30 of the Punjab Pre-emption Act, 1991 the period of 4 months has been prescribed for filing a suit for pre-emption and the period in the instant case commenced from the date of registration of sale-deed i.e. 29-6-2001. Relying upon the judgment passed in the case of Ghulam Muhammad v. Ghulam Hussain alias Hussain (2003 YLR 2560), learned counsel for the petitioner contended that the suit of the petitioner was within limitation as the same was filed on 29-10-2001, that is, within four months.

5. Conversely the learned counsel for the respondent has argued that the suit of the petitioner was barred by one day; and, that the petitioner had failed to prove the Talbs in accordance with law and, therefore, it was rightly dismissed.

6. The record of this case has been perused and with the consent of the learned counsel for both the parties, this civil revision has been heard today as a Pacca case.

7. The first question which requires determination in this case is as to whether the suit filed by the petitioner was within time or not. Admittedly the sale-deed (Exh.P5) in favour of the respondent/ vendee was registered on 29-6-2001 while the suit to pre-empt the said sale was filed on 29-10-2001. The period of filing a suit for pre-emption has been prescribed in section 30 of the Punjab Pre-emption Act, 1991 which reads as under:--

"Limitation.---The period of limitation for a suit to enforce a right of pre-emption under this Act shall be four months from the date:

(a) of the registration of the sale-deed;

(b) of the attestation of the mutation, if the sale is made otherwise than through a registered sale-deed;

(c) on which the vendee takes physical possession of the property if the sale is made otherwise than through a registered sale-deed or a mutation; or

(d) of knowledge by the pre-emptor, if the sale is not covered under paragraph (a) or paragraph (b) or paragraph (c)."

According to above cited section 30 the period for filing a suit for pre-emption is four months from the date of registration of sale-deed. The word "from" has been defined in section 8 of the West Pakistan General Clauses Act, 1956 which reads as under:--

"Commencement and termination of time.---In any West Pakistan Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word "from" and for the purpose of including the last in a series of days or any other period of time to use the word "to"."

The conjunctive reading of section 30 of the Punjab Pre-emption Act, 1991 and section 8 of the West Pakistan General Clauses Act, 1956 leads to the conclusion that while computing the period of limitation the first day is to be excluded, which is further fortified by section 12(1) of the Limitation Act, 1908 as also by section 29(2)(a) of the Limitation Act, 1908. The controversy, therefore, veered around the question as to when did the period of four months prescribed in section 30 of the Act ibid expired in the instant case. An answer to that question would, in turn, depends upon the meaning to be attached to the term "four months" or, to be more precise, to the expression "month". The term "month" has not been defined under the Punjab Pre-emption Act, 1991. Section 2(38) of the West Pakistan General Clauses Act, 1956, however, defines the word "month" as under:--

"month" shall mean a month reckoned according to the British Calendar."

The above definition does not resolve the issue for what needs to be examined is as to when a month would be complete according to the British Calendar if it were to be reckoned from the date of registration of sale-deed. Neither the Punjab Pre-emption Act, 1991 nor the West Pakistan General Clauses Act, 1956 lends any assistance in this regard. The term "reckoned" is equivalent to the term "calculated" or "counted". If the legislature wanted a month to mean only a compact unit of a calendar month, the normal definition would have been as a British calendar month or a calendar month. How a month is to be reckoned has been the subject matter of consideration by courts. According to Words and Phrases, permanent edition, West Publishing Company:--

"The term "month", whether employed in modern statutes or contracts, and not appearing to have been used in a different sense, denote a period terminating with the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof."

According to the Shorter Oxford English Dictionary, "month" means:--

"A space of time, either (a) extending from any day to the corresponding day of the next calendar month (called 'a calendar month') or (b) containing 28 days (often) miscalled a 'lunar month'."

Halsbury's Laws of England, 3rd Edition, Volume 37, Paragraph 143, gives the meaning of the word "month". That paragraph states:--

"When the period prescribed is a calendar month running from any arbitrary date the period expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts; save that, if the period starts at the end of a calendar month which contains more days than the next succeeding month, the period expires at the end of the latter month."

This question also fell for interpretation in the case of Talib Hussain and another v. Muhammad Sharif and 4 others (2000 CLC 323) and it was held as follows:--

"The contention of learned counsel for the respondents that General Clauses Act, 1898 is not applicable to the present case and that the period of four months is to be reckoned as lunar months, is devoid of any force. The period of limitation provided in the Act is simply 'four months' if the intention of the legislation was Islamic four months or 120 days, it would have specifically mentioned as 'four lunar/Islamic months'. That having not been so incorporated, I am unable to accept his contention that said four months would mean four lunar/Islamic months."

The above said view was followed in the case of Ghulam Muhammad v. Ghulam Hussain alias Hussain (2003 YLR 2560). In the case of Ghulam Muhammad (supra) the sale mutation was attested in favour of the vendees on 8-2-1992 while the suit was filed by pre-emptor on 8-6-1992. It was held that the suit was within time. I am also in respectful agreement with the principal laid down in the above cited precedents. Applying the above to the instant case and excluding the date on which

the sale-deed (Exh.P.5) was registered, the first month would expire on 30th July, 2001 and the succeeding three months on 30th August, 2001, 30th September, 2001 and 30th October, 2001. Thus, I am inclined to hold that the suit filed by the petitioner on 29-10-2001 to pre-empt the sale made vide registered sale-deed dated 29-6-2001 (Exh.P5) was within time.

8. The other important issue in the instant case is issue No. 1 whereby the onus was on the petitioner to prove that he had fulfilled the requirements of Talbs. The learned trial Court decided this issue against the petitioner whereas these findings were reversed by the learned Addl. District Judge, Gujranwala. The findings of the courts below in respect of this issue are at variance and, thus, while exercising my revisional jurisdiction under section 115, C.P.C., I deem it expedient to examine this issue so as to avert miscarriage of justice. The petitioner in Paragraph No. 3 of the plaint stated that he came to know about the sale on 2-9-2001 at 12 noon but while appearing before the learned trial Court as P.W.3 he did not state the date and year of making Talb-e-Muwathibat. The statement made by the petitioner (P.W.2) in his examination-in-chief reads as follows:--

It is a settled principle of aw that where a fact is required to be proved through oral evidence, such evidence must be direct and of the primary source. The foundation of such direct evidence in the case about the proof of the fact of Talb-e-Muwathibat, is the person who had made the Talb. If the pre-emptor in his examination-in-chief neither states nor explains about the facts regarding Talb-e-Muwathibat i.e. date, month and year then statement of such facts by his witnesses cannot be considered trustworthy and acceptable. In this regard reference may be made to the case of Humayun Naseer Cheema and 3 others v. Muhammad Saeed Akhtar and others (2007 CLC 819) and Haji Muhammad Usman through his legal heirs v. Muhammad Paryal (1987 CLC 552). Thus, I am persuaded to hold that the petitioner had failed to prove making of Talb-e-Muwathibat in accordance with section 13 of the Punjab Pre-emption Act, 1991.

9. It is the case of the petitioner/ pre-emptor that the vendees-respondents had kept the factum of sale-deed secret for which he had no notice. In paragraph 2 of the plaint, it has been stated that with regard to sale of the suit property no notice was given to the plaintiff. Paragraph 2 of the plaint reads as under:--

Section 31(1) of the Punjab Pre-emption Act, 1991 provides that it is incumbent upon the officer registering the sale-deed or attesting the mutation of sale to give

public notice in respect of such registration or attestation within two weeks as the case may be. Subsection (2) thereof envisages that the notice given under subsection (1) shall be deemed to have been sufficiently given if it is displayed on the main entrance of a mosque and on any other public place of the village or the place where the property is situated. Presumption of regularity is attached to all official acts. It is not the case of the petitioner that officer registering the sale-deed did not comply with the requirement of section 31 of the Punjab Pre-emption Act, 1991. The petitioner in Paragraph 2 of the plaint has pleaded that with regard to disputed sale no notice was given to him. Section 31 does not contemplate personal notice but instead requires public notice in respect of registration of sale-deed. The petitioner has not led any evidence qua the non-issuance of public notice by the Registering Authority. It would, therefore, be presumed that the petitioner had due knowledge of the registration of sale-deed of the suit-land within two weeks from the issuance of public notice under section 31 of the Punjab Pre-emption Act, 1991. In the case in hand, the petitioner sent notices of Talb-e-Ishhad (Exh.P1 and Exh.P2) to the respondent on 11-9-2001 while sale-deed was registered on 29-6-2001. Talb-e-Ishhad was required to be made by sending notice in writing attested by two truthful witnesses under registered cover acknowledgment due, to vendee within two weeks of knowledge of sale. The petitioner did not comply with requirement of section 13(1) of the Punjab Pre-emption Act, 1991 and sent notice of Talb-e-Ishhad after prescribed period of time. The petitioner had failed to make Talbs in accordance with law, therefore, right of pre-emption is not available to him. In this regard reliance may be placed on Muhammad Rafique v. Muhammad Ashiq and 2 others (1996 SCMR 441), Mian Asif Islam v. Mian Muhammad Asif and others (PLD 2001 SC 499) and Muhammad Ramzan v. Lal Khan (1995 SCMR 1510).

10. The C.M. No. 1-C of 2013 moved by the petitioner under Order XLI, Rule 27, C.P.C. for production of additional evidence has been dismissed vide separate order of even date.

11. This petition sans merit and is, therefore, dismissed with no order as to costs.

AG/M-203/L Petition dismissed.

**PLJ 2013 Lahore 690**
**Present: Shahid Waheed, J.**
**ZIA ULLAH MALIK--Appellant**
**versus**
**NADEEM BAIG--Respondent**

F.A.O. No. 133 of 2009, heard on 17.10.2012.

**Punjab Consumer Protection Act, 2005 --**
----Ss. 2(c) & 33--Return of complaint--Appellant was running a registered firm--Agreement for packing in correct weight grocery--Plant did not work properly--Suffered loss--Question of--Whether a firm falls within definition of consumer--Determination--A firm being a person falls within contemplation of definition of consumer as provided in Section 2(c) of Punjab Consumer Protection Act, and might competently maintain a complaint against manufacturer in respect of a product before Distt. Magistrate Court if it satisfied that there was transaction of sale or lease, sale or lease was transaction buying or leasing of product was for consideration, obtaining of product was not for resale purpose and obtaining of product was not for commercial purpose which did not include use by consumer of product and used only for purpose of his likelihood as a self-employed person--Appeal was allowed. [Pp. 692 & 693] A

AIR 1995 SC 1428, AIR 1997 Del. 182, 2007 NICA 39 & 1998 AIR ER (EC) 135, ref.
Mr. Naveed Zafar Khan, Advocate for Appellant.
Nemo for Respondent.
Date of hearing: 17.10.2012.

**JUDGMENT**

Appellant, Zia Ullah Malik, through this appeal under Section 33 of the Punjab Consumer Protection Act, 2005 has called in question the order dated 6.4.2009, passed by the learned District Consumer Court, Lahore whereby the appellant's complaint was returned.

2. Briefly, the facts giving rise to this appeal are that the appellant is running a registered Firm under the name and style of M/s. Overseas Trading Corporation. The services of the appellant by virtue of an agreement were hired by the Canteen Store Department ("CSD") for packing in correct weight the grocery and other items. The appellant for the above said purpose purchased an Electronic Bagging Plant from the respondent. It is worth mentioning here that the above said Plant was also installed by the respondent at the appellant's premises. The said Plant did not work properly and as a result thereof the appellant suffered losses. In these

circumstances, the appellant filed a complaint on 6.04.2009 before the learned District Consumer Court, Lahore against the respondent for the recovery of Rs.2,380,000/- on account of refund of the entire amount paid by the appellant to the respondent as cost of machine, extra cost paid for purchase of new machine and economic losses arising from deficiency and loss of use of product, etc sustained by the appellant due to defective and faulty product of the respondent. Learned District Consumer Court after hearing the preliminary arguments of the appellant returned the complaint vide order dated 6.4.2009 which reads as under:

"The respondents entered into an Agreement dated 20.11.2007 with M/S Overseas Trading Corporation for cleaning and packing of Grocery and other items for CSD, for which purpose a Packing Machine was purchased by the petitioner. The petitioner is running a registered Firm by the name of M/s Overseas Trading Corporation; as such the Corporation does not fall under the definition of a Consumer, as given in the Punjab Consumer Protection Act, 2005. This petition is returned to be filed before a proper forum if so advised.

File be consigned after due completion."
Feeling aggrieved by order dated 6.4.2009, the appellant has filed the instant appeal before this Court.

3. Learned counsel for the appellant submits that the impugned order is against the provisions of law and facts; and, that the learned District Consumer Court has not properly interpreted Section 2(c) of the Punjab Consumer Protection Act, 2005 and therefore, fell in error while returning the complaint.

4. Notice was issued to the respondent but despite service he did not turn up to oppose this appeal and resultantly, he was proceeded against exparte vide order dated 12.7.2010.

5. I have heard the learned counsel for the appellant and perused the record appended with this appeal.

6. The sole question which requires determination by this Court is as to whether a firm falls within the definition of "consumer" as given in Section 2(c) of the Punjab Consumer Protection Act, 2005. The definition of a "consumer" reads as under:--
"Consumer" means a person or entity who--

(i) buys or obtains on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose; or

(ii) hires any services for a consideration and includes any beneficiary of such services;

Explanation.--For the purpose of sub-clause (i), "commercial purpose" does not include use by a consumer of products bought and used by him only for the purpose of his livelihood as a self-employed person."
The above definition of the term "consumer" is comprehensive one as it covers not only consumer of products but also consumer of services. In relations to products--"consumer" means:

(1) a person or entity who for a consideration:
(i) buys any product, or
(ii) obtains on lease any product, and
(2) any user of such product

There are two exceptions. The term "consumer" does not include a person or entity who obtains any product: (i) for resale, or (ii) for any commercial purpose which does not include use by a consumer of products bought and used by him only for the purpose of his livelihood as a self-employed person. In the above quoted definition of "Consumer", two words, that is, "person" and "entity" have been used. The word "entity" has been defined in Section 2(e) of the Punjab Consumer Protection Act, 2005 which reads as under:--

"Entity" means as organization that has a legal identity apart from its members.
A firm does not fall within the above referred definition of "entity" as the members of a firm do not form a collective whole distinct from the individuals composing it. The word "person" has not been defined in the Punjab Consumer Protection Act, 2005. In such a situation we can invoke Section 2 of the Punjab General Clauses Act, 1956 which clearly says, that; "In this Act, and in all the Punjab Acts unless there is any thing repugnant in the subject or context, definition given in the General Clauses Act" would apply. Section 2(47) of the Punjab General Clauses Act, 1956 defines a "person" as follows:--

(47) "Person" shall include any company or association or body of individuals, whether incorporated or not".

In view of above, a firm being a "person" falls within the contemplation of definition of "consumer" as provided in Section 2(c) of the Punjab Consumer Protection Act, 2005 and may competently maintain a complaint against a manufacturer in respect of a product before the District Consumer Court if it satisfies that: (i) there is a transaction of sale or lease; (ii) the sale or lease is of product;(iii) the buying or leasing of product is for consideration; (iv) the obtaining of product is not for resale purpose; and, (v) the obtaining of product is not for commercial purpose which does not include use by a consumer of product and used by him only for the purpose of his livelihood as a self-employed person. In this regard reference may be made to the case of "Laxmi Engineering Works vs. P.S. G.

Industrial Institute" (AIR 1995 S.C. 1428), "Ravi Kant and others vs. National Consumer Disputes Redressal Commission and others" (AIR 1997 Del. 182), "Department of Enterprise Trade and Investment vs. The Carrill Group Ltd" (2007) NICA 39, "MFI Furniture Centre Ltd vs. Hibbert" 160 JP 178, "Benincasa vs. Dentalkit" (1998) All ER (EC) 135.

7. In the above circumstances, this appeal is allowed, order dated 06.04.2009, passed by the learned District Consumer Court, Lahore is set aside and the case is remanded to the learned District Consumer Court, Lahore for a fresh decision in accordance with law. No order as to costs.

(R.A.) Appeal allowed

**PLJ 2013 Lahore 684**
**Present: Shahid Waheed, J.**
**MOHSIN RAZA--Petitioner**
**versus**
**D.C.O. etc.--Respondents**

W.P. No. 6968 of 2013, decided on 10.6.2013.

**Constitution of Pakistan, 1973--**

----Art. 199--Constitutional petition--Contractual appointment was cancelled--Validity--It is well-settled principle of law that a contract employee cannot file a writ petition to seek renders in respect of grievance relating to terms and conditions of service. [P. 685] A

**Contractual appointment--**

----Appointment of civil servant was contractual in nature and no statutory obligation--Validity--Any duty or obligation falling upon a public servant out of contract entered into by him as such public servant cannot be enforced by machinery of a writ under Art. 199 of Constitution. [P. 685] B
PLD 1962 SC 108; 1984 CLC 2168; 1987 MLD 153 ref.

**Civil Servant--**

----It is settled principle of law that if an employees is dismissed in breach of contractual requirement he might recover damages and cannot claim reinstatement, whatever hardship suffers as result of his dismissal. [P. 685] C
Mr. Muhammad Iqbal Mohal, Advocate for Petitioners.
Mr. Shahid Mubeen, AAG for Respondents.
Date of hearing: 10.6.2013.

**ORDER**

The petitioners through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 have called in question the orders whereby their orders regarding contractual appointment have been cancelled.

2. Learned counsel for the petitioners through the instant petition has asked for an order in the nature of mandamus under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 for quashing the impugned orders on the plea that the same are unreasonable, violative of rules, policy and law applicable thereto.

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

4. Without touching merits of the case, it is suffice to say that it is also well-settled principle of law that a contract employee cannot file a writ petition to seek redress in respect of grievance relating to terms and conditions of service. The reason is that a writ of mandamus may be granted only in a case where there is statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. In the present case, the appointment of the petitioners is contractual in nature and there is no statutory obligation as between the respondents and the petitioners. In my view, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. This view finds support from the case of "M/s. Momin Motor Company vs. Regional Transportation Authority Dacca and others" (PLD 1962 SC 108), Major (R) Khalilur Rehman v. Overseas Pakistan Foundation and others (1984 CLC 2168) and M. A Rashid v. Province of Punjab and 2 others (1987 MLD 153). It is also settled principle of law that if an employee is dismissed in breach of a contractual requirement, he may recover damages and cannot claim re-instatement, whatever hardship he suffers as a result of his dismissal. In this regard reliance may be placed on Addis v. Gramophone Co. Ltd. (1909) AC 488), Vide Collier v. Sunday Referee Publishing Co. Ltd., [1940 (4) All. E.R. 234] Rogan-Gardiner v. Woolworths Ltd. (2010) WASC 290), Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs v. Muhammad Azam Chattha (2013) SCMR 120).

5. In view of above this petition is dismissed in limine.

(R.A.) Petition dismissed

**PLJ 2013 Lahore 665 (DB)**
**Present: Amin-ud-Din Khan and Shahid Waheed, JJ.**
**SARJA alias SHEELA--Appellant**
**versus**
**GHULAM RASOOL--Respondent**

R.F.A. No. 464 of 2010, heard on 21.5.2013.

**Qanun-e-Shahadat Order, 1984 (10 of 1984)--**

----Art. 17--Negotiable Instruments Act, 1881, S. 4--Thumb-impression on pronote and receipt--Question of--Whether a pronote is a document which requires attestation of two witnesses--Validity--Pronote is a document which requires attestation by two witnesses within meaning of Art. 17 of Q.S.O. for simple reason that transaction through a pronote is governed by a special law, that is Negotiable Instrument Act and Section 4 does not require any witness to testify promissory note--Compliance of provisions of Art. 17 of Order, 1984 by virtue of its clause ordains is not mandatory in respect of promote. [P. 668] A

PLD 1986 Quetta 232, 2006 CLD 91, PLD 2007 Lah. 114, 2007 YLR 1038 & PLJ 2000 Lah. 1619, rel.

**Qanun-e-Shahadat Order, 1984 (10 of 1984)--**

----Art. 17--Negotiable Instrument Acts, 1881, Scope of--Suit for recovery on basis of pronote--Thumb impression--Validity of agreement to sell without bear signature of attesting witness--Question of--Whether attestation of two witnesses was legal requirement of pronote--Stamp affixed on back of promissory note--No value in eye of law--Validity--It is settled principle of law that when pronote and receipt of pronote are one same leaf, the mere fact that some of stamps are on portion which falls on back printed receipt on pronote, would not lead the Court to treat those stamps as on a paper other than that of pronote. [P. 669] B

**Stamp Act, 1899 (II of 1899)--**

----S. 12--Qanun-e-Shahadat Order, (10 of 1984), Art. 17--Original pronote and receipt was found sufficiently stamped--Cancellation of adhesive stamps--Cancelled by writing on or across stamp with name or initials and date--Stamps were not properly cancelled and, therefore, it is to be treated as if pronote was not duly stamped--Writing his name on putting his initials by executant is not only mode of cancellation of stamp--Adhesive stamps can also be canceled in other ways--Object of cancellation of adhesive stamps is to prevent same stamps from being used again--Cancellation is required for purpose of preventing fraud, thus if adhesive stamp is affixed on document and it is cancelled by drawing a line across it, it cannot be used

again unless it is removed from document, which might not be possible without in some measure causing visible damage to stamp itself--All stamps appear to had been effectually cancelled by respondent in accordance with S. 12 of Stamp Act, and thus contention for appellant had no force and not applicable to instant case--Appeal was dismissed. [Pp. 669 & 670] C, D & E

Mirza Hafeez-ur-Rehman, Advocate for Appellant.
Ch. Muhammad Yaqub Sidhu, Advocate for Respondent.
Date of hearing: 21.5.2013.

**JUDGMENT**

Shahid Waheed, J.--Challenge in this appeal is to the judgment and decree dated 3.3.2010 passed by the learned Addl. District Judge, Jhang whereby the suit filed by the respondent for recovery of Rs. 1,000,000/- on the basis of pronote dated 5.11.2005 was decreed.

2. Briefly the facts of the case are that the respondent, Ghulam Rasool, on the basis of pronote dated 5.11.2005 (Ex.P1) instituted a suit under Order XXXVII, Rule 2, CPC against the appellant for recovery of Rs. 1,000,000/-. It is stated in the plaint that the respondent and the appellant had friendly relations with each other; and, that the appellant on 5.11.2005 borrowed Rs. 1,000,000/- from the respondent and for the security of its repayment executed pronote (Ex.P1) and receipt (Ex.P2) in the house of the respondent. In response to summons the appellant entered appearance before the learned trial Court and filed an application for leave to appear and defend the suit. The learned trial Court vide order dated 15.12.2007 granted leave to the appellant subject to his furnishing surety bond equivalent to the suit amount. After getting leave the appellant contested the suit by filing a written statement wherein though he admitted his thumb impression on the pronote (Ex.P1) and receipt (Ex. P2) but denied his liability to pay the amount on the plea that the pronote and receipt were obtained by the respondent fraudulently on the blank papers.

3. On pleadings of the parties the learned trial Court framed the following issues:--

1. Whether the plaintiff is entitled for recovery of Rs. 10 lac on the basis of pro-note and receipt dated? OPP

2. Whether the plaintiff has no cause of action and locus standi to file this suit? OPP

3. Whether the promissory note dated 05.11.2005 is bogus forged and based on fraud? OPD

4. Whether the suit is time barred? OPD

5. Whether the plaintiff is estopped by his own words and conduct to file the suit? OPD

6. Whether the suit is based on fraud, malafide and has also been filed just to harass the defendant? OPD

7. Whether the suit is not maintainable in its present form? OPD

8. Relief.

4. The respondent appeared before the learned trial Court as PW-3 and produced Ghulam Shabbir (PW-1) and Hakam Ali (PW-2). In documentary evidence the respondent tendered promissory note (Ex.P1) and receipt (Ex.P2). Conversely, the appellant himself appeared as DW1 and produced Muhammad Jahangir as DW-2. The appellant, however, did not tender any documentary evidence in support of his claim. After recording evidence the learned trial Court decreed the suit with costs vide judgment and decree dated 3.3.2010. Hence, this appeal.

5. In support of instant appeal, the learned counsel for the appellant has contended that no decree on the basis of pronote (Ex.P1) could have been passed by the learned trial Court as the same was not properly stamped; that the stamps affixed on the pronote (Ex.P1) have not been properly crossed; that the revenue stamps affixed on the back of promissory note (Ex.P1) carry no value in the eye of law; and, that pronote being a document creating future obligation was required to be attested by two witnesses in terms of Article 17 of the Qanun-e-Shahadat Order, 1984 and since the pronote (Ex.P1) is not in conformity with Article 17 of the Qanun-e-Shahadat Order, 1984, no decree could be passed on its basis. In support of his contention learned counsel for the appellant placed reliance on the case of K.M. Muneer Vs. Mirza Rashid Ahmad (PLD 1964 (W.P.) Karachi 172), Habib Bank Ltd. Vs. Mst. Nusrat Naheed, etc. (NLR 1989 UC 391), Malik Muhammad Akram Vs. Khuda Bakhsh (2000 CLC 759) and Muhammad Nawaz Vs. Abdul Sattar (PLJ 2000 Lahore 1619). On the other hand, the learned counsel for the respondent has vehemently opposed this appeal and supported the judgment and decree passed by the learned trial Court. He submitted that the respondent/plaintiff by producing the witnesses proved the execution of pronote (Ex.P1) and thus the onus was shifted on the appellant to establish that he had thumb marked on the blank papers but he failed to discharge his burden and, therefore, the judgment and decree passed by the learned trial Court is valid in all respects.

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

7. The first question requiring determination is as to whether a pronote is a document which requires attestation of two witnesses within the contemplation of Article 17 of the Qanun-e-Shahadat Order, 1984. We are not persuaded to agree

with the argument of the learned counsel for the appellant that pronote is a document which requires attestation by two witnesses within the meaning of Article 17 of the Qanun-e-Shahadat Order, 1984 for the simple reason that a transaction through a pronote is governed by a special law, that is, the Negotiable Instrument Act, 1881 and Section 4 thereof does not require any witness to testify the promissory note. Thus, compliance of the provisions of Article 17 of the Qanun-e-Shahadat Order, 1984 by virtue of its clause (2), which clearly ordains, "unless otherwise provided ..... in any special law; is not mandatory in respect of pronote. The above view finds corroboration from the judgment rendered in the case of. Mst. Sughran Begum and 11 others Vs. Haji Meer Qadir Bakhsh and two others (PLD 1986 Quetta 232), Amir Tufail Vs. Muhammad Sadiq (2006 CLD 91), Abdul Rauf Vs. Farooq Ahmad and another (PLD 2007 Lah. 114) and Multan Beverages Co. Vs. Abdul Rehman (2007 YLR 1038). The reliance of the learned counsel for the appellant on the judgment rendered in the case of Muhammad Nawaz Vs. Abdul Sattar (PLJ 2000 Lah. 1619) is not apt as the said judgment is based on the judgment rendered by the Division Bench of this Court in the case of Abdul Khaliq Vs. Muhammad Asghar Khan and two others (PLD 1996 Lah. 367) wherein the question involved was about validity of agreement to sell which did not bear signatures of attesting witnesses. The question whether attestation of two witnesses was legal requirement of pronote under Negotiable Instrument Act was neither raised nor considered by the learned Single Judge in his judgment. We, therefore, find no force in the contention of the learned counsel for the appellant for excluding the pronote (Ex.P1) from consideration for want of attesting witnesses in terms of Article 17 of the Qanun-e-Shahadat Order, 1984.

8. The next contention of the appellant's counsel is that the revenue stamps affixed on the back of the promissory note (Ex.P1) do not carry any value in the eye of law and as such the suit filed by the respondent could not be decreed. This contention is neither correct nor gets support from the judgment cited by him, that is, Habib Bank Ltd, Vs. Mst. Nusrat Naheed etc. (NLR 1989 UC 391). It is settled principle of law that when the pronote and the receipt of pronote are on the same leaf, the mere fact that some of the stamps are on the portion which falls on the back of the printed receipt or pronote, would not lead the Court to treat those stamps as on a paper other than that of a pronote. We have perused the original pronote and the receipt and found that it is sufficiently stamped. It was also contended that the stamps were not properly cancelled and, therefore, it is to be treated as if the pronote was not duly stamped. In this connection it would be helpful to reproduce Section 12 of the Stamp Act, 1899 which reads as under:--

"Cancellation of adhesive stamps.--(1)

(a) Whoever affixed any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when, affixing such stamp, cancel the same so that it cannot be used again, and

(b) Whoever executes any instrument on any paper bearing an adhesive stamp shall, at the time of execution, unless such stamp has been already cancelled in manner aforesaid cancel the same so that it cannot be used against.

(2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped.
(3) The person required by sub-section (1) to cancel an adhesive stamp may cancel in writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner."

The plain reading of sub-section (3) of the Section 12 of the Stamp Act shows that the adhesive stamps are to be cancelled by writing on or across the stamp with name or initials and the date by the executant or in any other effectual manner. The perusal of Section 12(3) of the Stamp Act makes it clear that writing his name or putting his initials by the executant is not the only mode of cancellation of the stamp. Adhesive stamps can also be canceled in other ways. The object of cancellation of adhesive stamps is to prevent the same stamps from being used again. The cancellation is required for the purpose of preventing fraud, thus if adhesive stamp is affixed on a document and it is cancelled by drawing a line across it, it cannot be used again unless it is removed from the document, which may not be possible without in some measure causing some visible damage to the stamp itself. Such a cancellation is effective because this section does not contemplate that a person require to cancel such a stamp must do so in such a manner that it may become impossible for a criminal minded person to use such stamp again in any circumstance whatsoever.

In this regard reference may be made to the judgment rendered in the case of Habib Bank Ltd. Vs. Raza Sons & Co.. (PLD 1978 Kar. 425), Motiram Nathomal V. Mangharam Tirathadas (ILR 1942 Kar. 56), Mst. Sajda Abbas Zaidi vs. Syed Arshad Ali Jafari (1990 CLC 1018). In the present case the adhesive stamps which have been affixed on the pronote and its receipt have been cancelled by drawing two lines across the face of each stamp. In our view all the stamps appear to have been effectually cancelled by the respondent in accordance with Section 12 of the Stamp Act and thus the contention raised by the learned counsel for the appellant

has no force and the judgment cited by him are not applicable to the facts of instant case.

9. As far as the proof of pronote (Ex.P1) and the Receipt (ExP2) are concerned, it is suffice to say that the respondent has proved the same by producing its marginal witnesses i.e. Ghulam Bashir (PW-1) and Hakam Ali (PW-2) who have admitted their signatures on the receipt (Ex.P2) and also the execution of pronote (Ex.P1). In these circumstances, the burden was on the appellant to establish that he had thumb marked on the blank papers and had not obtained any amount from the respondent. It is worth mentioning here that neither the statements of PW-1 and PW-2 have been shattered in the cross-examination nor any motive has been imputed to them that they were making a false statement. In the light of these circumstances, we are of the view that the plaintiff/respondent has proved his case and the learned trial Court has rightly decreed the suit.

10. This appeal lacks merit and is accordingly dismissed with no order as to costs.

(R.A.) Appeal dismissed

**2014 Y L R 69**
**[Lahore]**
**Before Shahid Waheed, J**
**SARDAR KHAN---Petitioner**
**Versus**
**NADIR ALI---Respondent**

Civil Revision No.1904 of 2004, heard on 25th June, 2013.

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

----S.13---Talbs, performance of---Requirements---Plaint was silent about the date, time, place and names of witnesses before whom the plaintiff declared his intention to exercise right of pre-emption---Requirement of mentioning date, time, place and names of witnesses was mandatory to all the pending matters of pre-emption---Omission qua non-mentioning of details of Talb-e-Muwathibat i.e. date, time, place and names of witnesses in the plaint was fatal---Plaintiff had not performed Talb-e-Muwathibat in accordance with law---Revision was dismissed.

Bashiran Begum v. Nazar Hussain PLD 2008 SC 559; Haji Muhammad Saleem v. Mst. Sahib Jamala and others PLD 2005 SC 977; Nazir Ahmed deceasd through L.Rs. and others v. Muhammad Hussain C.P. No.2307-L of 2012; Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs and others PLD 2007 SC 302; Haq Nawaz v. Muhamamd Kabeer 2009 SCMR 630; Ghafoor Khan through L.Rs v. Israr Ahmed 2011 SCMR 1545; Muhammad Ismail v. Muhammad Yousaf 2012 SCMR 911 and Muhammad Ali and 7 others v. Mst. Humera Fatima and 2 others 2013 SCMR 178 rel.

Haji Noor Muhammad v. Abdul Ghani and 2 others 2000 SCMR 329 and Altaf Hussain v. Abdul Hameed alias Abdul Majeed through Legal heirs and another 2000 SCMR 314 distinguished.

Mehdi Khan Chohan for Petitioner.
Naveed Shehryar Sheikh for Respondent.
Date of hearing: 25th June, 2013.

**JUDGMENT**

**SHAHID WAHEED, J.---**The petitioner, Sardar Khan through this Civil Revision under section 115, C.P.C. has called in question the judgment and decree dated 8-5-2004 passed by the learned Additional District Judge, Kharian who affirmed the judgment and decree dated 3-11-1996 passed by the learned Civil Judge, Kharian whereby his suit for possession through pre-emption was dismissed.

2. Briefly the facts of the case are that respondent purchased land measuring 13 Marla from its original owners namely Khan Muhammad and Muhammad Aslam etc. for a consideration of Rs.91,000 vide Mutation No. 1651 dated 7-3-1991. It is stated in the plaint that after getting knowledge of sale, the petitioner immediately declared his intention to exercise his right of pre-emption; and, that on 6-5-1991 notice of 'Talb-e-Ishhad' attested by two truthful witnesses was sent to the respondent. Thereafter on 11-5-1991, the petitioner filed a suit for possession of suit-land through pre-emption. In response to summons, the respondent entered appearance before the learned trial Court and contested the suit by filing a written statement on 30-10-1991. The learned trial Court reduced the controversy into issues and called upon the parties to adduce evidence in support of their respective claims. After recording evidence, the learned trial Court vide judgment and decree dated 13-2-1995 decreed the suit. The respondent filed an appeal before the first appellate court. The first appellate court remanded the case to the learned trial Court for a decision afresh on all issues. Consequent upon remand, the learned trial Court dismissed the suit vide judgment and decree dated 3-11-1996. Feeling aggrieved, the petitioner preferred an appeal before the learned Additional District Judge, Kharian and the same was dismissed vide judgment and decree dated 26-11-1997. The petitioner assailed the judgment and decree dated 26-11-1997 passed by the learned Additional District Judge before this court through Civil Revision No. 2135-D of 1997. The above said Civil Revision was accepted vide judgment dated 2-7-2002 and the case was remitted to the learned Additional District Judge, Kharian for re-decision of appeal strictly in accordance with law. Pursuant to judgment dated 2-7-2002, the learned Additional District Judge again dismissed the appeal of the petitioner vide judgment and decree dated 8-5-2004. Hence, this petition.

3. At the outset of hearing, I confronted the learned counsel for the petitioner with Paragraph 3 of the plaint which is silent about the date, time, place and name of witnesses before whom the petitioner/plaintiff declared his intention to exercise right of pre-emption. In response to court query, the learned counsel for the petitioner argued that mentioning of date, place, time and name of the witnesses in the plaint regarding making 'Talb-e-Muwathibat' was not the requirement of law at the time of institution of suit and stressed that the dictum laid down in the case of 'Haji Noor Muhammad v. Abdul Ghani and 2 others' (2000 SCMR 329) would apply to the instant case. He placed reliance on the case of 'Altaf Hussain v. Abdul Hameed alias Abdul Majeed through legal heirs and another' (2000 SCMR 314). He further submitted that the principle laid down in the case of 'Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs and others' (PLD 2007 SC 302) would apply prospectively and did not attract to the instant case. The contentions raised by the leaned counsel for the petitioner have no force. The requirement of mentioning date, time, place and name of witnesses is mandatory to all the pending matters of pre-emption at any stage of the proceedings may it be trial, appeal or revision and thus was essential for the petitioner's case and in this regard I find

support from the judgment rendered by the Hon'ble Supreme of Pakistan in the case of 'Bashiran Begum v. Nazar Hussain' (PLD 2008 SC 559), and the relevant extract thereof reads as under:--

"We have heard the learned counsel for the respective parties and with their help have also perused the available record. The High Court has met with all these references with sound and plausible reasons. It is to be noted that this controversy has been finally settled by a Full Bench of this Court comprising five Hon'ble Judges in Civil Appeal No. 1951 of 2000 decided on 12-12-2006 in case of Mian Pir Muhammad and another V. Faqir Muhammad through L.Rs. and others (PLD 2007 SC 302), wherein all these authorities and references have been plausibly discussed and it was held that in a suit for pre-emption mentioning of date, place and time of making Talb-e-Muwathibat, in the plaint, is mandatory because in the absence of proper date, place and time, the time given in section 13(3) of the Punjab Pre-emption Act, 1991 (hereinafter referred as the Act) for making Talb-e-Ishhad which is 14 days, cannot be correctly calculated. It is necessary that as soon as the pre-emptor acquires knowledge of sale of pre-empted property, he would make immediate demand about his desire and intention to assert his right of pre-emption without slightest loss of time and after making 'Talb-e-Muwathibat' in terms of section 13(2) of the Act, the pre-emptor has another legal obligation to perform i.e. Talb-e-Ishhad as soon as possible after making of Talb-e-Muwathibat, but none not later than two weeks from the date of knowledge/performance of Talb-Muwathibat. The mentioning of date, place and time in the plaint in a suit for pre-emption is mandatory regarding Talb-e-Muwathibat because from such date the time provided by the statute for making of Talb-e-Ishhad i.e. 14 days, can be calculated. If there is no mention of date, place and time of knowledge about sale and making of Talb-Muwathibat, then it would be very difficult to give effect to section 13(3) of the Act and there is every possibility that instead of allowing letter of law to remain in force, the pre-emptor may attempt to get a latitude by claiming any date of performance of Talb-e-Muwathibat in his statement in court and then on the basis of the same, try to justify the delay, if any, occurred in the performance of Talb-e-Ishhad. Performance of both these Talbs is a sine qua non for getting a decree in a pre-emption suit. This Court has approved the view that a plaint wherein date, place and time of making of Talb-e-Muwathibat and date of issuing notice of Talb-e-Ishhad in terms of Section 13 of the Act, is not provided, it would be fatal for the pre-emption suit. The Hon'ble Bench of five Judges has dissented from the cases of 'Haji Noor Muhammad v. Abdul Ghani and 2 others' (2000 SCMR 329), Altaf Hussain v. Abdul Hameed alias Abdul Majeed through legal heirs and another' (2000 SCMR 314) and has approved the view expressed in the cases of 'Haji Muhammad Saleem v. Mst. Sahib Jamala and others (PLD 2005 SC 977). According to the dictum laid down by the larger Bench of this Court mentioned above, the requirement of Talbs with requisite details in the plaint is also essential even in the pending cases."(Underlining is for emphasis).

This question again came up for consideration before the Hon'ble Supreme Court of Pakistan in the case titled 'Nazir Ahmad deceased through L.Rs. and others v. Muhammad Hussain' (C.P. No. 2307-L/ 2012) which has been decided vide order dated 11-3-2013 and the same reads as under:--

"Petitioner-pre-emptor has suc-ceeded in his pre-emption cause at the trial stage, but on appeal of the respondent, he has been non-suited as he has not mentioned in the plaint the time of making Talb-e-Muwathibat and also the witness in that regard. The argument that the judgment in Mian Pir Muhammad and another v Faqir Muhammad through L.Rs. and others (PLD 2007 SC 302) was not in the field when the petitioner filed the suit, therefore, the law enunciated therein shall not be attracted to the present case; suffice that preponderance of this Court's view in the pre-emption matters about the application of Pir Muhammad's case is otherwise, wherein it has been held that the law enunciated in case supra shall be applicable and attracted to all the pending matters at any stage of the proceedings, may it be trial, appeal or revision or even before this Court. Resultantly, we do not find this case fit for taking any exception. Dismissed. Leave refused."

Thus, the omission qua non-mentioning of details of Talb-e-Muwathibat i.e. date, time, place and name of witnesses in the plaint of instant suit is fatal as per principle laid down by the Hon'ble Supreme Court of Pakistan in the cases of 'Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs and others' (PLD 2007 SC 302); 'Haq Nawaz v. Muhamamd Kabeer' (2009 SCMR 630); 'Ghafoor Khan through L.Rs v. Israr Ahmed' (2011 SCMR 1545); 'Muhammad Ismail v. Muhammad Yousaf' (2012 SCMR 911); 'Muhammad Ali and 7 others v. Mst. Humera Fatima and 2 others' (2013 SCMR 178). In view of above, I am not inclined to exercise my revisional jurisdiction in favour of the petiti oner as he had not made Talb-e-Muwathibat in accordance with law. There is no need to discuss other issues.

4. The upshot of the above discussion is that this petition lacks merit and is accordingly dismissed with no order as to cost.

AG/S-81/L Petition dismissed.

**PLJ 2014 Lahore 118**
**Present: Shahid Waheed, J.**
**MUHAMMAD SHABIR SALFI--Appellant**
**versus**
**ALTAF AHMAD--Respondent**

R.F.A. No. 472 of 2011, heard on 20.12.2013.

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

----O. XXXVII, Rr. 1 & 2--Suit for recovery on basis of cheque, decreed--Insufficient Court fee--Application sought extension in time to furnish surety bond was rejected--After removing objection of Court fee, file was resubmitted--Delayed resubmission of file--Question of--Whether due to default in furnishing surety bond, trial Court could decree the suit--Validity--Omission of time period in leave granting order could neither bring an occasion of default in fulfilling the condition of furnishing surety bond nor give rise to a cause of action for filing an application seeking extension in time to furnish surety bond--Filing of application, on behalf of appellant, for extension in time to furnish surety bond was uncalled for and the order dismissing the application was unjustified--Trial Court fell into error while recalling the leave granting order and decreeing the suit--Appeal was allowed. [P. 121] A

Ch. Muhammad Fakhir Razzaq, Advocate for Appellant.
Mr. Alamgir, Advocate for Respondent.
Date of hearing: 20.12.2013.

**JUDGMENT**

Challenge in this appeal is to the judgment and decree dated 28.9.2010 passed by the learned Addl. District Judge, Pindi Bhattian whereby the suit of the respondent for recovery of Rs. 1,500,000/- was decreed.

2. The respondent, Altaf Ahmad, on the basis of Cheque No. 3735643 dated 11.10.2007 instituted a suit under Order XXXVII Rules 1 and 2, CPC against the appellant, Muhammad Shabir Salfi, for recovery of Rs. 1,500,000/-. In response to summons the appellant entered appearance before the learned trial Court and filed an application for leave to defend the suit. The respondent contested the application by filing reply. The learned trial Court vide order dated 21.7.2010 accepted the above said application and permitted the appellant to appear and defend the suit subject to furnishing of surety bond equivalent to the suit amount. Thereafter, on 4.8.2010, the appellant filed an application before the learned trial Court seeking extension in time to furnish surety bond. Contesting reply to this

application was filed by the respondent. The learned trial Court vide order dated 28.9.2010 rejected the application; and, through a separate judgment of even date decreed the suit.

3. The appellant feeling aggrieved by the judgment and decree dated 28.9.2010 passed by the learned Addl. District Judge, Pindi Bhattian, District Hafizabad, filed the instant appeal within the prescribed period of limitation. The office of this Court vide Diary No. 93212 dated 4.11.2010 returned the file to the appellant with certain objections mentioned in the objection-sheet and directed him to resubmit the same within a period of three days. One of the objections was that the Court fee was insufficient. The appellant on 13.6.2011 after removing the objections including the objection of Court fee resubmitted the file; and, also filed an application (C.M. No. 1-C/2011) under Section 5 of the Limitation Act for condonation of delay. In view of delayed resubmission of file, at the outset of hearing, learned counsel for the respondent by relying upon the cases of Ghulam Hussain and three others Vs. Bahadar (PLD 1954 Lah. 361). Muhammad Ahmad Vs. Muhammad Ali and others (PLD 1996 Lah. 158), and Naheed Ahmad Vs. Asif Nawaz, and three others (PLD 1996 Lah. 702), contends that the instant appeal is barred by time and, therefore, be dismissed. In reply to the above said preliminary objection the learned counsel for the appellant submits that the appeal was filed within time; that although the appellant due to his poverty could not supply the requisite Court fee within the time granted by the office of this Court yet the same was supplied and accepted by the office without any objection and thus at this stage the appeal cannot be dismissed on the ground of limitation. I have considered the arguments canvassed by the learned counsel for the parties. The precedents cited by the learned counsel for respondent do not apply to the facts of the instant case. However, in this regard guidance may be had from the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of Mst. Sabran Mai Vs. Ahmad Khan and another (2000 SCMR 847) wherein it has been observed that "once a suit, appeal or revision has been presented before the authorized officer of the Court within prescribed period of limitation, it cannot be treated time barred for the reason that the office has noted defects in the proceedings which have not been removed by the concerned party or his Advocate, and in such like situation the presiding officer of the Court at the best can consider the maintainability of proceedings in view of the provisions of Order VII, Rule 11, CPC or identical provisions available in the Code of Civil Procedure or the law under which the proceeding were instituted. It is also important to note that parties/advocates are also not absolved from their duty to remove the objection within the stipulated period prescribed by the concerned authorized officer subject to condition that specific notice has been served upon the party or Advocate to do

the needful. Even if after notice the defect is not removed the case shall be listed before the presiding officer who may in his discretion allow time to comply with objection of office." Thus, the question that needs determination in this case is as to whether this Court at this stage can condone the delay in complying with the objections of office or accept the Court fee which was deposited after eight months from the date of objection raised by the office? The answer to this question is in the affirmative. The case in hand shows that the office raised certain objections on the memorandum of appeal and returned the case to the appellant. The appellant was required to remove the objections within a period of three days but he took eight months to do the same. The office after eight months received the file and the Court fee without any objection; assigned number; registered the same as regular first appeal; and, fixed the case on judicial side. The memorandum of appeal if unstamped or insufficiently stamped falls to be dealt with under Section 149, CPC which empowers the Court in its discretion at any stage to allow the appellant to supply the deficiency in Court fee and upon such payment the memorandum of appeal shall have the same force and effect as if such fee had been paid in the first instance. This view finds support from the judgments of the Hon'ble Supreme Court rendered in the cases of Yaqoob Khan v. Rasool Khan and others (1981 SCMR 155) and Siddique Khan v. Abdul Shakoor Khan (PLD 1984 S.C 289). The principle governing exercise of power under Section 149, CPC is that the discretion of the Court is not to be exercised arbitrarily or capriciously but judiciously and with utmost care. Normally, the discretion may be exercised in favour of the litigant except in the case of contumacy or positive mala fide or negligence. In the case in hand the appellant in C.M.No. 1-C/2011 has urged that delay in filing the Court fee was neither deliberate nor intentional rather this was due to poor financial position; and, that he after getting loan had affixed the Court fee. This assertion is supported by an affidavit. The above stated assertions have not been refuted by a counter-affidavit. Thus, there is no reason to suppose that the appellant was guilty of contumacy or he had deliberately avoided to pay proper Court-fee; and, being guided by the order of the Hon'ble Supreme Court made in the case of Alauddin (deceased) represented by Mst. Kalsoom Begum and others v Abdul Raheem and 3 others (1988 SCMR 1688) I hereby condone the delay in complying with objections of the office; accept Court fee which was deposited by the appellant; and, accept CM. No. 1-C/2011 so as to make sure as to whether the judgment and decree of the learned trial Court calls for any interference.

4. On merits of the case, the learned counsel for the appellant submits that the judgment and decree of the learned Court below suffer from misapplication of the provisions of law; that the learned trial Court erroneously dismissed the appellant's

application for extension in time to furnish surety bond; and, that notwithstanding the failure on the part of the defendant/appellant to comply with the condition of the leave granting order the learned trial Court was required to apply its mind to the facts and the documents before it but this exercise was not done by the learned trial Court and thus this irregularity rendered the impugned judgment and decree void. Conversely, the learned counsel for the respondent has vehemently opposed this appeal and submitted that due to failure of the appellant to comply with the condition of leave granting order the learned trial Court had no option but to decree the suit. I have examined the contentions raised by the learned counsel for the parties. The learned trial Court vide order dated 21.7.2010 granted leave to the appellant subject to furnishing of surety bond equivalent to the suit amount. The appellant could not furnish the surety bond before the next date of hearing and for this reason the learned trial Court decreed the suit. The appellant also filed an application seeking extension in time to furnish surety bond. This application was also dismissed by the learned trial Court vide order dated 28.9.2010. The question involved in this case is as to whether due to default in furnishing surety bond, the learned trial Court could decree the suit? This question may be answered by examining the order dated 21.7.2010 whereby leave was granted to the appellant in following terms:

"Therefore, I accept the application and permit the petitioner to appear and defend the suit as defendant subject to furnishing surety bond for an amount of equal to suit amount i.e. Rs. 15,00,000/-, Now to come up for further proceedings on 3.8.2010."
The perusal of the above said order shows that the learned trial Court while granting leave to the appellant did not specify any time to furnish the surety bond. The learned trial Court was required to specify the time period for furnishing the surety bond. The omission of time period in the leave granting order could neither bring an occasion of default in fulfilling the condition of furnishing surety bond nor give rise to a cause of action for filing an application seeking extension in time to furnish surety bond. Thus, the filing of application, on behalf of the appellant, for extension in time to furnish surety bond was uncalled for; and, similarly the order dated 28.9.2010 dismissing the said application was unjustified. In view of above, I am of the opinion that the learned trial Court fell into error while recalling the leave granting order; and, decreeing the suit of the respondent.

5. In view of the foregoing position, I would allow this appeal and set aside the impugned judgment and decree dated 28.9.2010, remit the case to the learned trial Court for adjudication afresh in accordance with law. The order dated 28.9.2010 whereby appellant's application for extension in time for furnishing surety bond was rejected is also set aside. The acceptance of appeal is subject to the condition that the appellant shall furnish surety bond as directed by the learned trial Court vide order dated 21.7.2010 within one month from today. There will, however, be no order as to costs. The parties shall appear before the learned trial Court on 16.01.2014. (R.A.) Appeal allowed

**2014 Y L R 1188**
**[Lahore]**
**Before Shahid Waheed, J**
**KHADIM HUSSAIN---Petitioner**
**Versus**
**MUSHTAQ HUSSAIN through Legal Representatives and others---Respondents**

Writ Petition No.14022 of 2013, heard on 24th January, 2014.

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

----S. 12(2)---Specific Relief Act (I of 1877), S. 12---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for specific performance of contract---Application for setting aside ex parte decree---Fraud and misrepresentation---Contention of petitioner-defendant was that wrong address was mentioned in the plaint and ex parte decree was obtained through fraud and misrepresentation---Application for setting aside ex parte decree was accepted concurrently---Validity---Respondent-plaintiff could not lead any confidence inspiring evidence in support of his claim---Address of petitioner-defendant in the plaint was not correct and ex parte decree was obtained through fraud and misrepresentation---No misreading and non-reading of evidence had been pointed by the respondent-plaintiff--- Petitioner-defendant was justified in saying that he was not aware of the decree as same was obtained by mentioning his incorrect address---Present application was filed within time---Constitutional petition was dismissed in circumstances.

Abdul Qadoos v. Additional District Judge, Rawalpindi and others 2005 SCMR 1428 and Mst. Rasool Bibi through Legal Heirs v. Additional District Judge, Sialkot and another PLD 2006 Lah. 181 rel.

Naveed Shehryar Sheikh for Petitioner.
Mian Tariq Hussain for Respondents.
Date of hearing: 24th January, 2014.

**JUDGMENT**

**SHAHID WAHEED, J.---**The petitioner, on 9-7-1983 instituted a suit for specific performance of agreement to sell dated 9-7-1980 (Exh.R-1) against Shah Muhammad son of Ismail, predecessor-in-interest of present respondents Nos. 1 to 5 (hereinafter called "the respondents"). The suit was ex parte decreed by the learned trial Court vide judgment and decree dated 22-10-1984 (Exh.A.7) In compliance

with afore-stated decree, sale-deed No. 1293 dated 20-3-1989 was executed and on its basis Mutation No. 325 dated 9-1-1992 (Exh.A-6) was attested in favour of the petitioner. The respondents on 20-3-1993 filed an application under section 12(2), C.P.C. for setting aside ex parte decree dated 22-10-1984. The petitioner contested the application by filing a reply. On divergent pleadings of the parties, issues were framed and evidence was led. After recording evidence, the learned. Trial Court accepted the application vide order dated 5-12-2009. The petitioner, feeling aggrieved, assailed the above said order through revision petition under section 115, C.P.C., before the learned Addl. District Judge, Jhang who dismissed the same vide order dated 11-5-2010.

2. The petitioner has assailed the afore-stated orders of the learned courts below on the grounds that the same are based on misreading and non-reading of evidence available on record; that impugned orders have been based upon the extraneous consideration by virtue of which grave miscarriage of justice has taken place; that no case was made out within the parameters of section 12(2), C.P.C.; that the application filed under section 12(2), C.P.C. by the present respondents was time-barred; and thus the orders impugned in this petition are liable to be set aside. On the other hand, learned counsel for the respondents has vehemently opposed this petition and supported the orders impugned therein.

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

4. The petitioner instituted the suit against Shah Muhammad, predecessor-in-interest of the respondents, for specific performance of agreement to sell dated 9-7-1980 (Exh.R-1). In plaint the address of Shah Muhammad was stated as "Shah Muhammad son of 'Ismail caste Arain resident of Mouza Shah Mehmood, Tehsil and District Jhang". It is the case of the respondents that above stated address of Shah Muhammad was incorrect as he was resident of Chak No. 320/GB Tehsil and District, Toba Tek Singh;' that he died on 11-4-1969; that the petitioner being aware of death of Shah Muhammad mentioned address the plaint and, thus, by practising fraud and misrepresentation obtained ex parte decree from the learned trial Court. The petitioner contested the assertions made in the respondents' application filed under section 12(2), C.P.C. by giving evasive reply. The fact regarding death of Shah Muhammad on 11-4-1969, that is, before the date of execution of alleged agreement to sell, was not specifically denied by the petitioner. The issue as to whether Shah Muhammad was resident of Chak No.320/GB Tehsil and District Toba Tek Singh or as to whether the petition had mentioned wrong address of Shah

Muhammad in the plaint has been thrashed out by the learned courts below. The respondents in support of their claim produced oral as well as documentary evidence. Saif-ur-Rehman the attorney of the respondents, appeared before the, learned trial Court as AW-1. The respondents produced Maqbool Ahmad as AW-2. In documentary evidence the respondents tendered death certificate of Shah Muhammad (Exh.A.2), Mutation No.220 dated 13-6-1967 (Exh.A.3), Mutation No. 214 (Exh.A.4), copy of Registry (Exh.A.5), Mutation No. 325 (Exh.A.6), copy of decree (Exh.A-7), copy of Mutation No. 175 (Exh.A.8), copy of Jamabandi (Exh.A.9) and copy of order dated 22-10-1984 (Exh.A.10). The appraisal of afore-stated evidence unfolds: (i) that Shah Muhammad was resident of Chak No. 320/GB, Tehsil and District Toba Tek Singh; and, (ii) that Shah Muhammad died at the age of 75 years on 17-4-1969. On the other hand, the petitioner could not lead any confidence inspiring evidence in support of his claim. Even the additional evidence produced, by the petitioner through C.M. No. 4/2010 does not support the petitioner's plea. In view of above stated facts, it becomes clear that address of Shah Muhammad in the plaint was not correct; and, that the ex parte decree dated 22-10-1984 was obtained through fraud and misrepresentation. The learned counsel for the petitioner has failed to point out any misreading and non-reading of evidence and, thus, the findings recorded by the learned courts below about fraud and misrepresentation do not warrant any interference by this Court in exercise of its constitutional jurisdiction under Article 199 of the constitution of Islamic Republic of Pakistan, 1973.

5. Lastly, I would like to address the question of limitation. Learned counsel for the petitioner has canvassed that the application filed by the respondents under section 12(2), C.P.C. was barred by time. He submitted that the respondents had not filed any application for condonation of delay and, thus, as per principle laid down by the Hon'ble Supreme Court of Pakistan in the case of Abdul Qadoos v. Additional District Judge, Rawalpindi and others (2005 SCMR 1428), the application filed by the respondents under section 12(2) C.P.C. was, liable to be dismissed. The contention raised by the learned counsel for the petitioner has no force. The petitioner on 22-10-1984 obtained ex parte decree (Exh.A-7) and on its basis Mutation No.325 (Exh.A.6) was attested in his favour on 9-1-1992. The respondents pleaded that they came to know about the ex parte decree through Halqa Patwari 15 days before filing of application under section 12(2), C.P.C. Since the petitioner had obtained the ex parte decree (Exh.A-7) by mentioning incorrect address of Shah Muhammad in the plaint, the respondents were justified in saying that they were not aware of the decree. The respondents at the best could get knowledge of the decree

on the date when Mutation No. 325 (Exh.A.6) was attested in favour of the petitioner. The date of attestation of the mutation was 9-1-1992 and thus even from this date the application which was filed on 20-3-1993, was within time. In these circumstances, as per principle laid down in the case of Mst. Rasool Bibi through Legal Heirs v. Additional District Judge, Sialkot and another (PLD 2006 Lah. 181), there was no need to file any application under section 5 of the Limitation Act for condonation of delay. The precedent cited by the learned counsel for the petitioner being distinguishable on facts is-not relevant to the controversy in hand.

6. In view of above, this petition being devoid of any merit is dismissed.

AG/K-7/L Petition dismissed.

**PLJ 2014 Lahore 504**
**Present: Shahid Waheed J.**
**RAFIQUE AHMAD AWAN--Appellant**
**versus**
**A.D.J. SIALKOT, etc.--Respondents**

F.A.O. No. 281 of 2008, heard on 29.1.2014.

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

----O. XXXIX, R. 2(3)--Contempt proceedings--Violation of injunctive order passed by First Appellate Court--Contempt application was filed against three other persons--Contempt proceedings always initiated against persons who violates injunctive order and not against institution--Direction to be detained in civil prison was challenged--Proceedings conducted by First Appellate Court were not fair nor in accordance with law--Validity--Contempt proceedings were always initiated against a person who violates injunctive order and not against institution/organization and its offices--Proceedings were not conducted in above stated manner; and, thus it is clear that First Appellate Court had exercised his jurisdiction illegally and with material irregularity--Material irregularities committed by First Appellate Court evidence led by respondent did not make out any case of contempt of Court or violation of temporary injunction as it does not show any intentional disobedience of order by present appellant--Appellant violated injunctive order of Court deliberately/intentionally or that he had challenged authority of Court--Observation regarding conduct of appellant as recorded by First Appellate Court in impugned judgment did not find support from record--Thus, sentence awarded to appellant was not sustainable. [Pp. 507 & 508] A, B, C & E

**Contempt--**

----Violation of injunctive order--Validity--Mere unintentional disobedience to judgment, order or process of Court amounts to contempt in theory only and does not render to person liable to punishment. [P. 508] D

Appellant in Person.
Nemo for Respondents.
Date of hearing: 29.1.2014.

**JUDGMENT**

This appeal is directed against the judgment dated 31.10.2008 whereby the learned Addl. District Judge, Sialkot accepted the application filed by the Respondent No. 2

under Order XXXIX Rule 2(3), CPC and the appellant was directed to be detained in civil prison for a period of 6 months.

2. Briefly, the facts of the case are that in the year, 1998 the Government of Punjab launched City Development Project for Sialkot city. The District Administration surveyed various roads in the town and prepared a list of encroachments. Chief Corporation Officer, Municipal Corporation, Sialkot on receipt of encroachment report issued notices to the encroachers to remove the encroachments. Frontier Works Organization (FWO) was entrusted with development work by the Commissioner, Gujranwala and the funds were provided by the Punjab Government. The Respondent No. 2, Professor Abdul Hameed Akhtar, on receipt of demolition notice of Property No. 30/236 consisting of a house and a shop at Church Road, Sialkot instituted a suit for permanent injunction. Alongwith plaint an application under XXXIX Rule 1 & 2, CPC was also filed for grant of interim injunction. This application was dismissed by the learned Trial Court vide order dated 21.2.2001. Feeling aggrieved, the Respondent No. 2 filed an appeal before the learned Addl. District Judge, Sialkot. Notice of the appeal was issued to the other side vide order dated 23.2.2001. On the next date of hearing i.e. 24.2.2001 the respondents of the appeal entered appearance before the learned first Appellate Court. After hearing preliminary arguments, the learned Duty Judge (Addl. District Judge) restrained the respondents of the appeal from demolishing the disputed premises till the next date of hearing. The case was adjourned to 28.2.2001. On the said date the Respondent No. 2 moved an application for appointment of local commission. During pendency of application for appointment of local commission, the Respondent No. 2 on 15.6.2001 moved an application under Order XXXIX Rule 2 (3), CPC for initiation of proceedings against (i) Administrator Municipal Corporation, Sialkot, (ii) Frontier Works Organization through Officer Incharge of FWO, (iii) Municipal Magistrate, Sialkot; and, (iv) Mr. Nadeem Sarwar, Magistrate Ist Class, District Courts, Sialkot (hereinafter called the `defendants'). Before proceedings further it is worth mentioning here that the present appellant relinquished the charge of the post of Administrator, Municipal Corporation, Sialkot on 15.6.2001. In response to notice issued by the learned Addl. District Judge, the Municipal Corporation through Tehsil Nazim, Sialkot submitted reply to the contempt application/application filed under Order XXXIX Rule 2(3), CPC. The learned Addl. District Judge vide order dated 3.6.2002 framed the following issues:--

"1. Whether the respondent in violation of injunction order dated 24.2.2001 demolished a part of the house of the petitioner, if so, to what effect? OPP

2. Relief."

The Respondent No. 2 appeared before the learned Addl. District Judge as AW-3 and in support of his claim produced Irfan Bashir (AW-1) and Iqbal (AW-2). Vide order dated 16.7.2003 right of the defendants was closed and the matter was fixed for final arguments. From 18.7.2003 till 01.02.2008 the matter remained pending for hearing of final arguments. The learned Addl. District Judge, Sialkot vide order dated 8.2.2008 issued notice to the Tehsil Nazim, Sialkot directing him to intimate the Court about the present place of posting of the defendants. After getting addresses, the learned Addl. District Judge, Sialkot vide order dated 14.2.2008 summoned the defendants. On 28.5.2008 the present appellant entered appearance before the learned Addl. District Judge and sought an adjournment for preparation of his arguments. Thereafter, on 15.7.2008 the present appellant submitted his reply to the application filed under Order XXXIX Rule 2(3), CPC. After having received the reply, the learned Addl. District Judge, Sialkot vide order dated 31.10.2008, accepted the application filed by Respondent No. 2 under Order XXXIX Rule 2 (3), CPC and directed that the appellant be detained in civil prison for a period of 6 months.

3. The appellant through this appeal has called in question the order dated 31.10.2008 passed by the learned Addl. District Judge Sialkot on the grounds: that he was not allowed to lead evidence in support of his claim; that entire evidence was recorded in his absence whereas the contempt proceedings are of a criminal nature and the presence of the contemnor was necessary during the proceedings; that the findings of the learned Addl. District Judge are not based on record and were totally extraneous to the facts of the case; that evidence produced by Respondent No. 2 does not make out any case of violation of any injunction; that contempt application was moved against three other persons but the impugned judgment does not make any mention of remaining three persons; that contempt proceedings are always initiated against the person who violates the injunctive order and not against the institution like Corporation; and, that he being an old man who had a serious paralysis attack cannot serve punishment.

4. Name of the learned counsel for Respondent No. 2 has appeared in the cause-list and despite this fact none has entered appearance on behalf of the Respondent No. 2 and resultantly he is proceeded against ex parte.

5. I have heard the appellant and perused the record.

6. The questions which fall for determination in this appeal are as to whether the proceedings conducted by the learned Addl. District Judge were in accordance with law; and, that as to whether in the given facts and circumstances of the case the appellant could be punished under Order XXXIX Rule 2(3), CPC. The answer to the first question hinges upon the appraisal of proceedings conducted by the learned Addl. District Judge. The Respondent No. 2 instituted a suit for permanent injunction against:

(i) the Municipal Corporation through Administrator; and,

(ii) Chief Corporation Officer, Sialkot. The learned Trial Court vide order dated 21.2.2001 refused to grant interim injunction to Respondent No. 2. The Respondent No. 2 assailed the above said order before the learned Addl. District Judge, Sialkot who on 24.2.2001 passed order that "in the meanwhile, the respondents are restrained from demolishing the disputed premises till the next date of hearing." The Respondent No. 2 on 15.6.2001, filed an application under Order XXXIX Rule 2(3), CPC.

There were four respondents of this application (which hereinbefore have been called as the defendants) i.e. Administrator, Municipal Corporation, Sialkot, (ii) Frontier Works Organization through Incharge Officer of FWO (iii) Municipal Registrar, Sialkot and (iv) Mr. Nadeem Sarwar, Magistrate Ist Class, District Courts, Sialkot. Before proceeding further it is pertinent to mention here that contempt proceedings are always initiated against a person who violates the injunctive order and not against the institution/organization and its offices. The learned Addl. District Judge without realizing the above stated legal position issued notices to the above said defendants. The Municipal Corporation, Sialkot through Tehsil Nazim submitted reply to the application. After getting reply the learned Addl. District Judge vide order dated 3.6.2002 framed issues. The Respondent No. 2 in support of his claim led evidence but right of the defendants to lead evidence stood closed vide order dated 16.7.2003. The resume of afore-stated proceedings of the lower Court shows that till the closure of right of defendants to lead evidence the appellant was not in attendance before the learned Addl. District Judge for the reason that no notice was issued to him and he had relinquished the charge of the post of Administrator, Municipal Corporation on 15.6.2001. The whole proceedings were conducted in his absence. The learned

Addl. District Judge also did not take any step to ascertain the name of the incumbents of the posts of Administrator, Municipal Corporation, In-charge Officer of FWO and Municipal Magistrate (who were arrayed as Respondents No. 1, 2 and 3 in the application). After closing the right of the defendants to lead evidences, the learned Addl. District Judge initiated the proceedings to procure the attendance of the appellant and other officers. After securing the presence of officers including the present appellant, the learned Addl. District Judge neither afforded them an opportunity to lead evidence but instead heard the arguments; accepted the application filed by Respondent No. 2 under Order XXXIX Rule 2(3), CPC; directed to detain the appellant in civil prison; and, passed no order with regard to other defendants/officers. The proceedings conducted by the learned Addl. District Judge were neither fair nor in accordance with law. The learned Addl. District Judge was required: firstly, to check as to whether the respondents/defendants were impleaded by name; secondly, to get reply of all the alleged contemners; thirdly, to frame issues in the light of application and reply of alleged contemners; fourthly, to allow the applicant as well as the alleged contemners to lead evidence; and, fifthly, after hearing arguments to pass an order according to the conduct of each alleged contemner. The proceedings were not conducted in the above stated manner; and, thus it is clear that the learned Addl. District Judge had exercised his jurisdiction illegally and with material irregularity.

7. Leaving aside the afore-stated material irregularities committed by the learned Addl. District Judge, the evidence led by the Respondent No. 2 does not make out any case of contempt of Court or violation of temporary injunction as it does not show any intentional disobedience of the order by the present appellant. In order to constitute punishable contempt the disobedience must be willful [see Pitrus Lahara v. R.V. Dalal, (AIR 1953 Nag 179); and, Radhamohan Rana and others vs. Gobinda Gopalananda, (AIR 1951 Orissa 230)]. The mere unintentional disobedience to judgment, order or process of Court amounts to contempt in theory only and does not render a person liable to punishment. In this regard reference may be made to the case of State of Bihar vs. Rani Sonabati Kumari, (AIR 1954 Patna 513) and N. Baksi vs. O.K. Ghosh (AIR 1957 Patna 528). It goes without saying that penal provisions of law are always required to be applied with due care and caution, especially when the question of sentence of imprisonment and liberty of a citizen is involved. Before convicting and sentencing someone, the Court must, besides the violation of any order, satisfy itself that the violator of the stay order had intention to challenge the authority of the Court; and, it was not an act under some misunderstanding or misapplication. Existence of mens rea on the part of violator of

injunctive order is essentially required to be explored and established beyond doubt. I am afraid the above said principles escaped from the consideration of learned Addl. District Judge who by misreading and non-reading of evidence passed the impugned judgment. The statements of the witnesses who appeared on behalf of the Respondent No. 2 do not show that the present appellant violated the injunctive order of the Court deliberately/intentionally or that he had challenged the authority of the Court. The observation regarding the conduct of the appellant as recorded by the learned Addl. District Judge in the impugned judgment does not find support from the record. Thus, the sentence awarded to the appellant is not sustainable.

8. In view of above, this appeal is allowed and judgment dated 31.10.2008 passed by the learned Addl. District Judge, Sialkot is set aside and the application filed by Respondent No. 2 under Order XXXIX Rule 2 (3), CPC is dismissed with no order as to cost.

(R.A.) Appeal allowed

**PLJ 2014 Lahore 672**
**Present: Shahid Waheed, J.**
**ABDUL JALIL--Petitioner**
**versus**
**M/s. POLY PACK (PVT.) LIMITED through Chief Accountant--Respondent**

C.R. No. 657 of 2009, heard on 1.4.2014.

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

----O. XXVII, R. 3 & S. 96--Suit for rendition of accounts--Right to produce evidence was closed--Case was remanded with direction to provide only one opportunity to produce evidence--Challenge to--Validity--Evidence of plaintiff could not be closed under Order XXVII Rule 3, CPC--Civil Judge erroneously resorted to the provisions of Order XXVII Rule 3, CPC while dismissing the suit of the petitioner--High Court was not inclined to interfere with the order passed by ASJ as the same does not suffer from infirmity. [P. 674] A & B
Ch. Muhammad Hussain, Advocate for Petitioners.
Ch. Zulfiqar Ali, Advocate for Respondent.
Date of hearing: 1.4.2014.

**JUDGMENT**

Messers Poly Pack Limited The respondent on 2.9.2003 filed a suit against the petitioner, Abdul Jalil, for rendition of accounts with recovery of Rs. 401,826/-. In response to summons, the petitioner entered appearance before the learned trial Court and contested the suit by filing written statement. On divergent pleadings, the learned trial Court vide order dated 27.5.2005 framed issues and directed the parties to produce evidence in support of their respective claims. The respondent/plaintiff availed opportunities to produce evidence but it failed and resultantly the learned trial Court after invoking provisions of Order XXVII Rule 3, CPC closed the right of the respondent/plaintiff to produce evidence and dismissed the suit vide order and decree dated 13.6.2006. Feeling aggrieved, the respondent filed appeal under Section 96, CPC before the learned Addl. District Judge, Lahore and the same was accepted vide judgment dated 3.3.2009 and the case was remanded to the learned trial Court with direction to provide only one opportunity to the respondent/plaintiff to produce evidence and then to proceed with the trial in accordance with law and decide the case afresh.

2. The petitioner through this civil revision has challenged the validity of judgment dated 3.3.2009 passed by the learned Addl. District Judge, Lahore. Learned counsel for the petitioner in support of the instant petition has submitted that the respondent had availed number of opportunities to produce evidence and thus the learned trial Court rightly invoked the provisions of Order XXVII Rule 3, CPC while dismissing

the suit; and, that the learned first Appellate Court misread and non-read the record and also misapplied the provisions of law while accepting the appeal of the respondent.

3. On the other hand, learned counsel for the respondent has vehemently opposed this petition and submits that the judgment passed by the learned Addl. District Judge does not warrant any interference by this Court.

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

5. Perusal of the record reveals that on 09.5.2006 the case was fixed for recording of evidence of the respondent/plaintiff. On the said date the learned counsel for the respondent/plaintiff made a request for adjournment. The request was not opposed by the learned counsel for the petitioner/defendant; and, in these circumstances, the learned trial Court adjourned the case to 13.6.2006. The learned trial Court on 13.6.2006 closed the evidence of the respondent/plaintiff as it had failed to produce evidence. In my opinion the evidence of the respondent/plaintiff could not be closed under Order XXVII Rule 3, CPC on 13.6.2006. In this regard guidance may be had from the case of Syed Tasleem Ahmad Shah Vs. Sujawal Khan etc. (1985 SCMR 585) in which adjournment was sought by a party and was not objected to by the other. It was held by the Hon'ble Supreme Court of Pakistan that if a party does not oppose request for adjournment made by the other, it does not amount to request for adjournment by the former for the purpose of Order XXVII Rule 3, CPC. This principle has been reiterated by the Hon'ble Supreme Court of Pakistan in the case of Sh. Khurshid Mehboob Alam vs. Mirza Hasham Baig and another (2012 SCMR 361). Thus, I am of the view that the learned Civil Judge erroneously resorted to the provisions of Order XXVII Rule 3, CPC while dismissing the suit of the petitioner. In these circumstances, I am not inclined to interfere with the order passed by the learned Addl. District Judge, Lahore as the same does not suffer from any infirmity.

6. In view of above, this petition is dismissed with no order as to costs.
CM. No. 1-C/2011
CM. No. 1-C/2013

7. Office is directed to remit copy of these applications alongwith Annexures to the learned District & Sessions Judge, Lahore for holding an inquiry and initiating appropriate action under the law. The learned District & Sessions Judge, Lahore is directed to conclude the inquiry preferably within a period of two months from receipt of certified copy of this judgment under intimation to the Deputy Registrar (Judl.) of this Court. With this direction these C.Ms. stand disposed of.

(R.A.) C.Ms. disposed of

**2014 M L D 1346**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD MANSHA and another---Appellants**
**Versus**
**MUHAMMAD NAWAZ---Respondent**

F.A.O. No.4 of 2012, decided on 13th March, 2014.

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

----S. 5---Civil Procedure Code (V of 1908), O. VII, R. 11---Right of pre-emption---Cancellation of mutation relating to sale of property---Rejection of plaint---Scope---Contention of defendants was that due to cancellation of mutation the property had been reverted to the original owner---Application for rejection of plaint was accepted by the Trial Court but same was dismissed by the Appellate Court---Validity---Impugned mutation had been cancelled and cause of action to file a suit had ceased to exist as right of pre-emption would arise in case of sale of immovable property---No right of pre-emption would exist if there was no sale of immovable property---Right of pre-emption was not a right of re-purchase but same was a right of substitution---Right to pre-empt the sale would extinguish if sale or contract of sale had ceased to exist---Cancellation or revocation of sale would terminate right of pre-emption as pre-emptor in order to succeed had to establish such right on the day of sale, on the day of filing a suit and it should continue till the day of decree---Plaintiff had not disclosed the time of making of Talb-i-Muwathibat and such omission was not curable and plaint was liable to be rejected---Trial Court had rightly rejected the plaint under O. VII, R. 11, C.P.C.---Impugned judgment passed by the Appellate Court was set aside whereas that of Trial Court was restored---Appeal was accepted in circumstances.
Mian Pir Muhammad and others v. Faqir Muhammad through L.Rs. and others PLD 2007 SC 302; Haqnawaz v. Muhammad Kabir 2009 SCMR 630 and Muhammad Ali and 7 others v. Humaira Fatima and 2 others 2013 SCMR 178 rel.
Syed Muhammad Shah for Appellant
Rana Dildar Amanat for Respondent.
Date of hearing. 13th March, 2014

**JUDGMENT**

**SHAHID WAHEED, J.**---The suit property sold in favour of the appellants vide Mutation No.966 dated 31-12-2009 was sought to be pre-empted by the respondent,

Muhammad Nawaz, on the ground of his being Shafi-Sharik, Shafi-Khalit and Shafi-Jar with the assertion that he performed the requisite Talabs in accordance with law. The appellants entered appearance before the learned Trial Court and contested the suit by filing written statement. During pendency of the suit, the appellants filed an application under Order VII Rule 11 C.P.C. for rejection of plaint on the ground that due to cancellation of mutation No. 966 dated 31-12-2009 the suit property had been reverted to the original owner i.e. Hamad Naseer. The respondent resisted the above said application by filing a reply. Learned Trial Court vide order and decree dated 27-5-2011 accepted the application and rejected the plaint. The respondent assailed the above said order and decree dated 27-5-2011 through an appeal under section 96 C.P.C. before the learned Addl. District Judge, Ferozewala, District Sheikhupura who accepted the same vide judgment dated 21-12-2011 and remanded the case to the learned Trial Court.

2. The appellants have filed the instant appeal under Order 43 Rule 1(u) C.P.C.; and, has assailed the validity of judgment dated 21-12-2011 passed by the learned Addl. District Judge, Ferozewala, District Sheikhupura.

3. Learned counsel for the appellants contended that after cancellation of Mutation No. 966, the right to pre-empt the sale ceased to exist; and, thus the respondent could not maintain the suit; and, that the fact of cancellation of sale mutation No. 966 was an admitted fact but this was not properly appreciated by the learned Addl. District Judge while passing the impugned judgment. Conversely, learned counsel for the respondent vehemently opposed this appeal and submitted that ground urged in the application under Order VII Rule 11 C.P.C. could only be appreciated after recording of evidence; and, thus the learned Addl. District Judge rightly passed the judgment dated 21-12-2011.

5. I have considered the arguments canvassed by the learned counsel for the parties and perused the record.

6. In the case in hand, the appellants purchased the suit land from Hamad Naseer through an oral sale which was entered in the revenue record vide mutation No. 966 dated 31-12-2009 (Annex-H). It was the case of the respondent that he came to know about the above said sale on 11-2-2010 through Maqsood Ahmad son of Muhammad Abdullah in presence of Zaka Ullah Bhindar and Muhammad Asim while he was sitting in his Dera situated in village Sheikhupura Baidad; and, that after getting the knowledge of above said sale he declared his intention to exercise

his right of pre-emption in respect of the above said sale. The respondent on 6-3-2010 instituted a suit for possession of the suit property through pre-emption. During pendency of suit, Mutation No. 966 stood cancelled by the Revenue Officer vide order dated 15-3-2010. This fact has not been denied by the respondent. Now, a question arises as to whether after cancellation of sale Mutation No. 966 the cause of action to file a suit ceased to exist. Answer to the above said question is in affirmative for the simple reason that as per section 5 of the Punjab Pre-emption Act, 1991 the right of pre-emption arises in case of sale of immovable property. It means that when there is no sale of immovable property; there is no right of pre-emption. The right of pre-emption is not a right of re-purchase, either from the vendor or from the vendee, involving any new contract of sale but it is simply a right of substitution, entitling the pre-emptor, by reason of legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all rights and obligation arising from the sale under which he has derived his title. It is, in fact, as if in a sale deed the vendee's name is rubbed out and the pre-emptor's name is inserted in its place. Thus, when the sale or contract of sale ceases to exist then the right to pre-empt the sale also stands extinguished. The cancellation or revocation of sale, even during pendency of suit, terminates the right of pre-emption as it is an established principle of law that pre-emptor in order to succeed must successfully establish such right on the day of sale; on the day of filing a suit pre-empting the sale and its continued subsistence till the day of decree. In the instant case, the respondent claimed his right on the basis of sale made in favour of the appellant vide mutation No. 966. Thus, when the above said mutation stood cancelled, the cause of action to file a suit for pre-emption also stood extinguished as the suit property stood reverted to the original owner. In these circumstances the learned Trial Court validly rejected the plaint under Order VII Rule 11 C.P.C.

7. There is yet another aspect of the mater which is worth consideration. The respondent has given details regarding Talb-e-Mowathibat in paragraph No.6 of the plaint which reads as under:-

"That the plaintiff was informed on 11-2-2010 by one Maqsood Ahmad son of Muhammad Abdullah, Caste Jat, resident of Sheikhupura Baidad about the transaction of sale of the suit land for the first time in the Majlis being attended by Messers Zaka Ullah Bhindar son of Ghulam Rasool, Muhammad Asim son of Muhammad Ashiq Caste Jat Virk, alongwith others while the plaintiff was sitting in his Dera situated in the village Sheikhupura Baidad and after receiving information

about the transaction of the disputed sale, the plaintiff has spontaneously declared his intention to exercise the right of pre-emption there and then."

The perusal of the above cited paragraph reveals that the petitioner had not disclosed the time of making of Talb-e-Mowathibat. This omission is fatal as per principle laid down by the Hon'ble Supreme Court of Pakistan in the cases of "Mian Pir Muhammad and others v. Faqir Muhammad through L.Rs. and others" (PLD 2007 SC 302), "Haqnawaz v. Muhammad Kabir" (2009 SCMR 630), "Muhammad Ali and 7 others v. Humaira Fatima and 2 others" (2013 SCMR 178). The above stated omission was a fundamental flaw which as per principle laid down by the Hon'ble Supreme Court in the case of Ghulam Yasin and others v. Ajab Gull (2013 SCMR 23) was not curable. Thus in view of above flaw the plaint could also be rejected.

8. In view of above this appeal is accepted, judgment dated 21-12-2011 passed by the learned Addl. District Judge, Ferozewala, District Sheikhupura is set aside and resultantly the order and decree dated 27-5-2011 passed by the learned Civil Judge Ist Class, Ferozewala, District Sheikhupura is restored. No order as to costs.

AG/M-162/L Appeal allowed.

**PLJ 2014 Lahore 898 (DB)**
**Present: Shahid Waheed and Shezada Mazhar, JJ.**
**MUHAMMAD ISMAIL--Appellant**
**versus**
**Haji NAZIR AHMAD--Respondent**

R.F.A. No. 85 of 2008, heard on 21.4.2014.

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

----S. 96 & O. XXXVII, Rr. 1 & 2--Thumb-impression on pronote matched with thumb-impression on cheque--Suit on basis of pronote--During pendency of suit application for comparison of thumb impression on pronote was filed--Suit was decreed without deciding application--Challenge to--Validity--Pronote cheque and application for leave to appear and defend were sent to forensic science laboratory--Case was remanded to ASJ who shall firstly decide application for comparison of thumb impression keeping in view report of FSL and thereafter, shall decided suit afresh strictly in accordance with law. [Pp. 900 & 901] A & B

Ch. Sarfraz Ali Dayal, Advocate for Appellant.
Mr. Zafar Abbas Khan, Advocate for Respondent.
Date of hearing: 21.4.2014.

**JUDGMENT**

**Shahid Waheed, J.--**The respondent, Haji Nazir Ahmad, on the basis of a pronote dated 8.5.2004 filed a suit against the present appellant, Muhammad Ismail, under Order XXXVII, Rule 1 and 2 CPC for recovery of Rs. 300,000/-. The appellant after getting leave of the Court defended the suit by filing written statement. On divergent pleadings of the parties, issues were framed and evidence was led. During pendency of suit, the appellant filed an application before the learned trial Court for comparison of his thumb impression on the pronote. The learned trial Court without deciding the above said application decreed the suit vide judgment and decree dated 14.1.2008.

3. The appellant through this appeal under Section 96 CPC has assailed the above said judgment and decree dated 14.01.2008 passed by the learned Additional District Judge, Mianwali, inter alia, on the ground that the learned trial Court without deciding miscellaneous application could not decree the suit and this irregularity vitiates the impugned judgment and decree.

4. During pendency of this appeal learned counsel for the appellant made an offer that if thumb impression of the appellant on the pronote (Ex.P1) is matched with his thumb impression on cheque dated 26.9.2005 (Ex.P3) as well, as the application for leave to appear and defend the suit dated 28.7.2005 then he would not contest this appeal. This proposal was accepted by the learned counsel for the respondent. The above said proposal and acceptance has been recorded in the order dated 30.1.2013 which reads as under:

"The learned counsel for the appellant states that an application for comparison of the thumb impressions of the appellant was pending before the learned Addl./District Judge, Mianwali, which has not been disposed of. It is also pointed out by the learned counsel for the appellant that a cheque dated 26.9.2005 has been admitted before the learned trial Court as Ex.P-3. It is further stated by the learned counsel for the appellant that the that the thumb impression of the appellants on the pronote Ex.P1 may be got verified through the Finger Print Expert and may be compared with the appellants thumb impression on the cheque dated 26.9.2005 (Ex.P3) as well as the application of the appellant for leave to appear and defend the suit dated 28.7.2005. The learned counsel also submits that the appellant would not contest the instant appeal in case the Finger Print Expert gave a report of confirmation of the appellant's thumb impression on the pronote (Ex.P1). This proposal was accepted by the learned counsel for the respondent.

2. In view of the above, let the pronote Ex.P-1 alongwith the cheque dated 26.9.2005 Ex.P-3 and the application for leave to appear and defend the suit dated 28.7.2005 be sent to the Finger Prints Expert of the Forensic Science Laboratory, Lahore, at the expense of the appellant. The Finger Prints Expert is directed to submit his report after comparing the thumb impressions on the three documents as to whether thumb impression are that of the appellant and are similar. This report be submitted within a period of one month from today.

3. The Deputy Registrar (Judl.) of this Court is directed to submit the documents in a sealed envelope to the Forensic Science Laboratory at Lahore for comparison of thumb impressions of the appellant.

4. The instant RFA is directed to be listed for hearing on 7.3.2013."

5. In compliance with above said order dated 30.1.2013, the pronote, cheque dated 26.9.2005 (Ex.P3) and application for leave to appear and defend the suit dated 28.7.2005 were sent to the Punjab Forensic Science Laboratory, Home Department, Government of the Punjab, Lahore. The Punjab Forensic Science Agency submitted its report in a sealed envelope. On 17.4.2014 the above said report was desealed in the presence of learned counsel for the parties and placed on record as Mark `A'. The result and conclusion of the Punjab Forensic Science Agency is as follows:
Result and Conclusion

After complete comparison, two thumb impressions marked as `1' and `2' under the name of Muhammad Ismail s/o Muhammad Ramzan on original pronote (Item No. 3.1) found to be identical with each other and with the thumb impressions marked as `3', `4' and `5' on original cheque (Item No. 3.1). The thumb impression marked as `6' under the name of Muhammad Ismail s/o Muhammad Ramzan on original application (Item No. 3.3) found to be not-identical with the thumb impression marked as `1', `2' under the name of Muhammad Ismail s/o Muhammad Ramzan on original pronote (Item No. 3.1) and thumb impressions marked as `3',`4' and `5' on original cheque (Item No. 3.2).

Disposition of evidence:

The evidence items have been stored, in the secured vault and will be released to he authorized representative of submitting office.
Note: The results in this report relate only to the item(s) provided."

6. After reading the above said report (Mark `A') of the Punjab Forensic Science Agency, the learned counsel for the parties have arrived at a consensus and jointly submit that by accepting this appeal the impugned judgment and decree dated 14.1.2008 be set aside; and, the matter be remitted to the learned Additional District Judge, Mianwali, with a direction to first decide application filed by the appellant for comparison of his thumb impression keeping in view the report (Mark `A') of the Punjab Forensic Science Agency; and, thereafter to decide the suit afresh within a specified period of time.

7. In view of consensus reached between the learned counsel for the parties, this appeal is accepted, the judgment and decree dated 14.1.2008 passed by the learned Additional District Judge Minawali, is set aside. The case is remanded to the learned Additional District Judge, Mianwali, who shall firstly decide the appellant's

application for comparison of thumb impressions keeping in view the report (Mark `A') of the Punjab Forensic Science Agency; and, thereafter shall decide the suit afresh strictly in accordance with law preferably within one month from the date of appearance of the parties before him. The parties are directed to appear before the learned Additional District Judge, Mianwali, on 30.4.2014. No order as to cost.

(R.A.) Appeal accepted

**K.L.R. 2014 Civil Cases 393**
**[Lahore]**
***Present:* SHAHID WAHEED, J.**
**Ameer Afzal etc.**
***Versus***
**Govt. of Punjab through Secretary**

Writ Petition No. 14987 of 2014, decided on 1st July, 2014.

**(a) Discrimination---**

---Discrimination is a blemish and iniquity which spoils the action or policy of public functionaries or Government---The injunction of Islam, provisions of the Constitution and the cannons of morality abhor discrimination among citizens so as to maintain transparency and fairness; and to curb maladministration, corruption and corrupt practices. (Para 5)

**(b) Policy decision---**

---Policy decision of the Government, unless it is absolutely capricious, unreasonable and arbitrary and based upon mere *ipse dixit* of the executive or is violative of any Constitutional provision or law would be immune from judicial review.
(Para 4) Ref: 2011 SCMR 1621, AIR 1998 SC 145.

**(c) Interpretation of Statutes---**

---Where doing of an act is bound by time but is qualified by the term "ordinarily" it necessarily implies that such provision of law is intended to be directory only---Principle. (Para 4) Ref: 2003 YLR 1705.

**(d) Word and meaning---**

---"Ordinary", word of---Meaning. (Para 4)

STUDY LEAVE --- (Impugned clause)

**(e) Constitution of Pakistan, 1973---**

---Arts. 199, 25---Study Leave Rules, 1981, R. 7---Nomination for Ph.D. Course---Criteria---Discrimination---Study Leave---Impugned clause---Whether the clause (h) of letter No. SO (R & E) 3-10/2011, dated 5th July, 2012, that was, "study leave will be granted on due basis and remaining period will be considered as leave without pay" was valid?---Question for determination---In instant case, respondents

while inserting impugned clause in said letter had construed R. 7 of Study Leave Rules, 1981 as hurdle in making nomination of petitioner for Ph.D. Course---As per said rule only an employee who has more than 5 years' service is eligible for study leave and, therefore, to smooth the way of petitioners, whose services were less than five years, for Ph.D. course impugned clause was inserted in said policy letter---Held: *Ipse dixit* of respondent while inserting impugned clause in said policy letter was not valid---Said condition was expressly against the Study Leave Rules, 1981 which were applicable to the employees of the Agriculture Department, Government of the Punjab---Agriculture Department without making amendment in the Study Leave Rules could not deprive petitioners of their legitimate right of study leave with full pay in garb of impugned clause of criteria for making nominations for Ph.D. studies---Impugned clause was declared to have been incorporated in said letter without lawful authority and of no legal effect---Writ petition accepted. (Paras 4, 5, 6)

Ref: 2011 SCMR 1621, AIR 1998 SC 145, 2003 YLR 1705.

مذکور چھٹی میں زیر تنقید کلاز اسٹڈی لیو رولز کے منافی تھی۔ ہائیکورٹ نے رٹ پٹیشن منظور کی۔

[Impugned clause in said letter was against Study Leave Rules. High Court allowed writ petition].

*For the Petitioners:* Muhammad Javed Iqbal Qureshi, Advocate.
*For the Respondents:* Muhammad Arif Raja, Addl. A.G. with Amir Khatak, Addl. Secretary (Admn.).
*Date of hearing:* 1st July, 2014.

## JUDGMENT

**SHAHID WAHEED, J. ---** Shorn of dispensable details, facts of the case are that Government of the Punjab, Agriculture Department in terms of following criteria, incorporated in letter No. SO (R&E) 3-10/2011, dated 5th July, 2012, nominated the petitioners for Ph.D studies at University of Agriculture Faisalabad and University of Arid Agriculture, Rawalpindi for the year 2012-13:---

(a) At least 1st division in M.Sc. or M.Sc. (Hons) with CGPA 2.5 or better.
(b) Maximum age limit 45 years.
(c) Regular employee of Agriculture Department.
(d) 5 years service including contract period in Agriculture Department.
(e) Nominations will be made strictly on merit/marks obtained/CGPA in M.Sc/ M.Sc.(Hons).
(f) Bio-data, Synopsis and Certificate that no departmental/anti-corruption enquiry is pending against the nominee.
(g) Surety Bond to the effect that after completion of Ph.D., the nominee shall serve Agriculture Department at least for five years, failing which he will pay Rs. 10 lac to the Agriculture Department.

(h) Study leave will be granted on due basis and remaining period will be considered as without pay.
(i) The selected candidates will have to pass tests equivalent to GRE (General) and International GRE (Subject) with at-least 50% score in each.
(j) After completion of admission process, if nominee failed to join the Ph.D. classes for any reason, disciplinary action under rules will be taken against him."

2. The petitioners through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, has challenged the vires of clause (h) of the above-said criteria on the ground that the same is against the Leave Rules, 1981 read with Study Leave Rules prescribed by the Governor [Appendix 20 of CSR (Punjab) Vol.-1, Part-II].
3. In response to the notice, the respondent has submitted report and parawise comments. It has been stated in the report that before 2011 only those government servant were nominated for M.Sc./Ph.D. studies who had five years' service in the Agriculture Department; that this policy was in accordance with the Study Leave Rules, 1981 which provides that study leave should not ordinarily be granted to Government servants who have less than 5 years? service; that according to the said Study Leave Rules the candidates having less than 5 years regular service were not eligible for nominations; that for the year 2012-13, only one departmental candidate was found eligible for Ph.D. studies against the reserved quota of the Department in University of Agriculture, Faisalabad and Pir Mehr Ali Shah Arid Agricultural University, Rawalpindi; that the Government of the Punjab regularized the services of the petitioners in the year 2011 and thus they were not eligible for nominations for Ph.D. studies in view of Study Leave Rules, 1981 as they had less than 5 years regular service; and, that to facilitate the petitioners the department amended criteria/conditions and it was decided that study leave would be granted on due basis and remaining period would be considered as leave without pay.
4. Question involve in this petition is as to whether the clause (h) of letter No. SO (R & E) 3-10/2011, dated 5th July, 2012, that is, *"study leave will be granted on due basis and remaining period will be considered as leave without pay"* (hereinafter called the impugned clause) is valid. Since in the case in hand the respondent while inserting the impugned clause in letter No. SO (R & E)3-10/2011, dated 5th July, 2012 had construed Rule 7 of the Study Leave Rules, 1981 as hurdle in making nomination of the petitioners for Ph.D. Course, it is imperative to examine the said rule which reads as under:---
*"Study leave should not ordinarily be granted to Government servants who have less than five years' service."*
It is the argument of the Government that as per the above cited rule only an employee who has more than 5 years' service is eligible for study leave and, therefore, to smooth the way of the petitioners, whose services are less than five years, for Ph.D. course the impugned clause was inserted in the policy letter No. SO (R & E) 3-10/2011 dated 5th July, 2012. I am afraid the *ipse dixit* of the respondent while inserting impugned clause in the said policy letter is not valid. It appears that

the respondent while framing the impugned clause had lost sight of the word "ordinarily" used in Rule 7 of the Study Leave Rules, 1981 which is of great significance. The word "ordinarily" has been defined in the following dictionaries:---

(i) K.J. Aiyar's Judicial Dictionary, 13th Edition:

'Ordinarily' means, usual, normal, common, according to the established order, not characterized by peculiar or unusual circumstances. [*Munna Lal Agarwal v. Rajasthan High Court* (1992) 1. Western Law Case 550 (559) ( Raj)]. The insertion of the word 'ordinarily' does not alter the intendment of the provision. [*Union of India v. Vipin Chandra Hira Lal Shah* 1997 SCC (L&H) 41].

'Ordinarily' means usually or in a large majority of cases, cannot obviously mean always. The word 'ordinarily' gives certain amount of elasticity and would not mean invariably and without exception. [*Bhagbati Primary Fisherman's Cooperative Society v. State of Orissa* (1987) 64 Cut LT 464 (Ori)].

As observed by the Full Bench, Allahabad Court in its decision in the case of *Municipal Board Kanpur v. Janki Prasada* AIR 1963 All 433; the word "ordinarily" does not mean "permanently" nor does not mean "universally". It also does not mean "generally". It seems that it should not be taken to mean 'invariably' or 'always'. It leaves sufficient margin of discretion with the competent authority and gives a certain amount of elasticity to be Regulation 524 of Uttar Pradesh Police Regulation whereunder the discretion contemplated wherein can be exercised depending upon the circumstances and the exigencies of the situation on adequate grounds. [*Juranwan Prasad Mishra v. State of UP* 1995 All LJ 1451 at 1455].

In S. 80-A of the Representation of the People Act, 1951, the word 'ordinarily' indicates that normally it would be a single judge of the High Court who can exercise the jurisdiction which is vested in the High Court, but in appropriate cases, such jurisdiction can also be exercised by two or more judges. [*Kirshan Gupal v. Prakaschandra* (1974) 1 SCC 128 at 134].

The expression 'ordinarily' indicates that this is not a cast-iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though he has no proprietary or even a fiduciary interest in the subject-matter. [*Seethalakshmi Ammal v. State* AIR 1993 Mad 1 at 4].

Ordinarily means unless there are special reasons for not doing so. [*F.M. Kolia v. G.M. Barot* (1981) 22 Guj. LR 700 (DB)].

Transporting of foodgrains including shunting of wagons is ordinarily a part of the work of the Food Corporation of India. [1973 ACJ 5 (Del)].

The word 'ordinarily' means regularly or normally but not casually. [1974 AJ&K LR 527].

Section 177, CPC, embodies the ordinary or general rule of jurisdiction. The word „ordinarily? occurring in the Section means "except in the cases provided hereinafter to the contrary". The rule in the Section should, therefore, be read subject to any special provisions of law which may modify it. [*Nikka Singh v. State* 6 DLR (Simla) 228].

In common parlance, ordinarily, means in large majority of cases. The expression is not used in reference to a case to which there are no exceptions. [*Krishna Dayal v. General Manager, N. Rly* AIR 1954 Punj 245].

'Ordinarily' means habitually and not casually. It cannot obviously means "always" [Per Suba Rao CJ].

The plain and popular meaning of the word 'ordinarily' is usually, normally and not exceptionally as contrasted with extraordinarily. [Re Putta Ranganayakulu 1956 Cr.L.J 1049, 1955 Andh LT (Civ) 335, 1956 Andh WR 465 (S), AIR 1956 AP 161(FB)].

The word 'ordinary' may have different shades of meaning. Thus, in *Kailash Chandra v. Union of India* AIR 1961 SC 1364, their lordships while interpreting the words 'should ordinarily be retained' in R. 2044(2)(a) of the Railway Establishment Code, held that the word 'ordinarily' means 'in the majority of cases but not invariably'. That particular construction left a discretion to the appropriate authority, and it was not bound to retain the servant after he attained the age of 55, even if he continued to be efficient. It all depends upon the contents as to what the meaning of a word should be. The word 'ordinarily' in sub-rule (3) of rule 4, MP Detention Order, 1971, must, in the context in which it appears, mean 'without exception generally'. [*Nirmal Chand v. DM* AIR 1976 MP 95 (96), 1975 MPLJ 758, 1975 Jab LJ 810].

The word 'ordinarily' in rule 44 gives certain amount of elasticity to that rule. I may be possible to say that one of the 'extraordinary' circumstances visualized by the rule is the appointment of headmaster in institutions like the one before us. [*Aido Patroni v. E C Kesavan* AIR 1965 Ker 75].

The meaning attached to the word 'ordinarily' is 'as matter of regular Court; in most cases; usually, commonly; as is normal or usual'. In Corpus Juris Secundum, Vol. 67, the meaning imputed is:

Usual; common; normal; regular; conforming to general order; common in recurrence; often running. The antonym is extraordinary, unusual or uncommon.

For new para, Chamber's Dictionary assigns the meaning 'according to common order; usual. (*State of Uttar Pradesh v. Shri Ram Gupta* 1972 All Cr.R 415).

The term 'ordinarily has been the subject-matter of judicial interpretation and it is now settled that the term means not mainly or regularly, but usually and normally. [*State of Kerala v. Rajappan Nair* 1977 Ker LT 672 (674), (1977) 2 FAC 225, 1977 FAJ 393].

(ii) The Doubleday Roget's Thesaurus in Dictionary Form (Revised Edition):

"ordinarily" adv. usually, commonly, mostly, generally, habitually, as a rule, by and large, regularly, conventionally, customarily, normally, routinely."

(iii) The new Webster Encyclopedia-Dictionary of the English Language:

"ordinarily" adv. In an ordinary manner; usually; generally; in most cases."

Keeping in view the afore-stated definitions of the word "ordinarily" it becomes explicit that condition of 5 years of service is not mandatory for the grant of study leave under the above-said Rule. It is trite principle of law that where doing of an act is bound by time but is qualified by the term "ordinarily" it necessarily implies

that such provision of law is intended to be directory only [*See Hassan Usmani, sole proprietor and another v. TF Pipes Ltd. through Managing Director* (2003 YLR 1705)]. Thus it is clear that the Government/respondent had misconstrued Rule 7 of the Study Leave Rules, 1981 while inserting impugned clause in the criteria for making nominations for Ph. D. studies for the year 2012-13. This condition is expressly against the Study Leave Rules, 1981 which are applicable to the employees of the Agriculture Department, Government of the Punjab. The Agriculture Department without making amendment in the Study Leave Rules could not deprive the petitioners of their legitimate right of study leave with full pay in the garb of the impugned clause of the criteria for making nominations for Ph.D. studies. It is apposite to state here that policy decision of the Government, unless it is absolutely capricious, unreasonable and arbitrary and based upon mere *ipse dixit* of the executive or is violative of any Constitutional provision or law would be immune from judicial review. In this context reference may be made to the cases of *Messrs Al-Raham Tavels and Tours (Pvt.) Ltd. and others v. Ministry of Religious Affairs, Haj, Zakat and Ushr through Secretary and others* (2011 SCMR 1621) and *M.P. Oil Extraction and another v. State of Madhya Pradesh and others* (AIR 1998 SC 145). As the impugned clause, that is, clause (h) of letter No. SO(R&E)3-10/2011, dated 5th July, 2012 is merely based upon the *ipse dixit* of the executive; and, against the Study Leave Rules, I have no hesitation in saying, that the same is illegal, irrational and shows procedural impropriety.

5. Notwithstanding above, it has come to the notice of this Court that action of the respondent for making nominations for Ph.D. studies at University of Agriculture, Faisalabad and University of Arid Agriculture, Rawalpindi is discriminatory. The petitioners in this regard have made a specific reference to the case of Mst. Hunza Khakwani, Assistant Research Officer, who has been nominated to a Ph.D. course with full pay. This fact has not been denied by the respondent in its report and parawise comments. Discrimination is a blemish and iniquity which spoils the action or policy of public functionaries or Government. The injunction of Islam, provisions of the Constitution of the Islamic Republic of Pakistan, 1973 and the cannons of morality abhor discrimination among citizens so as to maintain transparency and fairness; and, to curb maladministration, corruption and corrupt practices. Thus, to do away with discrimination the respondent is required to give the same treatment to the petitioners which has been given to Mst. Hunza Khakwani.

6. In view of above, this petition is accepted and the impugned clause, that is, clause (h) of letter No. SO (R & E) 3-10/2011, dated 5th of July, 2012 issued by the respondent is declared to have been incorporated in the said letter without lawful authority and of no legal effect. Now it is for the respondent to pass an order *qua* the leave of the petitioners. Thus, the respondent is directed to pass appropriate order, without any delay, with regard to leave of the petitioners for completing Ph.D. course. No order as to costs.

Petition accepted.

**2015 M L D 299**
**[Lahore]**
**Before Shahid Waheed, J**
**WAPDA through Chairman and 3 others---Petitioners**
**Versus**
**ADVISORY BOARD, PUNJAB, through Chairman and 2 others---Respondents**

Writ Petition No.11832 of 2008, heard on 3rd September, 2014.

**(a) Electricity Act (IX of 1910)---**
----S. 26(6)---Electric Inspector, powers of---Defect in metering equipment---Slowness of electricity meter---Detection bill---Detection bill sent to consumer due to defect in metering equipment could be challenged before the Electric Inspector---However, where the consumer completely by-passed the metering equipment and used a device to supply energy by dishonest extraction of electricity, and question relating to correctness of the metering equipment was not involved, the charge made to consumer under S. 26A of Electricity Act, 1910, was not referable to the Electric Inspector in terms of S. 26(6) or any other provision of the Electricity Act, 1910.
Colon Textile Mills Ltd. through Factory Manager v. Chief Executive Multan Electricity Power Company Ltd. (MEPO) and 2 others 2004 SCMR 1679; Multan Electric Power Ltd. v. Muhammad Ashiq and others PLD 2006 SC 328 and Water and Power Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd. Okara and others PLD 2012 SC 371 rel.

**(b) Electricity Act (IX of 1910)---**
----Ss. 26(6) & 36(3)---Constitution of Pakistan, Art. 199---Electric Inspector and Provincial Advisory Board, conclusions of---Conclusions based on reasons---Such conclusions could not be interfered with by the High Court under Art. 199 of the Constitution.
Water and Power Development Authority and 2 others v. Messrs Crown Steel Industries and 2 others 2002 YLR 2876 and WAPDA through its Chairman and 2 others v. Nazir Cotton Mills Ltd. 2002 YLR 3395 rel.
Mian Muhammad Javed for Petitioners.
Muhammad Younas for Respondents.
Date of hearing: 3rd September, 2014.

**JUDGMENT**

**SHAHID WAHEED, J.---**The respondent No. 3, Sunahri Flour Mills (Pvt.) Ltd. (hereinafter called the consumer) being a consumer of the petitioners under Reference No 24 1121 24009004U, tariff B-II with 309 KW sanctioned load filed a petition under section 38 of The Regulation of Generation, Transmission and Distribution of Electric Power Act, t997 read with section 26(6) and 24(2) of the

Electricity Act, 1910 before the Electric Inspector, Lahore Region, Lahore/respondent No.2 and thereby called in question the electricity bill dated 7-8-2006. It was maintained in the petition that the impugned bill to the extent of bill adjustment amount of Rs.905144.00 + 150000.00 as 33% slowness charges on account of changed multiplying factor from 40 to 60 and Rs.60149.00 i.e. excess MDI charges exceeding 315 MDKW, (473-313 = 158 x 300 = 60149.00) was illegal.

2. In response to notice the petitioners entered appearance before the learned Electric inspector and contested the petition by filing a written statement. The petitioners in their written statement pleaded that an authorized checking team checked the metering equipment of the consumer on 11-5-2006 and found the same 33 % slow; that after considering consumption data, the checking team came to the conclusion that the meter was slow since December, 2005; and, that in view of the slowness multiplying factor was enhanced from 40 to 60 and the detection bill was charged for the period w.e.f. December, 2005 to April, 2006.

3. The learned Electric Inspector after affording opportunity of hearing to the parties vide decision dated 10-7-2007 declared the detection bill illegal. The penultimate paragraph of the decision made by the learned Electric Inspector reads as under:--

"Therefore the detection bill raised by respondents from 12/2005 to 04/2006 amounting to Rs.905144 is illegal and unjustified. Respondents are directed to withdraw the detection bill. Respondents have already charged the petitioner on the basis of 33 % slowness from 05/2006 onward till the replacement of the meter in 12/2006 which is correct with the exception that defective disputed meter has recorded abnormal MDI in 07/2006 beyond the capacity of 400KVA transformer. The respondents are directed to withdraw the 473 KW MDI charged in 07/2006 and charge the petitioner 337KW Mar i.e. the highest MDI recorded during the year 2005(10/2005)and overhaul the account of the petitioner accordingly. No late payment surcharge is leviable if levied same should be waved off."

4. Feeling aggrieved, the petitioners assailed the afore-referred decision of the learned Electric Inspector through an appeal before the learned Advisory Board Punjab, Lahore. The consumer appeared before the learned Advisory Board, Punjab and contested the appeal. The learned Advisory Board vide decision dated 24-5-2008 partially accepted the appeal in following terms:--

"For what has been stated above, the respondent is liable to pay 33% slowness with effect from March, 2006 to onward till replacement of disputed metering equipment except for 4/2006. However, the abnormal recorded MDI of 473 KW in July, 2006 is not payable by consumer, which shall be worked out on the basis of highest MDI recorded in the year, 2005.

For the foregoing reasons, the Advisory Board modifies the decision of Electric Inspector Lahore dated 10-7-2007 and holds that the respondent is liable to pay 33 % slowness w.e.f. March, 2006 to onward till replacement of meter with the exception of bill for 4/2006 and for 7/2006. It is also held that MDI for 7/2006 shall be worked out on the basis of highest MDI recorded in the year, 2005.

The appeal of WAPDA is partially accepted."

5. The petitioners through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 have challenged the validity of the decision made by the learned Advisory Board Punjab, Lahore.
6. Learned counsel for the petitioners contends that the decisions made by the fora below are without jurisdiction; and, that the impugned decision suffers from misreading and non-reading of evidence and thus liable to be set aside.
7. On the other hand, the learned counsel for the consumer has vehemently opposed this petition and submitted that the decisions made by the fora below have been passed with lawful authority; and, that the impugned decision does not suffer from any legal infirmity and thus the same is not liable to be interfered with by this Court.
8. I have heard the learned counsel for the parties and perused the record.
9. It would be appropriate to firstly deal with the objection qua the jurisdiction of the Electric Inspector and the Advisory Board, Punjab. It is the case of the petitioners that the Electric Inspector lacked jurisdiction to entertain the matter as the consumer was involved in dishonest abstraction of energy and the detection bill was prepared under section 26-A of the Electricity Act, 1910 which was immune from the scrutiny of the Electric Inspector. I am afraid this contention has no force. In the case in hand, the petitioners issued the detection bill amounting to Rs.905,144 for 151051 units and 666 KW MDI was charged on the basis of 33 % slowness of the metering equipment for the period with effect from December, 2005 to April, 2006. Admittedly, this is a case where meter became slow due to technical fault. It is now settled principle that controversy and dispute concerning the slowness of meter or other faults with the equipment falls within the exclusive jurisdiction of the learned Electric Inspector under section 26 of the Electricity Act, 1910. The Hon'ble Supreme Court of Pakistan in the case of Colon Textile Mills Ltd. through Factory Manager v. Chief Executive Multan Electricity Power Company Ltd. (MEPO) and 2 others (2004 SCMR 1679) has held that in case of defect in the metering equipment or any fault caused by the consumer with the intention to prevent the meter from registering the consumption of energy, the assessment made by the licensee of the charges through detection bill can be subject to scrutiny by way of reference made to the Electric Inspector by the consumer but if the metering equipment was completely by passed and through a device energy was being supplied by dishonest abstraction of electricity and question relating to the correctness of the metering equipment measuring apparatus was not involved, the charge made under section 26-A is not a dispute referable to the Electric Inspector in terms of section 26(6) or any other provision of the Electricity Act, 1910. Similar view has been taken in Multan Electric Power Ltd. v. Muhammad Ashiq and others (PLD 2006 SC 328), Water and Power Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd. Okara and others (PLD 2012 SC 371). Since in the case in hand the matter relates to the charges on account of slowness of the meter, the learned Electric Inspector had the jurisdiction to take cognizance of the consumer's complaint and to render decision thereon.

10. The other contention of the learned counsel for the petitioners is that the detection bill had been issued to the consumer due to 33 % slowness of the meter, which was fully justified, but the learned Advisory Board misread and non-read the evidence and fell in error while making the impugned decision. I asked learned counsel for the petitioners to point out the evidence which was not read or misread by the learned Advisory Board, Punjab. In response to court query he failed to point out anything in this regard. The petitioners in support of their claim produced: (i) Test Check proforma dated 11-5-2006, (ii) detection bill; and, (iii) consumption data before the learned Electric Inspector. The Advisory Board Punjab, is a higher authority and the decision of the learned Electric Inspector merged into its decision. The Advisory Board after appreciating the evidence available on record, particularly the above, stated documentary evidence produced by the petitioners, observed that "perusal of the consumption data reveals that the pattern of MDI recorded in the past ranges from 306 to 343 KW whereas in March, 2006 the MDI recorded is 172-KW, which makes it abundantly clear that the meter remained slow/defective in March, 2006, whereas the units and MDI recorded in April, 2006 are 73600 KWH and 322-KW, which establishes that the meter remained OK in the month. From above it is clear that defect of make and break nature existed and in the meter which resulted into recording of MDI some time as correct and sometimes incorrect. This conclusion is also fortified from the MDI charged in July, 2006 on the basis of enhanced M.F. (40 to 60), which comes out to be 473 KW, whereas the transformer installed is of 400 KVA and technically not justified. In this view of matter, the Board observes that meter remained defective 33 % slow w.e.f. May, 2006 to onward till replacement of meter in 12/2006 except that MDI recorded by defective meter in 7/2006 was abnormally high beyond transformer capacity, hence is not payable by the consumer." In fact while deciding the matter the Advisory Board Punjab, Lahore had neither misread nor non-read the evidence. The impugned order shows that the learned Advisory Board thoroughly analyzed the evidence of the case, the technical aspects of the matter and, thereafter, through a well-reasoned decision recorded its conclusions, which have been reproduced above. The view taken by the statutory appellate forum particularly on a question of fact and in the absence of perversity or patent illegality as to the liability of the consumer does not call for interference by this Court. In the case of Water and Power Development Authority and 2 others v. Messrs Crown Steel Industries and 2 others (2002 YLR 2876) it was observed that the conclusion drawn by the learned Electric Inspector and the Advisory Board, Punjab based on reasons cannot be interfered with by this Court in exercise of its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Similar was the view taken in the case of WAPDA through its Chairman and 2 others v. Nazir Cotton Mills Ltd. 2002 YLR 3395.

11. In view of above, this petition being devoid of any merit is dismissed. No order as to costs.

MWA/W-11/L Petition dismissed.

**PLJ 2015 Lahore 425**
**[Multan Bench Multan]**
***Present:* SHAHID WAHEED, J.**
**MUHAMMAD KHALID PERVEZ RAMAY--Petitioner**
**versus**
**TALAT MEHMOOD--Respondent**

C.R. No. 24 of 2009, heard on 26.1.2015.

**Negotiable Instruments Act, 1881 (XXVI of 1881)--**

----S. 84(2)--Civil Procedure Code, (V of 1908), O. VII, R. 11 & O. VI, R. 16--Limitation Act, (IX of 1908), Art. 64-A--Summary suit on basis of two cheques--Out of date cheque was stood dishonoured--Application for rejection of suit was dismissed--Challenge to--Application under Order VII Rule 11, CPC could not be accepted for reason that there was another negotiable instrument i.e. promissory note on basis of which suit was filed; and, that plaint could not be rejected piecemeal as concept of partial rejection is inapplicable to provisions of Order VII Rule 11, CPC, it would have its limited application in regard to provisions of Order VI Rule 16, CPC--There could be partial striking out of pleadings but not rejection of plaint--Petition was dismissed. [P. 427 & 428] A & B
PLD 1999 Kar. 1, 2005 CLC 848 & PLD 2009 Kar. 38, *ref.*

*Mr. Safdar Ramay,* Advocate for Petitioner.
*Rana Shaukat Hayat Noon,* Advocate for Respondent.
Date of hearing: 26.01.2015

**JUDGMENT**

The defendant, Khalid Pervez Ramay, has brought this petition under Section 115, CPC to seek revision of the order dated 11.12.2008 passed by the learned Addl. District Judge, Burewala whereby his application under Order VII Rule 11, CPC for rejection of plaint was dismissed

2. The respondents-plaintiffs through a summary suit under Order XXXVII Rule 2, CPC sued the petitioner-defendant for recovery of Rs. 1,500,000/- on the basis of negotiable instruments, that is, two cheques and one pronote. Initially this suit was decreed *vide ex parte* judgment and decree dated 3.3.2003. Later on, the petitioner filed an application under XXXVII Rule 4, CPC for setting aside the said *ex parte* judgment and decree dated 3.3.2003. This application was contested by the respondents. On divergent pleadings the learned trial Court framed issues and ultimately on its analysis of evidence *vide* order dated 31.01.2008, accepted the application, set aside the *ex parte* judgment and decree dated 3.3.2003; and allowed the petitioner to defend the suit subject to furnishing of surety bond equivalent to

Rs. 1,500,000/-. After getting leave of the Court the petitioner contested the suit by filing a written statement. He also filed an application under Order VII Rule 11, CPC for rejection of the plaint on the ground of limitation. This application was resisted by the respondents-plaintiffs. The learned trial Court *vide* order dated 11.12.2008 dismissed the said application and held that the question of limitation would be determined after framing of issues and recording evidence.

3. The question involved in this petition is as to whether the plaint of the summary suit filed by the respondents could be rejected under Order VII Rule 11, CPC on the ground of limitation. In order to find out the answer to the said question, it is necessary to appraise the grounds urged by the petitioner's counsel in support of application for rejection of plaint.

4. The grounds urged by the petitioner's counsel for rejection of plaint were twofold. Firstly, it was urged that the respondents on 28.11.2002 had filed a summary suit on the basis of two cheques, that is, (i) cheque dated 24.7.1994; and (ii) cheque dated 2.11.1999; that the first cheque, on its presentation before the Bank for encashment, was referred to drawer *vide* slip dated 1.8.1994 whereas the second cheque stood dishonoured and was returned by the Bank through slip dated 22.12.2002 with the remarks that it was out of date; and, thus the claim of the respondents by virtue of Article 64-A of the Limitation Act, 1908 read with Section 84(2) of the Negotiable Instrument Act,1881 had become time barred. In view of the order to be proposed in this petition, I am not touching merits of this ground. However, it would go without saying that even if it is held that this ground holds water, the application under Order VII Rule 11, CPC could not be accepted for the reason that there was another negotiable instrument i.e. promissory note on the basis of which suit was filed; and, that the plaint could not be rejected piecemeal as the concept of the partial rejection is inapplicable to the provisions of Order VII Rule 11, CPC, it would have its limited application in regard to the provisions of Order VI Rule 16, CPC.

There could be partial striking out of pleadings but not rejection of plaint. Partial acceptance or rejection of plaint is always considered as improper exercise of jurisdiction. In this regard reference may be made to the cases of *(Sree Rajah) Venkata Rangiah Appa Rao Bahadur and another v. Secretary of State and others* (AIR 1931 Madras 175) *Masood Ahmad and another v. Mathra Datt & Co. and others* (AIR 1936 Lah. 1021), *Feroze Din and another v. Master Muhammad Sher Khan* (1979 CLC 742), *Moinuddin Paracha and 6 others v. Sirajuddin Paracha and 23 others* (1993 CLC 1606), *Valuegold Limitted and 2 others v. United Bank Limited* (PLD 1999 Karachi 1), *EFU General Insurance Company Ltd. v. Zahidjee Textile Mills Ltd.* (2005 CLC 848) and *Ata Ullah and 6 others v. Sana Ullah and 5 others* (PLD 2009 Karachi 38).

5. The other grouse was about the claim made by the respondents on the basis of promissory note dated 25.2.1994. The petitioner's beef was that this claim was also time barred. This aspect of the matter has two dimensions. The petitioner's counsel argued that the alleged pronote was shown to be executed on 25.2.1994; that it was also shown to be payable on demand; that according to Article 73 of the Limitation Act, 1908 the suit could be filed within a period of three years from the date of execution of the alleged promissory note; and, thus the suit filed by the respondents on 28.11.2002 was barred by time. The other facet of the alleged promissory note was that on its reverse an additional note had been written whereby the amount was payable in three years and in three equal installments; and, that the first installment was stated to be payable in the month of March, 1998. Learned counsel for the petitioner contended that although the said additional note was fake yet the same did not extend any help to the respondents. According to him on the alleged default of first installment the promissory note became matured; and from the date of default i.e. March, 1998 the suit as per Article 75 of the Limitation Act, 1908 could be filed within a period of three years but the same was filed beyond the said period, that is, on 28.11.2002. I am afraid each of the separate parts of the arguments canvassed by the petitioner's counsel is not persuasive. The petitioner's two pronged attack on the respondents' claim arising out of promissory note being mutually exclusive made the question of limitation as mixed question of law and facts. Such question is always resolved after recording evidence and thus the learned trial Court rightly framed issue to this effect and called upon the parties to adduce evidence in support of their respective claims.

6. Before parting I deem it appropriate to observe here that the applicability of Article 75 of the Limitation Act, 1908 depends upon the terms of the promissory note and the nature of the claim or the character of the suit brought in terms of the promissory note. Article 75 of the Limitation Act, 1908 is applicable to those suits which are filed on a promissory note or bond payable by installments which provides that if default be made in payment of one or more installments, the whole shall be due whereas Article 74 of the Limitation Act, 1908 is applicable where it is simply stipulated in a promissory note that the amount borrowed thereunder shall be paid back within a period of certain years and the entire amount was divided into a number of installments. This view finds support from the cases of *Pancham vs. Ansar Hussain* (AIR 1925 Oudh 502), *Mt. Gaura v. Ram Charan* (AIR 1927 Oudh 539) and *Arjun Sahai v. Pitamber Das and others* (AIR 1963 All. 278). However, this is not the stage to determine which provision of the Limitation Act, 1908 would apply to the facts of the case on hands. Applicability of the relevant Article of the Limitation Act, 1908 depends upon the examination of the terms of the negotiable instruments; the nature of claim or character of the suit. The said issues are issues of facts which are required to be

proved through evidence. The learned trial Court has yet to record evidence and thus this Court is not in a position to express any opinion with respect to afore-stated issues; and, the question of limitation. It is, however, expected that the learned trial Court after recording evidence shall determine the question of limitation as per relevant Article or provisions of the Limitation Act, 1908.

7. In the sequel, answer to the question, under discussion, is in the negative and resultantly this petition being bereft of any merit is dismissed with no order as to costs. Parties are directed to appear before the learned trial Court on 11.2.2015.

(R.A.) Petition dismissed

**2015 C L C 987**
**[Lahore]**
**Before Shahid Waheed, J**
**PROVINCE OF PUNJAB and others----Petitioners**
**versus**
**ABDUL RASHID----Respondent**

Civil Revision No.1621 of 2005, heard on 14th April, 2015.

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

----S. 47 & O. XXI, Rr. 23-A, 24----Constitution of Pakistan, Art.10-A---Execution of decrees--- Question to be determined by Executing Court---Scope---Procedure for execution of decree---Objection to execution---Adjudication and disposal of objections by Executing Court---Scope---Decree-holder filed second execution petition before Executing Court and objection of judgment-debtor against the same was dismissed by Executing Court---Contention of judgment debtor was inter alia that decree-holder sought execution beyond the decree and the second execution petition was not competent---Held, that question with regard to maintainability of a second execution petition; applicability of the principle of res judicata and power of Executing Court to go beyond the decree were substantial questions of law and fact and could not therefore be decided in a summary manner---Executing Court was required to frame issues and thereafter decide the said questions in accordance with law---Non-framing of issues and not affording of opportunity to lead evidence in the given facts and circumstances was not only a violation of the principles of natural justice but also that of Art.10-A of the Constitution which guaranteed "fair trial" for determination of rights---High Court remanded the matter to Executing Court for fresh decision on the matter in accordance with law---Appeal was allowed, accordingly.

Muhammad Arif Raja, Addl. A.-G.
Nemo for Respondents Nos.1 and 2.
Muhammad Mudassar Bodla for Respondents Nos.3 and 4.
Date of hearing: 14th April, 2015.

## JUDGMENT

**SHAHID WAHEED, J.---** In the case on hands, respondent No.1 filed a suit for declaration to the effect that the acquisition proceedings qua his alleged land were illegal with the consequential prayer that he was entitled to get damages of Rs.46800 as compensation. The present petitioner resisted the said suit on the ground that the land did not belong to the respondents Nos.1 and 2; that land was acquired from the Central Government for the construction of canal; and, that the land was barren and, therefore, there was no question of payment of any compensation. This suit was dismissed by the learned Trial Court vide judgment and decree dated 4-3-1997. The respondent No.2, feeling aggrieved, assailed the said judgment and decree through an appeal under section 96 of C.P.C. before the learned Additional District Judge, Sheikhupura. This appeal was accepted vide judgment and decree dated 30-9-1999. The said judgment and decree were not further assailed and thus the same attained finality.

2. On 3-1-2001, the respondents Nos.1 and 2 filed an application for the execution of decree dated 30-9-1999. During the proceedings of the said petition the respondents Nos.l and 2 received amount of compensation i.e. Rs.42900. On payment of said amount, the execution petition was consigned to record vide order dated 7-11-2002.

3. On 2-4-2003, the respondents Nos.1 and 2 filed second petition for the execution of decree dated 30-9-1999 for the payment of cost of Rs.2064 and possession of the land. This petition was resisted by the petitioners by filing objection petition. The learned Executing Court/Senior Civil Judge, Sheikhupura dismissed the objection petition vide order dated 23-7-2003. The petitioner assailed the said order through an appeal before the learned Additional District Judge, Sheikhupura. This appeal was also dismissed vide order dated 10-11-2004. Hence, this petition.

4. Learned Additional Advocate-General contends that orders of the learned courts below suffer from misapplication of provisions of law and misreading of the record;

that the learned courts below have failed to appreciate the true legal position with regard to established principle of law that executing court cannot go beyond the decree; that nowhere in the suit for declaration filed by respondents Nos.1 and 2 prayer for possession was made and, therefore, the said relief could not be allowed in the garb of execution of the decree; and, that the second execution petition was not competent.

5. On the other hand, despite service of notice none has entered appearance on behalf of respondents Nos.1 and 2 and, therefore, they are proceeded against ex parte.

6. Before proceeding further it is apposite to state here that this revision petition is barred by time. I confronted learned Addl. Advocate-General with this fact. He submits that impugned orders suffer from material irregularity; and, that the said illegality or irregularity cannot be allowed to be remained in field on the ground of limitation; and, that in order to undo the perversity and illegality in the impugned order the powers under section 115(1), C.P.C. be invoked. Since this petition has been admitted to regular hearing vide order dated 27-1-2006, I am inclined to exercise my suo motu power under section 115(1), C.P.C. to examine the validity of the impugned orders and appraise the arguments of the learned Addl. Advocate-General.

7. The question with regard to maintainability of the second execution petition; applicability of the principle of res judicata; and the power of the Executing Court to go beyond the decree were the substantial questions of law and facts. The averments made in the objection petition and the above said questions could not be decided in a summary manner. The learned Executing Court was required to frame issues and thereafter to decide the same in accordance with law. Non-framing of issues and non-affording of opportunity to lead evidence in the given facts and circumstances of the case was not only violative of the principle of natural justice but also Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 which guarantees fair trial for determination of the rights.

8. In the sequel, I am inclined to set aside the order dated 10-11-2004 of the learned Addl. District Judge, Sheikhupura and the order dated 23-7-2003 of the learned Senior Civil Judge, Sheikhupura. Resultantly, the objection petition filed by the petitioner shall be deemed to be pending before the learned Executing Court which shall decide the same afresh after framing issues and in accordance with law. Parties are directed to appear before the learned Executing Court/Senior Civil Judge, Sheikhupura on 23-4-2015. No order as to costs.

KMZ/P-14/L Case remanded.

**2015 M L D 1169**
**[Lahore]**
**Before Shahid Waheed, J**
**GHULAM FATIMA---Petitioner**
**versus**
**DUR MUHAMMAD and others---Respondents**

C.M No.451-C of 2012 in C.R. No.372-D of 1996, decided on 11th September, 2014.

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

----Ss. 12(2) & 115 & O. XXII---Application under S.12(2), C.P.C.---Judgment/order, setting aside of---Misrepresentation---Death of one of the revision petitioners during pendency of revision---Non-impleading of legal heirs of deceased revision petitioner---Effect---Revisional jurisdiction of High Court---Applicability of Order XXII, C.P.C.---Scope---Contention of applicants was that one of the revision petitioners had died during the pendency of revision and to his extent power of attorney had lost its validity and without impleading the applicants/legal heirs as party misrepresentation had been committed---Validity---Applicants had neither averred in the application nor pleaded during arguments that facts pleaded by the counsel were contrary to the record---No untrue statement of fact or incorrect or false representation on behalf of other revision petitioners was made---Present case was not a case of misrepresentation of facts---Deceased revision petitioner and other defendants filed revision in his life time---Interest of all revision petitioners/defendants was common and other revision petitioners had contested the revision petition---No prejudice was caused to other revision petitioners and present applicants---Applicants had not alleged that their (revision petitioners) brothers had colluded with the plaintiffs/respondents of revision petition and there was no occasion to misrepresent the facts/case before the High Court at the time of final arguments of revision---Other revision petitioners who were sons of deceased were bound to bring on record the left over legal heirs of deceased revision petitioner who were the applicants---Applicants were bound to come forward and become a party in the revision petition---Impugned judgment/order could not be said to have been passed without impleading the legal heirs of deceased revision petitioner---Provisions of Order XXII, C.P.C. were not applicable to the revisional jurisdiction of High Court and if any of the revision petitioner died, same would not abate the revision petition---Impugned order could be passed in the present case without impleading the legal heirs of deceased revision petitioner---Revisional proceedings were always considered as proceedings between a higher court and a lower court---Revision petition was dismissed after examining the record of the case---No misreading or non-reading of evidence had been alleged by the applicants---Death of one of the revision petitioner and invalidity of his power of attorney was not

fatal for the disposal of revision petition---Application for setting aside judgment/order was dismissed in circumstances.

Khan Sahib Khan Muhammad Saadat Ali Khan v. The Administrator Corporation of City of Lahore PLD 1949 Lah. 541; Perdil and others v. Barkat and others PLD 1953 Pesh. 14; Muhammad Sadiq v. Muhammad Sakhi PLD 1989 SC 755 and Bashir Ahmad through L.Rs. v. Muhammad Hussain and others 2010 SCMR 822 rel.

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

----S. 115 & O. XXII---Revisional jurisdiction of High Court---Applicability of Order XXII, C.P.C.---Scope---Provisions of Order XXII, C.P.C. were not applicable to the revisional jurisdiction of High Court and if any of the revision petitioner died, same would not abate the revision petition.

**(c) Words and phrases---**

----"Misrepresentation"---Meaning.

Black's Law Dictionary rel.
Waseem Mumtaz for Petitioner.
Mian Muhammad Jamal for Respondents Nos. 1, 3 and 4.
Ch. Abdul Sami for Respondents Nos. 6, 7 to 9.

**ORDER**

**SHAHID WAHEED, J.---**This is an application under section 12(2), C.P.C. by the daughters of one of the revision petitioner, that is, Peeran Ditta, for setting aside the judgment/order and decree dated 8-3-2011 passed by this Court in C.R. No.372-D/1996.

2. Briefly the facts of the case are that the respondents Nos.5 to 9 being aggrieved by the judgment and decree of the learned Civil Judge dated 5-10-1995 and that of the learned District Judge, Lodhran dated 11-3-1996 filed Civil Revision No.372-D/1996 before this Court. Malik Javaid Akhtar Wains, Advocate being the counsel for respondents Nos.5 to 9/revision petitioners appeared before this Court and advanced his arguments. After hearing arguments of learned counsel for the parties, the revision petition was dismissed by this Court vide order and decree dated 8-3-2011.

3. It is the case of the applicants that one of the revision petitioners, that is, Peeran Ditta (revision petitioner No.1) had died on 20-10-2010; and thus, to his extent power of attorney, executed in favour of Malik Javaid Akhtar Wains, Advocate had

lost its validity; and, the case presented, without impleading the applicants/legal heirs as party, at least on his behalf falls within the ambit of "misrepresentation" within the contemplation of section 12(2), C.P.C.

4. The learned counsel for the respondents Nos.1, 3 and 4 has vehemently opposed this application and submits that the same being not maintainable is liable to be dismissed.

5. It is true that a person may challenge the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction under section 12(2), C.P.C. But the question is as to whether the case of the applicants fills within the ambit of "misrepresentation". The word "misrepresentation" has not been defined in the Code of Civil Procedure, 1908. Thus dictionary may be referred to for determining the meaning of the word "misrepresentation". In Bank's Law Dictionary, 6th edition, the word "misrepresentation" has been defined as follows:--

"Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead".

Now in the light of above meaning of the word "misrepresentation", the case on hands is examined. It has neither been averred in the application nor pleaded before this Court during the course of arguments that the facts pleaded by Malik Javaid Akhtar Wains, Advocate were contrary to the record. It means that no untrue statement of fact or incorrect or false representation on behalf of the revision petitioners was made before his Court. Thus, it is not a case of misrepresentation of facts.

6. As regards the authority of said counsel to plead the case on behalf of deceased Peeran Ditta before this Court on 8-3-2011, it is suffice to say that Peeran Ditta along with his four sons i.e. Ghulam Rasool, Ghulam Sarwar, Ghulam Mustafa and Ghulam Haider being unsuccessful defendants filed civil revision in his life time. The interest of all the defendants/revision petitioners was common. During the pendency of revision petition Peeran Ditta died. It is not the case of the applicants who are daughters of Peeran Ditta that their brothers had colluded with the plaintiffs/respondents of the revision petition meaning thereby that there was no occasion to misrepresent the facts/case before this Court at the time of final arguments of civil revision. Notwithstanding the above, firstly, it was the obligation of the other revision petitioners, who were sons of Peeran Ditta, to bring on record the left over legal heirs of Peeran Ditta, that is, the applicants on record; secondly, it was the duty of the applicants to come forward and become a party in the revision

petition; thirdly, other petitioners of civil revision were legal heirs of Peeran Ditta, deceased, therefore, this cannot be said that the order/judgment and decree were passed without impleading the legal heirs of Peeran Ditta. As stated above, it was a common interest of Peeran Ditta and other revision petitioners; and, other revision petitioners had contested the revision petition so no prejudice was caused to other revision petitioners and the applicants by the impugned order/judgment and decree. Lastly, the provisions of Order XXII, C.P.C., which are not applicable to revisional jurisdiction of this Court, have already been amended by the Law Reforms Ordinance, 1972, and if any of the petitioners, dies it does not abate the revision petition, hence the order, in the given circumstances, could be passed in the instant case without impleading the legal heirs of the deceased/Perran Ditta, as held in the case of Khan Sahib Khan Muhammad Saadat Ali Khan v. The Administrator Corporation of City of Lahore (PLD 1949 Lahore 541), Perdil and others v. Barkat and others (PLD 1953 Peshawar 14), Muhammad Sadiq v. Muhammad Sakhi (PLD 1989 SC 755) and Bashir Ahmad through L.Rs. v. Muhammad Hussain and others (2010 SCMR 822). Even otherwise, the revisional proceedings are always considered as proceedings between a higher Court and a lower Court. This Court after examining the record of the case dismissed the revision petition. The applicants have not alleged that the judgment and decree passed in C.R No.372-D/1996 suffer from misreading or non-reading of evidence. Thus, in the given circumstances, death of Peeran Ditta and invalidity of his power of attorney executed in favour of above said counsel was not fatal and, therefore, it is not a case of misrepresentation within the contemplation of section 12(2), C.P.C.

7. Upshot of the above discussion is that this application lacks merit; and thus, the same is dismissed. No order as to cost.

C.Ms. Nos.1091-C and 1165 of 2012.

8. C.M. No.1091-C/2012 is an application under Section 151, C.P.C. for staying the proceedings of the learned Executing Court during the pendency of C.M.No.451-C-29012 (application under section 12(2), C.P.C.). In this application, this Court vide order dated 23-5-2012 stayed the executing proceedings. Subsequently, respondent No.1, Dur Muhammad, filed application i.e. C.M. No.1165-C/2012 for recalling of above said of order. Notice of C.M. No.1165-C/2012 was issued to the other side vide order dated 30-5-2012. These two applications are pending before this Court and are required to be disposed of. In this context, it is suffice to say that since the main application i.e. C.M. No.451-C/12 has been dismissed, therefore, the said two applications have become redundant and are disposed of accordingly.

AG/P-20/L Applications dismissed.

**PLJ 2015 Tr.C. (Services) 227**
**[Punjab Subordinate Judiciary Service Tribunal Lahore]**
***Present:*** **MEHMOOD MAQBOOL BAJWA, CHAIRMAN, AMIN-UD-DIN KHAN AND SHAHID WAHEED, MEMBERS**
**CH. SHABBIR HUSSAIN--Appellant**
**versus**
**REGISTRAR, LAHORE HIGH COURT, LAHORE etc.--Respondents**

S.A. No. 62 of 2002, heard on 27.3.2015.

**Punjab Subordinate Judiciary Service Tribunal Act, 1991--**

----S. 5--Judicial officer--Pro forma promotion--Deferred for promotion due to delay in recalling suspension order--Seniority was not sole criterion for promotion--Scrutinized service record and review performance and reputation--Unfit for promotion--Question of--Whether promotion of judicial officers was rightly withheld by competent authority--Determination--It is well recognized principle that promotion is neither a vested right nor it can be claimed with retrospective effect--Whenever there is a change of grade or post for better there is an element of selection involved which is considered for promotion and it is not earned automatically but under an order of competent authority to be passed after consideration of comparative suitability and entitlement of those incumbents.
[P. 232] A PLD 1987 SC 172, 1991 SCMR 696 & 2005 SCMR 1742, *ref.*

**Promotion--**

----Judicial officer--Disciplinary proceedings were hurdle in grant of promotion--Validity--Although there can be no absolute bar to promotion yet as a general principle promotion can only be withheld on reasonable and relevant grounds which may include pendency of disciplinary proceedings or a criminal prosecution against a judicial officer--Promotion of judicial officer was rightly withheld due to pendency of disciplinary proceedings until same were over. [P. 233] B

**Punjab Subordinate Judiciary Service Tribunals Act--**

----S. 5--Judicial officer--Pro forma promotion--Question of--Whether judicial officer was entitled for proforma promotion when his immediate junior was promoted with consequential back benefit--Case of pro forma promotion of retired judicial officer--Validity--Where a senior officer was deferred for promotion due to no fault of his own and his junior was promoted and subsequently senior was also promoted during his service, but could not get pro forma promotion during service and retired--Said policy also contemplates that

pro forma promotion is generally granted in a case where an officer whose junior was promoted on regular basis but he was deferred due to reason that he was under suspension or facing a departmental inquiry provided eventually he was exonerated of charge. [P. 233] C

**Pro forma Promotion--**

----Judicial officer--Pro forma promotion was deferred due to pending of disciplinary proceedings--Suspension and facing departmental inquiry--Validity--Grant of pro forma promotion is based on concept of presumption that except temporary hurdles such as inquiry or adverse remarks, which prove to be frivolous later on, officer was fit for promotion on a particular date in past--Keeping into consideration pro forma promotion policy, it cannot be said that he was refused pro forma promotion for no fault of his own, but hurdle in his way was permanent on account of imposition of minor penalty and, therefore, his claim for pro forma promotion was not justified. [P. 233] D

**Promotion--**

----Judicial officer--Pray for grant of pro forma promotion--Penalty of censure, stoppage of annual increment--Validity--Grant of pro forma promotion to judicial officer for post of from date when his juniors were promoted, it is suffice to say that to that effect appellant had not filed any departmental appeal or representation during his service and, thus, such prayer cannot be allowed by virtue of Para-V of Pro forma Promotion Policy.

[P. 234] E

**Punjab Civil Servants (Efficiency & Discipline) Rules, 1979--**

----R. 7-A--Judicial officer--Promotion--Discipline proceedings--Termination from service--Minor penalty of stoppage of increments--Judicial officer was not promoted with his batch mates by virtue of imposition of minor penalty of stoppage of promotion due to pendency of disciplinary proceedings or suspension order--Validity--When a judicial officer is found guilty in discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in administration--Judicial officer cannot be rewarded by promotion as a matter of course even if penalty is minor in nature. [P. 235] F

**Promotion--**

----Judicial officer--Promotion was deferred due to pendency of disciplinary proceedings--Unblemished record--This is a minimum requirement to ensure a clean and efficient judicial administration and to protect public interest--Judicial

officer found guilty of misconduct cannot be placed at par with other judicial officers and his case has to be treated differently--It is expected from authority that it would not reward a judicial officer with promotion retrospectively from a date when for his conduct before that date he was penalized--When a judicial officer is held guilty and penalized and is, therefore, not promoted at least till date on which he is penalized, he cannot be said to have been subjected to further penalty on that account--Denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct--While considering judicial officer for promotion, his whole record has to be taken into consideration and if P.J.S.B. takes penalties imposed upon judicial officer into consideration and denies him promotion, such denial is neither illegal nor unjustified. [P. 235] G

Appellant in person.

*Mr. Nayyar Iqbal Ghouri*, Advocate for Respondent.

Date of hearing: 27.3.2015.

**JUDGMENT**

**Shahid Waheed, Member.--**This is an appeal of a retired Judicial Officer in which he has impleaded Lahore High Court, Lahore, through its Registrar and 144 other Judicial Officers as respondents.

2. The appellant, Ch. Shabbir Hussain, retired District & Sessions Judge through this appeal under Section 5 of The Punjab Subordinate Judiciary Service Tribunal Act, 1991 has prayed that by accepting this appeal the Respondent No. 1 be directed to award him pro forma promotion to the post of Additional District & Sessions Judge from the date when his immediate junior was promoted against the said post; and, thereafter to grant him pro forma promotion to the rank of District & Sessions Judge with effect from 24th December, 2011, i.e, the date on which the Respondent No. 2 along with others were promoted as District & Sessions Judge with all consequential back benefits.

3. This appeal has arisen in the background that on 6th July, 1982 the appellant started his career as Civil Judge. He was promoted to the rank of Senior civil Judge *vide* Notification No. 255/RHC/Sr-CJJ dated 25th November, 1997. While posted as Senior Civil Judge, Rajanpur, the appellant was placed under suspension *vide* Notification No. 134/RHC/SCJJ dated 29th April, 1998 in aid of ensuing disciplinary proceedings to be conducted against him under The Punjab Civil Servants (Efficiency & Discipline) Rules, 1975. One of the allegations against the appellant was that he while posted as Civil Judge at Burewala, District Vehari, entertained and decided two civil suits filed by his brothers. In the said disciplinary proceeding the learned Authorized Officer *vide* his report dated 15th February, 1999 imposed upon the appellant a minor penalty of stoppage of three annual increments. This punishment took effect with the issuance of Notification No. 523/RHC/SCJJ

dated 5th October, 2001 and as consequence thereof the appellant was reinstated in service. In the meantime the appellant became eligible to be promoted to the post of Additional District & Sessions Judge and, therefore, his name along with his batch mates was considered by the Provincial Judicial Selection Board in its meeting held on 28th October, 1999. The appellant was ignored due to pendency of above said disciplinary proceedings and, therefore, *vide* Notification No. 393/RHC/SCJJ dated 16th November, 1999 his juniors, that is, Respondents Nos. 2 to 28 were promoted as Additional District & Sessions Judge. Therefore, the appellant challenged his punishment i.e. Notification No. 523/RHC/SCJJ dated 5th October, 2001 before this Tribunal through Service Appeal No. 7 of 2002. During pendency of this appeal the Provincial Judicial Selection Board held its five meetings and in each of these meetings the name of the appellant was not recommended and resultantly his juniors, i.e. Respondents No. 29 to 32 were promoted *vide* Notification No. 38/RHC/SCJJ dated 1st February, 2000; Respondents No. 33 to 54 were promoted *vide* Notification No. 433/RHC/SCJJ dated 4th October, 2000, Respondents No. 67 to 104 were promoted *vide* Notification No. 67/RHC/SCJJ dated 13th March, 2001; Respondents No. 105 to 124 were promoted *vide* Notification No. 202/RHC/SCJJ dated 7th September 2001; and, the Respondents No. 125 to 145 were promoted *vide* Notification No. 226/RHC/ADJJ dated 10th October, 2001. However, in the year 2002 the Provincial Judicial Selection Board recommended the name of the appellant for promotion and resultantly *vide* Notification No. 59/RHC/SCJJ dated 18th April, 2002 the appellant was promoted to the rank of Additional District & Sessions Judge. After getting promotion to the rank of Additional District & Sessions Judge the appellant on 25th May, 2002 filed a representation under Section 21 of The Punjab Civil Servants Act, 1974 for grant of pro forma promotion with effect from the date when his juniors were promoted to the post of Additional District & Sessions Judge. The said representation was not responded by the Respondent No. 1 and, therefore, after lapse of statutory period the appellant filed the instant appeal before this Tribunal.

4. At the time of final hearing of this appeal the Respondent No. 1 placed before us the complete original service record of the appellant. Perusal of record evinces that during the pendency of present appeal: (i) the appellant's earlier Service Appeal No. 7 of 2002 was dismissed by this Tribunal *vide* judgment dated 16th January, 2003. This judgment was challenged before the Hon'ble Supreme Court of Pakistan through CPLA. No. 814-L of 2003. This petition was dismissed as withdrawn *vide* order dated 24th February, 2005 (ii) the representation of the appellant for grant of pro forma promotion to the rank of Additional District & Sessions Judge with effect from the date when his juniors were promoted was rejected *vide* Letter No. 977/RHC/SC-I dated 20th July 2005 (iii) the appellant was promoted to the rank of District & Sessions Judge with effect from 31st March 2012; and, (iv) the appellant stood retired on attaining the age of superannuation on 13th September 2014.

5. The appellant argued that after imposing a minor penalty of stoppage of three increments *vide* report dated 15.2.1999, the learned Authorized Officer had exhausted his complete jurisdiction in terms of Rule 7-A of The Punjab Civil Servants (Efficiency & Discipline) Rules, 1975 and, therefore. Authority was required to immediately recall the suspension order dated 29th April, 1998 and reinstate him into service but the Authority delayed the matter and reinstated him into service *vide* Notification dated 5th October, 2001; that by imposing the minor penalty of stoppage of three increments and deferring him for promotion due to delay in recalling the suspension order he was penalized twice for the same alleged misconduct and, thus, it was a case of double jeopardy; that pendency of inquiry or minor penalty was not a hurdle in the way of his promotion and, thus, he was entitled for pro forma promotion from the date his juniors were promoted.

6. On the other hand, learned counsel for Respondent No. 1 has vehemently opposed this appeal and submitted that seniority was not the sole criterion for promotion; that the Competent Authority scrutinized the service record and reviewed the performance and reputation of the appellant before declaring him unfit for promotion to the post of Additional District & Sessions Judge; that due to imposition of minor penalty which was maintained upto the level of Hon'ble Supreme Court of Pakistan the appellant could not claim pro forma promotion as per Pro forma Promotion Policy.

7. In this case the appellant on 20th March, 2015 pointed out that the Respondents No. 2 to 145 were arrayed as pro forma respondents; and, that he had been retired on 13th September 2014 and, therefore, in case of acceptance of present appeal seniority of the pro forma respondents either served or un-served would not be affected as he would be only entitled to monetary benefits. In view of above this appeal was ordered to be fixed on 27.3.2015. Today the pro forma respondents are not in attendance and, therefore, they are proceeded against *ex-parte*.

8. The first question which falls for determination in this appeal is as to whether the promotion of the appellant to the post of Additional District & Sessions Judge was rightly withheld by the Competent Authority. It is well recognized principle that promotion is neither a vested right nor it can be claimed with retrospective effect. Whenever there is a change of grade or post for the better there is an element of selection involved which is considered for promotion and it is not earned automatically but under an order of the Competent Authority to be passed after consideration of comparative suitability and the entitlement of those incumbents. In this regard reference may made to the cases of *Muhammad Umar Malik and others vs. Federal Service Tribunal and others* (PLD 1987 SC 172), *Government of the Punjab through Secretary Services, Punjab Lahore and 4 others vs Muhammad Awais Shahid and 4 others* (1991 SCMR 696) and *Abid Hussain Sherazi vs. Secretary M/O Industries and Production, Government of Pakistan, Islamabad* (2005 SCMR 1742). The appellant

has conceded before us: (i) that he was deferred for promotion to the post of Additional District & Sessions Judge firstly, on 16th November, 1999; secondly, on 1st February, 2000, thirdly, on 26th July, 2000; fourthly on 4th September, 2000; fifthly on 13th March 2001; sixthly on 7th September 2001; and, seventhly on 10th October, 2001 due to pendency of disciplinary proceedings which culminated in the imposition of minor penalty of stoppage of three annual increments *vide* Notification No. 523/RHC/SCJJ dated 5th October, 2001; (ii) that he challenged the minor penalty before this Tribunal through Service Appeal No. 07 of 2002 which was dismissed *vide* judgment dated 16th January,2003; (iii) that the said judgment was assailed before the Hon'ble Supreme Court of Pakistan through CPLA No. 814/L of 2003 but the same was dismissed as withdrawn *vide* order dated 24th February,2005. It means that the disciplinary proceedings were the hurdle in the grant of promotion to the appellant. Although there can be no absolute bar to promotion yet as a general principle promotion can only be withheld on reasonable and relevant grounds which may include pendency of disciplinary proceedings or a criminal prosecution against a Judicial Officer. Thus, the promotion of the appellant was rightly withheld due to pendency of disciplinary proceedings until the same were over.

9. The second moot point involved in this case is as to whether the appellant is entitled for pro forma promotion to the post of Additional District & Sessions Judge when his immediate junior was promoted to the said post with all consequential back benefits. This is a case of pro forma promotion of a retired Judicial Officer and according to pro forma promotion policy circulated by the Government of the Punjab, Service and General Administration Department (Regulation Wing) *vide* Notification No. SOR.II (S&GAD)2-59/78 dated 19th April, 2003 pro forma promotion of a retired officer means a case where a senior officer was deferred for promotion due to no fault of his own and his junior was promoted and subsequently the senior was also promoted during his service, but could not get pro forma promotion during the service and retired. The said policy also contemplates that pro forma promotion is generally granted in a case where an officer whose junior was promoted on regular basis but he was deferred due to the reason that he was under suspension or facing a departmental inquiry provided eventually he was exonerated of the charge. The grant of pro forma promotion is based on the concept of presumption that except the temporary hurdles such as inquiry or adverse remarks, which prove to be frivolous later on, the officer was fit for promotion on a particular date in the past. Keeping into consideration the case of the appellant vis-a-vis the above stated pro forma promotion policy, it cannot be said that he was refused pro forma promotion for no fault of his own, but the hurdle in his way was permanent on account of imposition of minor penalty *vide* Notification No. 523/RHC/SCJJ dated 5th October, 2001 and, therefore, his claim for pro forma promotion was not justified. In this regard fortification may be had from the case of *Ch. Muhamamd Saleem v Government of the Punjab through Chief Secretary, SGA&I Department, Lahore and 5*

*others* (1994 SCMR 517). In this case the petitioner joined the Forest Service as a Forest Ranger (BS-11) on 5.10.1962. This post was upgraded to BS-16 by the Government with effect from 1.5.1977. When the question of adjustment of the petitioner in the higher grade came up for consideration it was found that six disciplinary cases were pending against him. His promotion/upgradation, therefore, was deferred. These departmental cases terminated subsequently and the petitioner was awarded the penalty of censure, stoppage of annual increment without future effect and recoveries of small amounts of Rs. 30.40 and Rs. 115. After inquires the case for promotion was submitted before the competent authority but the same was declined. The order of the competent authority was upheld by the Hon'ble Supreme Court with the following observations:

> "Pro forma promotion is made only when a civil servant has been wrongly deprived of the promotion post. In the case in hand no departmental inquiries all ended against the petitioner and he was also punished in one of them. There is therefore, no question of wrongful deprivation."

10. As regards the prayer for grant of pro forma promotion to the appellant for the post of District & Sessions Judge from the date when his juniors were promoted, it is suffice to say that to this effect the appellant had not filed any departmental appeal or representation during his service and, thus, this prayer cannot be allowed by virtue of Para-V of the Pro forma Promotion Policy dated 19th April, 2003 which reads as under:

> "However, keeping in view the hardship caused to the retired civil servant it has been decided that in case where a civil servant was wrongfully prevented from promotion (para 41(a) refers) and subsequently promoted during his service, but could not get pro forma promotion during his service and retired, such office may be considered for pro forma promotion, provided he files a representation to this effect during his service. The representation filed after retirement shall not be considered."

11. Now, we advert to the plea of double jeopardy. The appellant argued that although the disciplinary proceedings under Rule 7-A of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1975 stood terminated with effect from the imposition of minor penalty of stoppage of three annual increments by the Authorized Officer *vide* report dated 15th February, 1999 yet the suspension order i.e. Notification No. 134/RHC/SCJJ dated 29th April, 1998 unnecessarily remained in force till the issuance of Notification No. 523/RHC/SCJJ dated 5th October, 2001 and due to this reason he was not promoted to the post of Additional District & Sessions Judge along with his batch mates on 16th November, 1999; and, by virtue of imposition of minor penalty of stoppage of three annual increments by the Authorized Officer and by withholding promotion due to pendency of disciplinary proceedings or suspension order he was penalized twice for the same alleged fault.

He argued with vehemence that this is a case of double jeopardy. We are not persuaded to accept this contention. In the present case the Authorized officer in exercise of his power under Rule 7-A of The Punjab Civil Servants (Efficiency & Discipline) Rules, 1975 imposed upon the appellant a minor penalty of stoppage of three annual increments *vide* his report dated 15th February, 1999 and forwarded the record to the Authority under Rule 8 ibid for order. The Authority after evaluating the record decided to agree with the learned Authorized Officer and resultantly *vide* Notification No. 523/RHC/SCJJ dated 5th October, 2001 a minor penalty of stoppage of three annual increments was imposed upon the appellant and he was reinstated in service with immediate effect. When a judicial officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. A judicial officer cannot be rewarded by promotion as a matter of course even if penalty is minor in nature. A judicial officer has no vested right to promotion. He has only a right to be considered for promotion. In the case on hands the appellant was considered for promotion along with his batch mates to the post of Additional District & Sessions Judge but he was deferred due to pendency of disciplinary proceedings. To qualify for promotion, the least that is expected of a judicial officer is to have an unblemished record. This is a minimum requirement to ensure a clean and efficient judicial administration and to protect the public interest. A judicial officer found guilty of misconduct cannot be placed at par with the other judicial officers and his case has to be treated differently. It is expected from the Authority that it would not reward a judicial officer with promotion retrospectively from a date when for his conduct before that date he was penalized. When a judicial officer is held guilty and penalized and is, therefore, not promoted at least till the date on which he is penalized, he cannot be said to have been subjected to further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering the judicial officer for promotion, his whole record has to be taken into consideration and if the Provincial Judicial Selection Board takes the penalties imposed upon the judicial officer into consideration and denies him the promotion, such denial is neither illegal nor unjustified.

13. This appeal sans merit and is accordingly dismissed.

(R.A.) Appeal dismissed

**2015 C L C 1704**
**[Lahore]**
**Before Shahid Waheed, J**
**AHMAD ALI and another----Appellants**
**versus**
**Sheikh AMMAN ELAHI----Respondent**

E.F.A. No.264 of 2007, heard on 14th May, 2015.

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

----S. 145---Surety, liability of---Scope---When a person had undertaken as a surety for due performance of a decree or any part thereof, to the extent of undertaking surety was personally liable for due performance of liability of the judgment-debtor to the decree-holder and decree-holder was entitled to proceed against him---Whether a compromise was or was not excluded under the terms of a surety bond was a question of fact in each case---Executing Court had neither framed issues nor considered the objections of the surety and had dismissed the objection petition being not maintainable---Executing Court had not determined the liability of surety under the surety bond---Said act of Executing Court was departure from provisions of law and same could not be approved---Case was remanded to the Executing Court to decide the objection petition of the surety afresh after framing of issues---Impugned order passed by the Executing Court was set aside---Objection petition would be deemed to be pending before the Executing Court who should decide the same afresh in accordance with law---Appeal was accepted in circumstances.

Dalip Singh v. Kishan Chan AIR 1937 Lah. 34 ref.

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

----S. 145---Contract Act (IX of 1872), Ss.133 to 141---Discharge of surety---Determination as to whether surety stood discharged or continued to be liable under the surety bond---Tests.

Following are real tests to apply for determining whether a surety stands discharged or continues to be liable under the surety bond.

(a) If the terms of the bond indicate that the surety undertook the liability on the basis that the dispute should be decided on the merits by the Court and not amicably settled, the compromise will effect a discharge of the surety.

(b) If the terms of the bond show that the parties and the surety contemplated that there might be an amicable settlement as well, and the surety executed the bond knowing that he might be liable under the compromise decree, there can be no discharge and the surety will be liable under the compromise decree.

(c) Where the surety bond was executed in favour of Court and by it the surety undertook to pay certain amount of money on behalf of the defendant if decreed by the Court and compromise decree between the parties to the suit introduces complicated provisions or include matters extraneous to the judicial proceedings in which the surety bond was executed, the surety is discharged from his liability.

(d) If there is fraud or collusion or any of the matter on which a contract can be set aside, the surety can claim exemption on these grounds, for consent decree is treated on the same footing as agreements.

(e) Sections 133 to 141 of the Contract Act, 1872 do not in terms apply to the surety bond executed in favour of the Court but their equitable principles apply to it.
(f) Where the plaintiff and defendant have entered into compromise without the consent of the surety by which he is seriously prejudiced and according to which substantial departure is made from the terms of the surety bond under which the surety engages himself to pay the decretal money then of course surety would be discharged.

Kunj Lal v Batuk Prasad 120 Ind. Cal. 552(1); Kabiruddin v Debi Singh AIR 1935 Nag. 16; Raja Bahadur Dhanvaj Sirji v. Raja P. Parthasarthy and others (1963) 3 SCR 921), Jatindra Narayan Deb v. Gaurange Chandra Dutta Banik and another AIR 1957 Assam 71; Chakkunny, (Surety) v. Viswanatha Iyer AIR 1961 Kerala 312; Amin Lal v. Faridabad Auto Industries Private Ltd. 1979 (1) ILR (Punjab) 298); Mohan Lal v. Suraj Mani and another AIR 1973 (J&K) 92; Messrs Meena Trading Co., Karachi v. Abdul Ghani and another PLD 1972 Kar. 19) and Shahamad Khan v. Sh. Muhammad Akbar and others 2005 CLC 641 ref.

Iftikhar Ullah Malik for Appellants.
Muhammad Javed Iqbal Qureshi for Respondent.
Date of hearing: 14th May, 2015.

## JUDGMENT

**SHAHID WAHEED, J.---** This appeal arises out of an execution case. The decree-holder, who is respondent before me, on 6-3-2002 instituted a suit for recovery of Rs.5,400,000 under Order XXXVII, C.P.C. along with 20% damages and cost of the suit. The defendants of the suit filed an application before the learned Additional District Judge, Faisalabad and sought leave to appear and defend the suit. Vide order dated 23-7-2002 leave was granted to the defendants subject to furnishing of surety bonds equivalent to the suit amount. In compliance with said order the present appellants executed two separate surety bonds. The sureties engaged themselves to pay the amount if the Court eventually passed a decree against the defendants. While trial of the suit was in progress the plaintiff entered into compromise with the defendants as a result of which the suit was decreed vide order and decree dated 11-12-2002. Afterwards execution proceedings were taken out by the decree-holder and he sought to proceed against the surety/appellants. The appellants on 9-9-2003 filed a petition raising objection to the execution of decree and sought release of the attached property and person. The said objection petition was contested by the decree-holder/respondent. On consideration of the matter the learned Additional District Judge vide order dated 22-1-2007 dismissed the objection petition being not maintainable. Aggrieved by the said order sureties have come up in appeal before this Court.

2. This appeal was .originally 'Tiled by Ahmad Ali (appellant No.1) and Muhammad Ali (appellant No.2). Subsequently, the appellant No.2 entered into compromise with the decree-holder/respondent and made a request to this Court for withdrawal of the appeal to his extent. The said request was allowed and vide order dated 22-5-2014 the present appeal was dismissed as withdrawn to the extent of appellant No.2.

3. The question involved in this case is whether the surety's liability under the surety bond continues or has ceased to exist when the surety was not present when the compromise deed was scribed and the consent decree was passed in the case. In my opinion this would not militate against the principle underlying section 145, C.P.C. which provides as under:---

Sec.145 Enforcement of liability of surety.--- Where any person has become liable as surety:

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfillment of any condition imposed on any person, under an order of the Court in any suit or in any proceedings

consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

A combined reading of different clauses of above cited section 145 C.P.C. clearly indicates that when a person has undertaken as a surety for the due performance of a decree or any part thereof, to the extent of undertaking the surety is personally liable for due performance of the liability of the judgment-debtor to the decree-holder and latter is entitled to proceed against him. However, as per the cases of Kunj Lal v Batuk Prasad 120 Ind. Cal. 552(1), Kabiruddin v Debi Singh (AIR 1935 Nag. 16), Raja Bahadur Dhanvaj Sirji v. Raja P. Parthasarthy and others (1963) 3 SCR 921), Jatindra Narayan Deb v. Gaurange Chandra Dutta Banik and another (AIR 1957 Assam 71), Chakkunny, (Surety) v. Viswanatha Iyer, (Decree-holder) AIR 1961 Kerala 312), Amin Lal v. Faridabad Auto Industries Private Ltd. (1979 (1) ILR (Punjab) 298), Mohan Lal v. Suraj Mani and another (AIR 1973 (J&K) 92), Messrs Meena Trading Co., Karachi v. Abdul Ghani and another (PLD 1972 Karachi 19) and Shahamad Khan v. Sh. Muhammad Akbar and others (2005 CLC 641) following are real tests to apply for determining whether a surety stands discharged or continues to be liable under the surety bond.

(a) If the terms of the bond indicate that the surety undertook the liability on the basis that the dispute should be decided on the merits by the Court and not amicably settled, the compromise will effect a discharge of the surety.

(b) If the terms of the bond show that the parties and the surety contemplated that there might be an amicable settlement as well, and the surety executed the bond knowing that he might be liable under the compromise decree, there can be no discharge and the surety will be liable under the compromise decree.

(c) Where the surety bond was executed in favour of Court and by it the surety undertook to pay certain amount of money on behalf of the defendant if decreed by the Court and compromise decree between the parties to the suit introduces complicated provisions or include matters extraneous to the judicial proceedings in which the surety bond was executed, the surety is discharged from his liability.

(d) If there is fraud on collusion or any of the matter on which a contract can be set aside, the surety can claim exemption on these grounds, for consent decree is treated on the same footing as agreements.

(e) Sections 133 to 141 of the Contract Act, 1872 do not in terms apply to the surety bond executed in favour of the Court but their equitable principles apply to it.

(f) Where the plaintiff and defendant have entered into compromise without the consent of the surety by which he is seriously prejudiced and according to which substantial departure is made from the terms of the surety bond under which the surety engages himself to pay the decretal money then of course surety would be discharged.

4. In the present case the appellant contested the execution of the decree to his extent by pleading that principles contained in section 135 of the Contract Act were applicable; that terms of the surety bond showed that he did not agree that the respondent could enter into a compromise with judgment-debtor; that by terms of the compromise, certain other disputes were also settled between the respondent and judgment-debtor which complicated the matter further; that his liability under the bond had ceased because the decree being installments decree without his consent and on compromise between the decree-holder on one hand and defendant/judgment-debtor on the other hand, he could no longer be liable for payment of amount under the decree in question; and, that decree was obtained through fraud or collusion. It is well established that the question whether a compromise was or was not excluded under the terms of a surety bond is a question of fact in each case. [See Dalip Singh v. Kishan Chan (AIR 1937 Lahore 34)]. The learned Additional District Judge neither framed issues nor considered the above said objections of the appellant and dismissed the objection petition being not maintainable vide impugned order dated 22-1-2007. Perusal of impugned order shows that the learned Executing Court had not applied the aforesaid principles to determine the liability of the appellant under the surety bond. This was a clear departure from provisions of law and, therefore, the same cannot be approved.

5. In the afore stated attending circumstances and for order to be proposed in this appeal, I have not touched the merits of the case lest it might not prejudice the case of either of the parties. The appropriate course is to remand the case to the learned Executing Court to decide the appellant's objection petition afresh after framing following issues:---

(i) Whether the decree in question cannot be executed against the objector on the grounds contained in the objection petition?

(ii) Relief.

6. In the sequel this appeal is allowed, order dated 22-1-2007 passed by the learned Additional District Judge, Faisalabad, is set aside and result would be that the appellant's objection petition shall be deemed to pending before the learned Additional District Judge, Faisalabad, who shall decide the same afresh in accordance with law after framing the afore stated issues. Parties are directed to appear before the learned Additional District Judge, Faisalabad on 25-6-2015. No order as to costs.

ZC/A-81/L Appeal allowed.

**2015 P L C (C.S.) 1503**
**[Lahore High Court]**
**Before Shahid Waheed, J**
**MUHAMMAD IQBAL**
**Versus**
**GOVERNMENT OF PUNJAB through Chief Secretary, Punjab and another**

W.P.No.15320 of 2014, decided on 19th March, 2015.

**(a) Constitution of Pakistan---**

----Arts. 199 & 25-A---Constitutional petition---Maintainability---Civil service---Disciplinary proceedings against the Heads of schools whose result remained below---Show-cause notice, issuance of---Interlocutory orders passed in disciplinary proceedings---Scope---Show-cause notice or a charge-sheet was merely an expression made by a department/organization against its employee stating therein that particular acts of misconduct were alleged against him---Issuance of show-cause notice or a charge-sheet was the first step of the disciplinary proceedings and being interlocutory order were in nature of a step towards a final order to be passed and would be merged with the final order---Civil servant, in disciplinary proceedings, would have to wait till a final order was passed---Interference in interlocutory orders unless same were shown to be without jurisdiction would amount to stifling of disciplinary proceedings---High Court declined to entertain constitutional petition challenging/quashing show-cause notice---Appropriate course for the petitioner to adopt was to file his reply to the impugned show-cause notice and invite the decision of disciplinary authority thereon---Present constitutional petition was pre-mature---Department had taken notice of low percentage of school results and had directed action against the Heads of the schools---Policy/letter in question being one of the modes to check malpractices---Creating hurdle in upgrading the standard of education and making citizen literate was not violative of any law or provision of the Constitution---Constitutional petition was dismissed in circumstances.

Allah Bukhsh v. DIG, Police 2003 UC 60; Abdul Wahab Khan v. Government of the Punjab and 3 others PLD 1989 SC 508; Muhammad Javed v. Executive District Officer (Education) Sialkot and 2 others PLJ 2002 Lahore 1393 and M/s. Al-Rehman Travels and Tours (Pvt.) Ltd. and others v. Ministry of Religious Affairs, Hajj, Zakat and Usher through Secretary and others 2011 SCMR 1621 rel.

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

----Art. 199---Constitutional jurisdiction of High Court---Scope---Constitutional petition was not maintainable against intermediate stages or steps of departmental proceedings---High Court declined to interfere with the policy matter in its

constitutional jurisdiction---If policy was in conflict with any provision of law or was violative of fundamental right of a citizen then same might be challenged before High Court under its constitutional jurisdiction.

M/s. Al-Rehman Travels and Tours (Pvt.) Ltd. and others v. Ministry of Religious Affairs, Hajj, Zakat and Usher through Secretary and others 2011 SCMR 1621 rel.

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

----Art. 25-A---Compulsory education---Scope---State was bound to provide free and compulsory education to all children of five to sixteen years. [p. 1506] C

Raja Naveed Azam for Petitioner.
Aziz ur Rehman Khan, A.A.-G. for Respondents.

**ORDER**

**SHAHID WAHEED, J.---** Petitioner, Muhammad Iqbal, being Senior Headmaster of Government High School, Lashkarpur, Multan through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 has called in question the letter No.PA/DS(SE)Results-Multan/2013 dated 19-9-2013 issued by the Government of the Punjab, School Education Department whereby a direction has been issued to the Executive District Officers (Education), of Multan, Vehari, Lodhran and Khanewal to take action against the heads of the schools whose 9th Class Secondary School Certificate Examination, 2013 results were below 25%; and, a Show-Cause Notice No.SO(E&D-I)/Res.(2013/Multan) dated 31-3-2014 issued to him under section 7(b) read with section 5(1)(a) of the Punjab Employees, Efficiency, Discipline and Accountability Act, 2006.

2. As regards the impugned show-cause notices, it is suffice to say that show-cause notice or a charge-sheet is merely an expression made by a Department/Organization against its employee stating therein that particular acts of misconduct are alleged against him. This is the first step of the disciplinary proceedings and being interlocutory orders are in the nature of a step towards a final order eventually to be passed and will be merged with the final order. The Hon'ble Supreme Court of Pakistan in the case of "Allah Bukhsh v. DIG, Police (2003 UC 60) has held that constitutional petition against show-cause notice is not maintainable and civil servants in disciplinary proceedings will have to wait till a final order is passed. It is also settled principle of law that a constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is not maintainable against intermediate stages or steps of departmental disciplinary proceedings. In this regard reference may be made to the case of "Abdul Wahab Khan v. Government of the Punjab and 3 others" (PLD 1989 SC 508) and "Muhammad Javed v. Executive District Officer(Education) Sialkot and 2 others"

(PLJ 2002 Lahore 1393). Interference in the interlocutory orders such as charge-sheet/show-cause notice and putting an end to them at their inception, unless same are shown to be without jurisdiction, would amount to stifling of disciplinary proceedings. In view of above, this is not the stage at which this Court should entertain the petition filed by the petitioner challenging and for quashing show cause notice and appropriate course for the petitioner to adopt is to file his reply to the impugned show-cause notice and invite the decision of the disciplinary authority thereon. Prior to that stage, any petition for quashing show cause notice is premature.

3. The other grouse of the petitioner is with respect to the validity of letter No. PA/DS (SE)Results-Multan/2013 dated 19-9-2013 issued by the Government of the Punjab, School Education Department whereby a direction has been issued to the Executive District Officers (Education), of Multan, Vehari, Lodhran and Khanewal to take action against the heads of the schools whose 9th Class Secondary School Certificate Examination, 2013 results were below 25%. It is settled principle of law that ordinarily High Court does not interfere with the policy matter in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. However, if policy is in conflict with any provision of law or is violative of fundamental right of a citizen, the same may be challenged before this court in its constitutional jurisdiction. In this regard reference may be made to the case of "M/s. Al-Rehman Travels and Tours (Pvt.) Ltd and others v. Ministry of Religious Affairs, Hajj, Zakat and Usher through Secretary and others" (2011 SCMR 1621). In, this context I have examined the above said impugned letter. The Articles included in the Part-II, Chapter 2 of the, Constitution of the Islamic Republic of Pakistan, 1973, that is, Articles 29 to 40 contain principles which are required to be followed by the State both in the matter of administration as well as in the making of laws. They embody the aims and objects of the State under the Republican Constitution, e.g., that it is 'Welfare State' which shall: (a) promote, with special care, the educational and economic interests of backward classes or areas; (b) remove illiteracy and provide free and compulsory secondary education within minimum possible period; and (c) make technical and professional education generally available and higher education equally accessible to all on the basis of merit. In continuation to aforementioned principles of policy, the State as per Article 25-A of the Constitution of the Islamic Republic of Pakistan, 1973 is bound to provide free and compulsory education to all children of the age of five to sixteen years in such a manner as may be determined by law. Realizing the manifesto of the policies and programs of the State, the School Education Department, Government of the Punjab, vide letter dated 19th September, 2013 has taken notice of the low percentage of school results of Secondary School Certificate Examination-2013 and, therefore, has directed to take action against the heads of the schools whose 9th Class Secondary School Certificate Examination-2013 were below 25% so as to maintain standard of education, to remove illiteracy; and, to achieve the afore-stated objectives of the State. The Policy/letter in question being one of the modes to

check malpractice and creating hurdle in upgrading the standard of education and making the citizens of Pakistan literate is not violative of any law or provision of the Constitution of the Islamic Republic of Pakistan, 1973.

4. Before parting it is apposite to state here that the questions involved in this petition were also the subject matter of W.P.No.16143 of 2014. The said petition was dismissed vide order dated 27-1-2014 and the same was upheld by the learned Division Bench of this Court in I.C.A. No.463 of 2014. Thus, the judgment passed by the learned Division Bench in I.C.A. No.463 of 2014 is applicable to the case in hands and in view thereof I am clear in my mind that the prayer made by the petitioner cannot be acceded to.

5. In the sequel, this petition being devoid of any merit is dismissed.

ZC/M-135/L Petition dismissed.

**PLJ 2015 Lahore 333**
**[Multan Bench Multan]**
*Present:* SHAHID WAHEED, J.
PIRAN DITTA and others--Petitioners
versus
DUR MUHAMMAD and 3 others--Respondents

C.M. No. 451-C of 2012 in C.R. No. 372-D of 96, decided on 11.9.2014.

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

----S. 12(2)--Misrepresentation--Decree was passed without impleading legal heirs--Validity of judgment--A person may challenge validity of a judgment, decree or order on plea of fraud, misrepresentation or want of jurisdiction under Section 12(2), CPC--No untrue statement of fact or incorrect or false representation on behalf of revision petition was made before High Court. [P. 334 & 335] A & C

**Words & Phrases--**

----Misrepresentation--Word "misrepresentation" has not been defined in CPC--Thus dictionary may be referred to for determining meaning of word "misrepresentation"--In Black's Law Dictionary, 6th edition, word "misrepresentation" has been defined. [P. 334] B

*Mr. Waseem Mumtaz,* Advocate for Petitioner.
*Mian Muhammad Jamal,* Advocate for Respondents Nos. 1, 3 and 4.
*Ch. Abdul Sami,* Advocate for Respondents Nos. 6, 7 to 9.
Date of hearing: 11.9.2014.

**ORDER**

This is an application under Section 12(2), CPC by the daughters of one of the revision petitioner, that is, Peeran Ditta, for setting aside the judgment/order and decree dated 08.03.2011 passed by this Court in C.R. No. 372-D/1996.

2. Briefly the facts of the case are that the Respondents No. 5 to 9 being aggrieved by the judgment and decree of the learned Civil Judge dated 05.10.1995 and that of the learned District Judge, Lodhran dated 11.03.1996 filed Civil Revision No. 372-D/1996 before this Court. Malik Javaid Akhtar Wains, Advocate being the counsel for Respondents No. 5 to 9/revision petitioners appeared before this Court and advanced his arguments. After hearing arguments of learned counsel for the parties,

the revision petition was dismissed by this Court *vide* order and decree dated 08.03.2011.

3. It is the case of the applicants that one of the revision petitioners, that is, Peeran Ditta (revision Petitioner No. 1) had died on 20.10.2010; and thus, to his extent power of attorney, executed in favour of Malik Javaid Akhtar Wains, Advocate had lost its validity; and, the case presented, without impleading the applicants/legal heirs as party, at least on his behalf falls within the ambit of "misrepresentation" within the contemplation of Section 12(2), CPC.

4. The learned counsel for the Respondents No. 1, 3 and 4 has vehemently opposed this application and submits that the same being not maintainable is liable to be dismissed.

5. It is true that a person may challenge the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction under Section 12(2), CPC. But the question is as to whether the case of the applicants falls within the ambit of "misrepresentation". The word "misrepresentation" has not been defined in the Code of Civil Procedure, 1908. Thus dictionary may be referred to for determining the meaning of the word "misrepresentation". In Black's Law Dictionary, 6th edition, the word "misrepresentation" has been defined as follows:

> "Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead".

Now in the light of above meaning of the word "misrepresentation", the case on hands is examined. It has neither been averred in the application nor pleaded before this Court during the course of arguments that the facts pleaded by Malik Javaid Akhtar Wains, Advocate were contrary to the record. It means that no untrue statement of fact or incorrect or false representation on behalf of the revision petitioners was made before this Court. Thus, it is not a case of misrepresentation of facts.

6. As regards the authority of said counsel to plead the case on behalf of deceased Peeran Ditta before this Court on 08.03.2011, it is suffice to say that Peeran Ditta alongwith his four sons i.e Ghulam Rasool, Ghulam Sarwar, Ghulam Mustafa and Ghulam Haider being unsuccessful defendants filed civil revision in his life time. The interest of all the defendants/revision petitioners was common. During the pendency of revision petition Peeran Ditta died. It is not the case of the applicants

who are daughters of Peeran Ditta that their brothers had colluded with the plaintiffs/respondents of the revision petition meaning thereby that there was no occasion to misrepresent the facts/case before this Court at the time of final arguments of civil revision. Notwithstanding the above, firstly, it was the obligation of the other revision petitioners, who were sons of Peeran Ditta, to bring on record the left over legal heirs of Peeran Ditta, that is, the applicants on record; secondly, it was the duty of the applicants to come forward and become a party in the revision petition; thirdly, other petitioners of civil revision were legal heirs of Peeran Ditta, deceased, therefore, this cannot be said that the order/judgment and decree were passed without impleading the legal heirs of Peeran Ditta. As stated above, it was a common interest of Perran Ditta and other revision petitioners; and, other revision petitioners had contested the revision petition so no prejudice was caused to other revision petitioners and the applicants by the impugned order/judgment and decree. Lastly, the provisions of Order XXII, CPC, which are not applicable to revisional jurisdiction of this Court, have already been amended by the Law Reforms Ordinance, 1972, and if any of the petitioners, dies it does not abate the revision petition, hence the order, in the given circumstances, could be passed in the instant case without impleading the legal heirs of the deceased/Peeran Ditta, as held in the case of *Khan Sahib Khan Muhammad Saadat Ali Khan v. The Administrator Corporation of City of Lahore* (PLD 1949 Lahore 541), *Pordil and other v. Barkat and others* (PLD 1953 Peshawar 14), *Muhammad Sadiq v. Muhammad Sakhi* (PLD 1989 S.C 755) and *Bashir Ahmad through LRs v. Muhammad Hussain and others* (2010 SCMR 822). Even otherwise, the revisional proceedings are always considered as proceedings between a higher Court and a lower Court. This Court after examining the record of the case dismissed the revision petition. The applicants have not alleged that the judgment and decree passed in C.R No. 372-D/1996 suffer from misreading or non-reading of evidence. Thus, in the given circumstances, death of
Peeran Ditta and invalidity of his power of attorney executed in favour of above said counsel was not fatal and, therefore, it is not a case of misrepresentation within the contemplation of Section 12(2), CPC.

7. Upshot of the above discussion is that this application lacks merit; and thus, the same is dismissed. No order as to cost.

C.Ms. No.1091-C & 1165 of 2012.

8. C.M. No. 1091-C/2012 is an application under Section 151, CPC for staying the proceedings of the learned Executing Court during the pendency of C.M.No. 451-C-2012 (application under Section 12(2), CPC). In this application, this

Court *vide* order dated 23.5.2012 stayed the executing proceedings. Subsequently, Respondent No. 1, Dur Muhammad, filed application i.e C.M. No. 1165-C/2012 for recalling of above said order. Notice of C.M. No. 1165-C/2012 was issued to the other side *vide* order dated 30.5.2012. These two applications are pending before this Court and are required to be disposed of. In this context, it is suffice to say that since the main application i.e. C.M. No. 451-C/12 has been dismissed, therefore, the said two applications have become redundant and are disposed of accordingly.

(R.A.) Order accordingly

**PLJ 2015 Tr.C. (Services) 111**
**[Punjab Subordinate Judiciary Service Tribunal, Lahore]**
***Present:*** **JUSTICE MEHMOOD MAQBOOL BAJWA, CHAIRMAN, AMIN-UD-DIN KHAN AND SHAHID WAHEED, MEMBERS**
***Raja*** **MUHAMMAD SHAFIQ JAVED--Appellant**
**versus**
**LAHORE HIGH COURT, LAHORE through its Registrar--Respondent**

S.A. No. 7 of 2011, heard on 6.3.2015.

**Punjab Civil Servants (Efficiency & Discipline) Rules, 1975--**
----Rr. 3(b) & (c)--Punjab Subordinate Judiciary Service Tribunal Act, 1991, S. 5--Judicial officer--Resignation was accepted--Notification--Review of notification--Condonation of delay in filing review petition--Charge relinquish report--Not disclosed sufficient cause for condonation of delay--Validity--It is by now well settled principle of law that if departmental representation is barred by time, then without disclosing any sufficient reason for delay no subsequent order of disposal of such incompetent representation could create fresh cause of action and that appeal before tribunal would be incompetent--Appeal was dismissed. [P. 115] A PLD 1990 SC 951, 1998 SCMR 882, 2004 SCMR 18, 2011 SCMR 8 & 2015 SCMR 165, *rel.*

*M/s. M.A. Ghaffar-ul-Haq and Syed Zaheer Hassan Shah,* Advocates for Appellant.

*Mr. Zubda-tul-Hussain,* Advocate for Respondent.

Date of hearing: 6.3.2015.

**JUDGMENT**

**Justice Shahid Waheed, Member.**--Prayer in this appeal, under Section 5 of The Punjab Subordinate Judiciary Service Tribunal Act, 1991, is to set aside Letter No. 171/RHC/C-I dated 31st March, 2011 whereby the review petition of the appellant against Notification No. 133/RHC/CJJ dated 9th May, 2009 was rejected.

2. Shorn of dispensable details, the facts of case are that on 9th February, 1991, one Muhammad Ashraf filed a complaint against the appellant, Raja Muhammad Shafiq Javed, who at that time was working as Civil Judge. Pursuant to said complaint, an inquiry was conducted against the appellant wherein he was held guilty and resultantly under the provisions of Rule 3(b) and (c) of The Punjab Civil Servants (Efficiency & Discipline) Rules, 1975 a major penalty of dismissal from service was imposed upon him *vide* Notification No. 25/RHC/CJJ dated 31st January, 2001.The appellant challenged the said Notification before this Tribunal through Service Appeal No. 51 of 2001. This appeal was accepted *vide* judgment dated 10th December, 2004. The respondent challenged the said judgment before the Hon'ble Supreme Court of Pakistan through Civil Petition No. 599-L of 2005. This petition was dismissed *vide* order dated 5th October, 2006. In compliance with the judgment

passed by the Hon'ble Supreme Court of Pakistan, the appellant was reinstated into service with back benefits *vide* Notification No. 237/RHC/CJJ dated 1st November, 2006. Subsequently, the appellant performed his duties as Civil Judge, 1st Class, at Noorpur Thal (01.11.2006 to 25.07.2007), Pindigheb (26.7.2007 to 12.10.2008); and, Rawalpindi (13.10.2008 to 16.4.2009). Lastly on 17.4.2009 he was posted at Lahore as OSD Lahore High Court, Lahore. While assuming the charge of post of OSD, Lahore High Court, the appellant on 23rd April, 2009 also tendered his resignation. This resignation was accepted *vide* Notification No. 133/RHC/CJJ dated 9th May, 2009. After a lapse of more than one year the appellant filed a petition for review of Notification No. 133/RHC/CJJ dated 9th May, 2009. The appellant also filed an application for condonation of delay in filing the said review petition. Both the said applications were rejected by the Authority *vide* Letter No. 171/RHC/C-l dated 31st March, 2011. Hence, this appeal.

3. At the outset of hearing we confronted learned counsel for the appellant with the fact that appellant's appeal/petition seeking review of the Notification No. 133/RHC/CJJ dated 9th May, 2009 was barred by time and asked as to how this appeal was competent. In response to said query, learned counsel for the appellant submitted that copy of the Notification No. 133/RHC/CJJ dated 9th May, 2009 was not communicated to the appellant; that on gaining knowledge the appellant on 13th August, 2009 filed an application for obtaining certified copy of the said Notification but the same was not provided to him; that the appellant with intention to get certified copy of the said Notification moved the Hon'ble Lahore High Court through W.P. No. 134370 of 2010 but the same was dismissed being not maintainable; that the appellant approached the Hon'ble Supreme Court of Pakistan through CPLA No. 1263 of 2010; and, that during hearing of the case Hon'ble Supreme Court of Pakistan advised the appellant to withdraw the appeal and approach the respondent by way of representation as provided under the law; that consequently the appellant filed a representation before the respondent but the same was rejected *vide* Letter No. 171/RHC/CJJ dated 31st March, 2011; and, that from the said date the instant appeal is within limitation and, therefore, competent.

4. On the other hand, learned counsel for the respondent submitted that the appellant was aware of the Notification No. 133/RHC/CJJ dated 9th May, 2009 whereby his resignation was accepted. In support of this contention he presented before us a copy of the charge relinquishment report; and, Letter No. 14587 dated 18th January, 2010 whereby the Deputy Registrar (Admn) on behalf of the Registrar, Lahore High Court, Lahore forwarded the charge relinquishment report to the Accountant General, Punjab, Pay-Roll-X, Lahore. He urged that the appellant being aware of the Notification No. 133/RHC/CJJ dated 9th May, 2009 relinquished the charge of the post of OSD, Lahore High Court, Lahore and thus he could not take the plea of non-communication of said Notification. He further argued that when the departmental appeal/representation was barred by time then this appeal would not be competent.

5. We have heard learned counsel for the parties and perused the record. The admitted facts of the case are that while assuming the charge of post of OSD in the Lahore High Court, Lahore the appellant on 23rd April, 2009 also tendered his resignation; that the said resignation was accepted *vide* Notification No. 133/RHC/CJJ dated 9th May, 2009; and, that against the said Notification the appellant on 30th July, 2010 filed a departmental representation. These admitted facts show that the appellant's departmental representation was barred by time. It is the case of the appellant that delay in filing departmental representation occurred due to the default of the respondent is not communicating Notification No. 133/RHC/CJJ dated 9th May, 2009 to him. This plea has no substance and the same is negated from the contents of charge relinquishment report signed by the appellant, which reads as under:-

"CHARGE RELINQUISHMENT REPORT

I, Raja Muhammad Shafiq Javed, have this 9th day of May-2009, relinquished the charge of post of O.S.D., Lahore High Court, Lahore, in compliance with the Notification No. 133/RHC/CJJ dated 9th May, 2009.

Sd/
*Rana Muhammad Shafiq Javed*
O.S.D.
Lahore High Court, Lahore.

The above said charge relinquishment report was forwarded to the Accountant General Punjab in following words:--

"LAHORE HIGH COURT, LAHORE

To No. 14587

The Registrar,
Lahore High Court, Lahore.

To

The Accountant General Punjab,
Pay Roll-X,
Lahore
Dated Lahore the 18-1-2010

Forwarded a Certificate declaring that the charge of the post of O.S.D, Lahore High Court, Lahore, has been relinquished by Raja Muhammad Shafiq Javed, on 9th day of May-2009, in compliance with the Notification No. 133/RHC/CJJ dated 9th May, 2009.

Sd-
Deputy Registrar (Admn)
For Registrar"

6. Perusal of above stated charge relinquish report; and, Letter No. 14587 dated 18th January, 2010 unfold the fact that the appellant was in possession of the Notification No. 133/RHC/CJJ, dated 9th May, 2009. He, therefore, could have filed departmental representation seeking review of said Notification within a prescribed period of time. Conversely, he consumed more than a year and filed departmental

representation on 30th July, 2010. This was patently barred by time. Although the appellant, by concealing the afore stated facts, made a feigned attempt to cover up the default by filing a petition before the learned High Court, and Hon'ble Supreme Court of Pakistan with a prayer that a direction be issued to the respondent for delivering him a copy of Notification No. 133/RHC/CJJ dated 9th May, 2009 yet the same were of no avail as these facts were not stated in the application for condonation of delay. The appellant in his departmental representation or in the application for condonation of delay before the respondent had neither disclosed sufficient cause for condonation of delay nor explained the delay of each day in filing the belated representation. We are, therefore, clear in our mind that the appellant had failed to disclose sufficient cause for condonation of delay in filing departmental representation and, therefore, the same was rightly rejected by the respondent *vide* impugned Letter No. 171/RHC/C-I dated 31st March, 2011.

7. The other argument that the Hon'ble Supreme Court of Pakistan during the course of hearing of CPLA No. 1263 of 2010 advised the appellant to withdraw the petition and to approach the respondent by way of representation as provided under the law is also against facts. In fact the appellant made a request before the Hon'ble Supreme Court of Pakistan to withdraw the said petition in order to avail legal remedy before the proper forum for redressal of his grievance. On the basis of said request the petition was dismissed as withdrawn. The order dated 28th July, 2010 of the Hon'ble Supreme Court of Pakistan, for ease of reference, is reproduced hereunder:--

> "Learned counsel for the petitioner wants to withdraw this petition in order to avail legal remedy before the proper forum for redressal of his grievance. Dismissed as withdrawn."

8. It is by now a well settled principle of law that if a departmental representation is barred by time, then without disclosing any sufficient reason for delay no subsequent order of disposal of such incompetent representation could create fresh cause of action; and, that the appeal before the Tribunal would be incompetent. Reliance in this regard is placed on *The Chairman, PIAC and others vs. Naseem Malik* (PLD 1990 SC 951) *Abdul Wahid vs. Chairman Central Board of Revenue, Islamabad and another* (1998 SCMR 882), *Muhammad Afzal vs. Inspector General of Police and others* (2004 SCMR 18), *Muhammad Islam vs. Inspector General of Police, Islamabad and others* (2011 SCMR 8) and *Muhammad Asif Chatha and others vs. Chief Secretary, Government of Punjab, Lahore and others* (2015 SCMR 165). In the case on hands, the appellant had not only failed to disclose sufficient cause for condonation of delay in filing departmental representation but has also not filed any application for the same before this Tribunal. Thus, this appeal, as per above said principle of law, is not competent.

7. In the sequel, this appeal fails and is accordingly dismissed.

(R.A.) Appeal dismissed

**PLJ 2015 Tr.C. (Services) 116**
**[Punjab Subordinate Judiciary Service Tribunal, Lahore]**
***Present:*** **JUSTICE MEHMOOD MAQBOOL BAJWA, CHAIRMAN, AMIN-UD-DIN KHAN AND SHAHID WAHEED, MEMBERS**
**MUHAMMAD ANAYET GONDAL--Appellant**
**versus**
**REGISTRAR, LAHORE HIGH COURT, LAHORE--Respondent**

Service Appeal No. 11 of 2012, heard on 16.1.2015.

**Punjab Civil Servants (Efficiency & Discipline) Rules, 1999--**

----R. 18--Punjab Subordinate Judiciary Service Tribunal Act, 1999, S. 5—Constitution of Pakistan, 1973, Art. 10-A--Judicial officer--Dismissal from service--Notification--Disciplinary proceedings--Notice for enhancement of punishment was not given--Neither documents were supplied nor reasonable time for filing reply to show-cause notice was granted--Validity--It is settled principle of law that natural justice in relation to disciplinary proceedings means observance of procedural fairness before holding an officer guilty of misconduct--Depriving delinquent officer of opportunity of taking inspection of documents or non-granting of reasonable time for filing reply to show-cause notice amounts to violation of principle of natural justice and also of fundamental rights guaranteed u/Art. 10-A of Constitution which contemplates fair trial for determination of rights of parties--Procedural fairness was not observed as reasonable time for submitting reply to show-cause notice was not given to judicial officer and, therefore, notification was not sustainable in eye of law--Appeal was accepted. [P. 119] A & B

*Mian Tariq Hussain,* Advocate alongwith Appellant.
*Mr. Zubda-tul-Hussain*, Advocate and *Mian Ashfaq Ahmad,* Deputy Registrar, Tribunal for Respondent.
Date of hearing: 16.1.2015.

**JUDGMENT**

**Justice Shahid Waheed, Member.--**This appeal under Section 5 of The Punjab Subordinate Judiciary Service Tribunal Act, 1999 has arisen from the disciplinary proceedings initiated against the appellant, Muhammad Anayet Gondal, under the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999 which culminated in the impugned Notification dated 28.05.2012 whereby major penalty of dismissal from service was imposed upon the appellant.

2. In the case on hands, the appellant, while working as Civil Judge at District Toba Tek Singh was charged with following misconduct *vide* charge-sheet dated 16.6.2011.

1. That while posted as Civil Judge, Toba Tek Singh, you accused during the course of hearing of case titled *"Sagheer Ahmad vs. Abdul Razzaq"* passed orders contrary to the law and facts being motivated by some unlawful personal gain or due to religious belief and thus committed misconduct within the meaning of Rule 3(b) punishable under Rule 4(i)(b) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999.
2. That you maintained Bank Account No. 02001487 in Alflah Bank, Toba Tek Singh wherein you deposited Rs. 10,000/- on 27th October, 2009, Rs. 23000/- on 3rd November, 2009, Rs. 50,000/- on 5th December, 2009, Rs.40,000/- on 17th December, 2009, Rs.32,000/- on 4th January, 2010, Rs.8,90,000/- on 13th February, 2010, Rs.7,000/- on 18th February, 2010, Rs.25,000/- on 1st March, 2010, Rs. 1,39,550/- on 8th March, 2010, Rs.25,000/- on 24th May, 2010 and Rs.50,000/- on 14th June, 2010 in cash for which you could not plausibly explained the source of income and the source of deposit and thus you indulged yourself in corruption and lived beyond your known means of income within the meaning of Rule (3)(c)(i) punishable under Rule 4(i)(b) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999.
3. That during your posting as Civil Judge, Toba Tek Singh, you discharged your judicial function irresponsibly and against settled principle of law by declining bails and also by granting bails and thus you exercised your judicial power ostensibly for illegal personal gain and committed corruption which is punishable under Rule 3(c) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999.
4. That you also engaged yourself in the business of Stock Exchange during your active judicial service which is not permissible under the law and thus you committed misconduct which is punishable under Rule 4(1)(b) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999.
5. That you sold your car bearing Registration No. NV-895 Islamabad and purchased a new car bearing Registration No. LEB 10/5314 beyond the value of your earlier car without obtaining prior permission from the Hon'ble Lahore High Court, Lahore and thus you committed misconduct which is punishable under Rule 4(1)(b) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999.
6. That you obtained loan from National Bank of Pakistan, Ghalla Mandi Branch, Gojra and also obtained loan of Rs. 1,40,000/- on credit card No. 4862-5100-0000-9099 of Bank Alflah without prior permission of the Hon'ble Lahore High Court, Lahore and thus you committed misconduct punishable under Rule 4(1)(b) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999.

7. That you developed relations with the litigants of a declaratory suit titled *"Azim Saleem vs. Province of Punjab, etc.*" and on the basis of your personal contacts made decision in favour of Azim Saleem plaintiff and thus you committed misconduct which is punishable under Rule 4(1)(b) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999."

The appellant on 24.6.2011 submitted reply to the said charge-sheet and denied the allegations. The Inquiry Officer, Malik Falak Sher, District & Sessions Judge, Okara in his report dated 28.11.2011 found the appellant guilty of misconduct and proposed that he be awarded major penalty of reduction to a lower pay scale. The disciplinary authority, viz., the Administrative Committee, Lahore High Court, Lahore, disagreeing with the proposed punishment, issued show-cause notice dated 10.3.2012 to the appellant to explain as to why major penalty of dismissal from service be not imposed upon him. After affording opportunity of hearing to the appellant, the Authority imposed upon him major penalty of dismissal from service *vide* impugned Notification dated 24.5.2012. Feeling aggrieved, the appellant through a petition under Rule 18 of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999 sought review of the Notification dated 24.5.2012. This review was not responded and, therefore, after lapse of 90 days the appellant filed the instant appeal before this Tribunal.

3. For the order to be proposed in this appeal we are not touching merits of the case. During the course of arguments, the appellant pleaded that reasonable time for submitting reply to the final show-cause notice dated 10.3.2012, that is, a notice for enhancement of punishment, was not given to him. He submitted that he received the said show-cause notice on 14.3.2012 and at that time he was discharging his duties as Civil Judge Class-I, at Darya Khan; that he filed an application dated 14.3.2012 before the Registrar, Lahore High Court, Lahore with a request that he be allowed to peruse/consult the record of inquiry proceedings and for provision of necessary documents for submitting proper reply to the notice; and, that neither the documents were supplied to him nor reasonable time for filing reply to the show-cause notice was granted and, therefore, the hearing afforded to him on 16.3.2012 was feigned. On the other hand, learned counsel for the respondent has resisted the contentions canvassed by the appellant. He submitted that the appellant was in possession of the requisite documents; and, had a reasonable time to file reply to the show-cause notice but he did not avail the opportunity and thus at this stage he cannot be allowed to plead the said ground. The arguments advanced by the respondent's counsel are not persuasive. It is settled principle of law that natural justice in relations to disciplinary proceedings means observance of procedural fairness before holding an officer guilty of misconduct. Depriving the delinquent officer of the opportunity of taking inspection of all documents or non-granting of reasonable time for filing reply to the show-cause notice amounts to violation of principle of natural justice and also of a fundamental right guaranteed under Article

10-A of The Constitution of the Islamic Republic of Pakistan, 1973 which contemplates fair trial for determination of the rights of the parties. In the instant case, perusal of record evinces that procedural fairness was not observed as reasonable time for submitting reply to the show-cause notice dated 10.3.2012 was not given to the appellant and, therefore, the impugned Notification dated 24.5.2012 is not sustainable in the eye of law.

4. In the sequel, while setting aside the impugned Notification dated 24.5.2012, this appeal is accepted and the Registrar of the Lahore High Court, Lahore is directed to place the matter before the Authority for granting reasonable time to the appellant for submitting reply to the final show-cause notice dated 10.3.2012 and thereafter to take further steps as per relevant rules.

(R.A.) Appeal accepted

**PLJ 2015 Tr.C. (Services) 132**
**[Punjab Subordinate Judiciary Service Tribunal, Lahore]**
***Present:*** **JUSTICES MEHMOOD MAQBOOL BAJWA, CHAIRMAN, AMIN-UD-DIN KHAN AND SHAHID WAHEED, MEMBERS**
**MEHBOOB ELAHI SHEIKH--Appellant**
**versus**
**REGISTRAR, LAHORE HIGH COURT, LAHORE--Respondent**

Service Appeal No. 5 of 2009, heard on 27.2.2015.
**Government Servants (Efficiency & Discipline) Rules, 1999--**
----Rr. 2(e), 4(1)(a)(ii) & 18--Punjab Subordinate Judiciary Service Tribunal Act, 1991, S. 5--Judicial officer--Notification--Penalty of stoppage of two annual increments--Challenge to--Question of--Whether minor penalty of withholding of increments could be imposed upon judicial officer--Validity--In exercise of power of judicial nature does not constitute misconduct as defined in Rule 2(e) of Rules, 19990--Alleged negligence being *bona fide* mistake did not constitute misconduct and, therefore, no punishment could be imposed on judicial officer--Impugned notification in eye of law was not sustainable--Appeal was accepted. [Pp. 135 & 136] A & B
PLD 1977 SC 24 & 1988 SCMR 691, *ref.*

*Syed Ijaz Qutab,* Advocate for Appellant.
*Mr. Zubda-tul-Hussain,* Advocate for Respondent.
Date of hearing: 27.2.2015.

**JUDGMENT**

**Justice Shahid Waheed, Member.--**Challenge in this appeal is to the Notification No. 301/RHC/D&SJ dated 17.11.2007 whereby a minor penalty of withholding of two annual increments was imposed upon Mehboob Elahi Sheikh, Ex-District & Sessions Judge; and, to a Letter No. 1015/RHC/C-I dated 15.7.2009 whereby review petition against the said Notification was rejected.

2. This appeal under Section 5 of the Punjab Subordinate Judiciary Service Tribunal Act, 1991 has arisen in the background that Mehboob Elahi Sheikh, original appellant, since deceased (hereinafter called "the Judicial Officer"), was served with a charge-sheet containing the following allegations:

(1) That while posted as Judge Banking Court, Rawalpindi and seized of execution proceedings arising out of judgment and decree dated 9.6.2004 in suit titled Muslim Commercial Bank versus B & B Oil Mills Limited etc, you allowed application under Order XXI Rule 58 read with Rule 62 and Section 15 of the Financial Industries (Recovery of Finances) Ordinance, 2001 filed by Muhammad Khalid

(complainant) by order dated 17.12.2004 with further directions contained therein.

(2) That the complainant deposited the decretal amount of Rs. 39,43,244.78 through crossed Cheque No. 2029751 dated 20.01.2005, which was encashed from Union Bank, Islamabad on 01.02.2005, and the proceeds were deposited in Court's account.

(3) That on 29.6.2005, you entertained an application filed by Kashif Zubair Ahmad Sheikh, Advocate real brother of the complainant, and by two orders dated 4.7.2005 allowed return of the aforesaid amount to the applicant by conducting false proceedings in connivance with the above said Advocate to the grave detriment of interest of plaintiff/bank and the complainant on the basis of so-called statement made by the complainant on oath without his knowledge and signatures.

(4) That the proceedings conducted and orders dated 4.7.2005 passed on application of Kashif Zubair Ahmad Sheikh were ex-facie without jurisdiction, of dubious nature, gross judicial impropriety and for considerations other than legal.

The Judicial Officer submitted reply to the charge-sheet and traversed the afore cited allegations. The Inquiry Officer held a detailed inquiry and in his report recommended minor penalty of stoppage of two annual increments under Rule 4(1)(a)(ii) of the Government Servants (Efficiency & Discipline) Rules, 1999 (hereinafter called the Rules, 1999).The Authority under the Rules, 1999 agreeing with the recommendations of the Inquiry Officer imposed minor penalty of withholding of two annual increments upon the Judicial Officer *vide* Notification No. 301/RHC/D&SJ dated 17.11.2007. Feeling aggrieved, the Judicial Officer filed a petition under Rule 18 of the Rules, 1999 seeking review of the Notification No. 301/RHC/D&SJ dated 17.11.2007. This petition was rejected *vide* Letter No. 1015/RHC/C-I dated 15.7.2009. Hence, this appeal.

3. The moot point involved in this appeal is as to whether in the given facts and circumstances of the case a minor penalty of withholding of two annual increments could be imposed upon the Judicial Officer on the basis of allegations set out in the charge-sheet. The appellant's counsel urged that if anything was proved against the Judicial Officer, it was only an inadvertent *bona fide* negligence in performance of judicial duties; that said negligence alone could not be made basis of punishment particularly when the same was not prompted by any *mala fide*, ill-will or ulterior motive; that to err is human and law gives a fair deal of allowance to unintentional human errors; and, that unblemished service record of the Judicial Officer bears testimony to the effect that the lapse, whatever found against him was the first of its kind; and thus, the punishment was uncalled for. Conversely, the learned counsel for the respondent has vehemently opposed this appeal and resisted the arguments canvassed by the appellant's counsel. He submitted that the Judicial Officer

committed grave negligence while performing his judicial duty and, therefore, minor penalty was justified; and, that the learned Inquiry Officer taking a lenient view had recommended minor penalty of stoppage of two annual increments which was not harsh and, therefore, the impugned Notification and letter do not warrant any interference by this Tribunal.

4. The arguments advanced by the learned counsel for the respondent have not persuaded us to confirm the impugned Notification *qua* the imposition of minor penalty of withholding of two annual increments upon the Judicial Officer. In the present case, the Judicial Officer was charged for misconduct and corruption. The learned Inquiry Officer in the concluding paragraph of his report, that is, Paragraph No. 13 had observed that *"the officer complained of has acted in excess of jurisdiction and was negligent in performance of judicial duties by not applying the procedural requirement in release of the amount to a stranger, thus, in my opinion, he is guilty of sheer negligence. Since, he has not received any illegal gain or benefit by release of the amount, the action performed by him could be termed as bona fide"*. This observation shows: firstly, that the charge of corruption was not proved; and, secondly, there was an error or negligence in performance of judicial duties by the Judicial Officer but the same was *bona fide*. As the charge of corruption was not proved against the judicial officer so there is no need to dilate upon it. Apropos of alleged negligence, a question arises as to whether under the Rules, 1999 disciplinary proceedings could be initiated against the Judicial Officer or a punishment could be imposed upon him for a mistake committed by him in the course of adjudicating the matter when his action or decision was free from any taint of dishonesty or corruption. On examination of the Rules, 1999 we are of the view that an erroneous decision honestly arrived at in exercise of powers of judicial nature does not constitute misconduct as defined in Rule 2(e) of the Rules, 1999. In this regard guidance may be had from the case of *"M.A.Rehman vs Federation of Pakistan and others"* (1988 SCMR 691) wherein it was held as follows:--

> "Surely an honest mistake committed by an officer in such exercise of jurisdiction will not attract the ground of conduct prejudicial to good order or service discipline. Similarly it will not violate any rule of Government Servants (Conduct) Rules, 1964, because honest errors will not constitute willful abuse of office. Nor does such act fall within the category of conduct unbecoming of an officer and a gentleman.
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> So that it is well settled that as long as the power is exercised in good faith and without ulterior motives the functionary in whom the power is invested cannot render himself liable to action for mistakes committed in the course of decisions taken by him."

The principle governing *bona fide* mistake was reiterated by the Hon'ble Supreme Court of Pakistan in the case of *"Riaz Hussain vs Inspector General of Police, Punjab and 2 others"* (2007 PLC(C.S) 182) in the following words:

> "The defect in the investigation may not be a valid ground for discharge of an accused but insufficiency of evidence is definitely a strong ground to discharge a person from criminal charge and it is clear from the order of Magistrate that accused was discharged for want of evidence and not only for the defect in the recovery memo, or in the investigation. The omission of the petitioner as an Investigating Officer of the case in not obtaining the signature of the witness on the recovery memo, may or may not be a factor to damage the prosecution case but in absence of any evidence that the omission of not obtaining the signatures on the recovery memo, was intentional, it would be treated as a *bona fide* mistake which may not constitute an act of misconduct".

In the light of findings of the learned Inquiry Officer and above stated principle of law it becomes clear that the alleged negligence being a *bona fide* mistake did not constitute misconduct and, therefore, no punishment could be imposed on the Judicial Officer. Thus, the impugned Notification and letter in the eye of law are not sustainable.

5. Notwithstanding the above, there is nothing on record to indicate that the past service record of the Judicial Officer revealed instances of inefficient handling of cases. The single instance of any incorrect behaviour of an individual in any discipline whatsoever can hardly furnish a ground for holding him guilty of incompetency or inefficiency. Thus, the unblemished service record of the Judicial Officer leads to the irresistible conclusion that the allegations levelled against him being the single slip or error could neither be construed as amounting to misconduct nor could be converted into gross inefficiency and carelessness and, therefore, the punishment awarded to him was uncalled for. In this context reliance may be placed on the case of *A.U Mussarrat vs Government of West Pakistan* (PLD 1977 S.C 24).

6. Upshot of the above discussion is that we **accept** this appeal and set aside the Notification No. 301/RHC/D&SJ dated 17.11.2007 and Letter No. 1015/RHC/C-I dated 15.7.2009.

(R.A.) Appeal accepted

**PLJ 2015 Tr.C. (Services) 137**
**[Punjab Subordinate Judiciary Service Tribunal, Lahore]**
***Present:*** **JUSTICES MEHMOOD MAQBOOL BAJWA, CHAIRMAN, AMIN-UD-DIN KHAN AND SHAHID WAHEED, MEMBERS**
**ALAM SHER--Appellant**
**versus**
**REGISTRAR, LAHORE HIGH COURT, LAHORE--Respondent**

Service Appeal No. 29 of 2010, heard on 13.2.2015.

**Punjab Sub-ordinate Judiciary Service Tribunal Act, 1991--**

----S. 5--Punjab Civil Servants (Efficiency and Discipline) Rules, 1999--R. 18--Judicial officer--Penalty of withholding of two annual increments--Misconduct and inefficiency--Inadvertent neglect in proceedings--Question of--Whether minor penalty of withholding of two annual increments without cumulative effect could be imposed on basis of allegation set out in charge sheet--Determination--Neglect alone could not be made basis of punishment when same was not prompted by any *mala fide*, ill will or ulterior motive against any of litigating parties--Negligence while performing judicial duties--Validity--Unblemished service record of judicial officer leads to irresistible conclusion that allegation levelled against him being single slip or error could not be construed as amounting to inefficiency and, therefore, punishment awarded to him was uncalled for--Appeal was accepted. [P. 141] A & B PLD1977 SC 24, *ref*.

*Syed Ijaz Qutab*, Advocate for Appellant.
*Mr. Ishfaq Qayyum Cheema*, Advocate for Respondent.
Date of hearing: 13.2.2015.

**JUDGMENT**

**Justice Shahid Waheed, Member.--**Challenge in this appeal is to the Notification No. 136/RHC/CJJ dated 19th July, 2010 whereby a minor penalty of withholding of two annual increments for a period of two years without cumulative effect was imposed upon the appellant.

2. This appeal under Section 5 of the Punjab Subordinate Judiciary Service Tribunal Act, 1991 has arisen in the background that on 25th September, 2007 one Mumtaz Ali and Shabana Noureen filed a complaint against the appellant, Alam Sher, who at that time was posted as Civil Judge, Multan. Apropos of this complaint, the Authority *vide* Letter No. 214/RHC/C-I dated 14th July, 2008 appointed District & Sessions Judge, Khanewal as Inquiry Officer to probe into the

allegations levelled in the said complaint. The Inquiry Officer accordingly served a Charge Sheet No. 175/EB dated 17th July, 2008 upon the appellant and called for his reply. The appellant on 30.7.2008 submitted reply to the charge-sheet and denied the allegations. The Inquiry Officer held a detailed inquiry and submitted his report to the Authority on 11th September, 2008. The penultimate paragraph thereof reads as under:--

> "Although complainant has withdrawn from the prosecution of her complaint on her behalf and on behalf of her uncle Mumtaz Ali, but undersigned has examined merits of the complaint. In this respect order-sheets produced by Mr. Habib Ashraf Qureshi, ACOC, Sessions Court, Multan have been perused which show that the respondent on the one file i. e. execution petition recorded the order on 30.7.2007 but due to inadvertence recorded another date in the file of application under Section 12(2), CPC apparently on 29.7.2007. This fact of recording of date of 29.7.2007 has been explained by respondent in his written defence that in fact order was recorded on 30.7.2007 but inadvertently date was written as 29.7.2007. Even otherwise there is nothing on file to show that file was placed before respondent on Sunday at his residence. So far as shortening of date without notice is concerned, the respondent has attached with his written defence a certificate issued by Sh. Dilawar, Advocate, counsel for complainant, *Mst.* Shabana Noureen wherein he narrated that on his request the date was shortened to 29.7.2007 by respondent in the presence of opposite party. In view of these facts, there appears no *mala fide* on behalf of Mr. Alam Sher for shortening date and fixing case on Sunday. This may happen due to rush of work. The officer, it is learnt, enjoys good reputation and sound integrity. Since the complainant has withdrawn from the prosecution of the complaint, therefore, no action against the respondent is proposed who has even otherwise solemnly undertaken to remain careful in future.

The Authority under the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999 did not agree with the inquiry report and ordered *de novo* inquiry; and, *vide* Letter No. 774/RHC/C-I dated 8th May, 2009 appointed Mr. Muhammad Din Basra, District & Sessions Judge as Inquiry Officer. Pursuant to above said letter, the new Inquiry Officer charged the appellant with misconduct and inefficiency *vide* fresh charge-sheet No. 853 dated 12th June, 2009 on the basis of following allegation:

> "That while posted as Civil Judge at Multan, an application u/S. 12(2), CPC titled *"Mumtaz Ali vs. Arjamand etc."* was fixed before your Court for 13.7.2007 for summoning the original file. On the said date the said petition was adjourned by you for 29.09.2007 for requisitioning the original file but later on in connivance with the respondent, you with *mala fide* intention changed the date from 29.09.2007 to 29.07.2007 by making interpolation in the judicial record and dismissed the above captioned petition for non-prosecution with ulterior motive despite the fact that on 29.7.2007 it was a Sunday and was not a date of hearing in the case. "

The appellant on 27th June, 2009 submitted his written defence. After holding detailed inquiry, the said Inquiry Officer *vide* his report dated 9th June, 2010 concluded as follows:--

> "After having evaluated the evidence on record I have come to the conclusion that charge of inefficiency stands proved against the accused officer. So far as charge of gross misconduct in conducing proceedings with ulterior motives or *mala fide* intentions is concerned no concrete evidence has been adduced on behalf of the prosecution nor any allegation of corruption has been levelled against him by complainant or her witnesses. It is also relevant to point out that admittedly an execution proceedings filed by the opposite side were being adjourned without issuance of any process or coercive measures. Had the officer been in league with the other side then he must have issued coercive process in from of warrants of possession in favour of the decree holder on the date when petition u/S. 12(2) was dismissed for non-prosecution. Rather it is proved on record that execution petition was adjourned to 22-9-07 without any effective proceedings. It is also in the statement of AW-1 *Mst.* Shabana Noureen that when they informed the Presiding Officer regarding dismissal of their petition u/S. 12(2), CPC for non- prosecution he advised to file an application for its restoration. Complainant Shabnam Noureen has not levelled any allegation of corruption against the accused officer and other complainant Mumtaz Ali did not enter in the witness box despite repeated opportunities granted. The charge of gross misconduct or conducting proceedings with ulterior motives or *mala fide* intention is not proved against accused officer.

> Adverting to the charge of inefficiency which stands proved the accused officer while appearing as DW-6 has stated that due to death of his real brother, rush of work and summer season he inadvertently mentioned the date as 29-7-07 instead of 30-7-07 whereas in execution petition Ex. A/16 on the order sheet exact date of hearing i.e. 30-7-2009 has been mentioned. I, therefore, propose on the accused officer penalty of withholding of two annual increments for period of two years without cumulative effect u/R. 4(1) (a) (ii) of Punjab Civil Servants (Efficiency & Discipline) Rules, 1999."

On the receipt of the above said inquiry report , the Authority *vide* impugned Notification No. 136/RHC/CJJ dated 19th July, 2010 imposed minor penalty of withholding of two annual increments for a period of two years without cumulative effect upon the appellant. Feeling anguished, the appellant through a petition under Rule 18 of The Punjab Civil Servants (Efficiency & Discipline) Rules, 1999 sought review of the said notification. This review was not responded and, therefore after lapse of 90 days the appellant filed the instant appeal before this Tribunal.

3. The sole question which falls for determination in this appeal is as to whether in the given facts and circumstances of the case a minor penalty of withholding of two annual increments for a period of two years without cumulative effect could be imposed upon the appellant on the basis of allegation set out in the charge sheet dated 12th June, 2009. The appellant's counsel contended that if anything was proved against the appellant, it was only an inadvertent neglect in adjourning the proceedings on a date which fell on a holiday; that said neglect alone could not be made the basis of punishment particularly when the same was not prompted by any *mala fide*, ill-will or ulterior motive against any of the litigating parties; that to err is human and law gives a fair deal of allowance to unintentional human errors; that the service record of the appellant bears testimony to the effect that the lapse, whatever found against him was the first of its kind; and, that the punishment is harsh. On the other hand, learned counsel for the respondent has resisted the contention canvassed by the appellant's counsel. He submitted that the appellant committed grave negligence while performing his judicial duty and, therefore, minor penalty was justified; and, that the appellant, through a detailed inquiry, was found guilty of serious negligence while performing judicial duties and thus the impugned order/notification is quite justified.

4. The arguments canvassed by the learned counsel for the respondent are not persuasive to confirm the impugned Notification *qua* the imposition of minor penalty of withholding of two annual increments for a period of two years without cumulative effect upon the appellant. In the present case the appellant was charged for inefficiency and misconduct. The charge of gross misconduct or conducting proceedings with ulterior motive or *mala fide* intention was not proved against the appellant and, therefore, there is no need to dilate upon it. However, as regard the charge of inefficiency, in respect of which the appellate was punished, the Inquiry Officer concluded, *"the accused officer while appearing as DW-6 as stated that due to death of his real brother, rush of work and summer season he inadvertently mentioned the date as 29.7.2007 instead of 30.7.2007 whereas in execution petition (Ex. A/16) on the order-sheet exact date of hearing i.e. 30.7.2009 has been mentioned."* This observation shows that there was an error but it was of lower category emanating from the instinct possibly of human error and definitely not prompted by any motive. There is nothing on the record to indicate that the past service record of the appellant revealed instances of inefficient handling of cases. The single instance of any incorrect behavior of individual in any discipline whatsoever can hardly furnish a ground for holding him guilty of incompetency or inefficiency. Thus the unblemished service record of the appellant leads to the irresistible conclusion that the allegation levelled against him being the single slip or error could not be construed as amounting to inefficiency; and, therefore, the punishment awarded to him was uncalled for. In this regard reliance may be placed on the case of *A.U. Musarrat vs. Government of West Pakistan* (PLD 1977 SC 24) wherein, Hon'ble Supreme Court of Pakistan held as follows:--

> "Although there may be some rare cases of gross negligence which if found to be established would leave one in no manner of doubt as to the inefficiency of the official concerned yet a single slip or lapse, if any one the part of a Government servant with a consistently good record would not invariably justify such an inference ……

> ……..
> …….. ordi
> narily a single slip or error and of course to err is human, should not be straight away construed as amounting to inefficiency."

5. In view of above, answer to the question stated in Para 3 ante, is given in the negative; resultantly we accept this appeal; and, set aside the Notification No. 136/RHC/CJJ dated 19th July, 2010 whereby minor penalty of withholding of two annual increments for a period of two years without cumulative effect was imposed upon the appellant.

(R.A.) Appeal accepted

**PLJ 2015 Lahore 1295**
**[Multan Bench Multan]**
***Present:* SHAHID WAHEED, J.**
***Mst.* ZUBAIDA BEGUM--Petitioner**
**versus**
**NAZAR HUSSAIN, etc.--Respondents**

W.P. No. 6751 of 2009, decided on 29.10.2014.

**Justice--**

----Principle--Procedural technicalities--Justice at no cost and at no stage be allowed to fall prey to the procedural technicalities. [P. ] A

**Constitution of Pakistan, 1973--**

----Art. 199--Constitutional petition--Application for comparison of thumb-impression was dismissed without expressing any cogent reason--Challenge to--Objection qua maintainability of petition--Validity--In view of principle of law delay alone could not be made basis for dismissal of the application for comparison of thumb impression--Order which does not contain reason is always termed as perverse order and against such type of order constitutional petition under Art. 199 of the Constitution, is competent. [P. 1297] A, B & C

*Mian Abdul Ghaffar Joiya,* Advocate for Petitioner.
*Mr. Faisal Bashir Ch.,* Advocate for Respondent No. 2-D.
Nemo for others Respondents.
Date of hearing: 29.10.2014

**ORDER**

Shorn of unnecessary details, the facts of the case are that private respondents filed a suit against the petitioner for specific performance of agreement to sell dated 28.11.2002. In response to summons the petitioner entered appearance before the learned trial Court and contested the suit by filing written statement. In the written statement the petitioner denied the execution of the alleged agreement to sell dated 28.11.2012. On divergent pleadings the learned trial Court framed issues and called upon the parties to adduce evidence in respect of their claims. During trial the petitioner filed an application for comparison of her thumb-impression with the thumb-impression affixed on the alleged agreement to sell dated 28.11.2012 from the finger print expert. This application was contested by the private respondents. After affording opportunity of hearing to the parties, learned trial Court dismissed the application *vide* order dated 2.7.2009. The above said order was assailed through a revision petition before the learned Additional District Judge, Rajanpur. The said revision was dismissed *vide* order dated 10.8.2009. Hence, this petition.

2. The sole grievance of the petitioner is that both the learned Courts below have dismissed her application for comparison of thumb-impression without

expressing any cogent reason. On the other hand, learned counsel appearing on behalf of the Respondent No. 2-d (Muhammad Yousaf) has opposed this petition and submitted that the petition is not maintainable. The other respondents are not in attendance. Since this is an old case and proceedings before the learned trial Court are stayed, I am not inclined to adjourn this case to procure presence of other private respondents who are hereby proceeded against ex-parte.

3. After hearing learned counsel for the parties, I find substance in the arguments canvassed by the petitioner's counsel. Both the learned Courts below have rejected the petitioner's application for comparison of her thumb-impression with the thumb-impression affixed on the alleged agreement to sell dated 28.11.2002 and register of petition writer on the ground that same had been moved at the stage of final arguments to prolong the case. The reason prevailed upon learned Courts below to dismissed the petitioner's above said application is not valid. The Hon'ble Supreme Court of Pakistan has consistently held that lis involving a disputed question is decided, it has to be decided on proper appraisal of evidence and that if a lis involving appreciation or interpretation of law is decided, it has to be decided in accordance with the well-recognized principles laid down by the superior Courts from time to time. Justice at no cost and at no stage be allowed to fall prey to the procedural technicalities. They be ignored if they tend to create hurdle in the way of justice. For law can survive as a living force only, when it dynamically assimilates and adapts to the changes around to further the cause of justice. This is how the law grows and this how the jurisprudence advances. [See *Syed Sharif-ul-Hassan through L.Rs. v Hafiz Muhammad Amin and others* (2012 SCMR 1258)]. In view of above stated principle of law delay alone could not be made basis for dismissal of the application for comparison of thumb impression. The learned trial Court was required to decide the application filed by the petitioner with cogent reasons. Thus, the orders, which have been impugned in this petition, being bereft of any reason are not valid. As regards the objection qua the maintainability of this petition, it is suffice to say that order which does not contain reason is always termed as perverse order and against such type of order constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is competent.

4. In the sequel, without touching merits of the case I am inclined to accept this petition. The order dated 10.8.2009 passed by the learned Additional District Judge, Rajanpur, and order dated 2.7.2009 passed by the learned Civil Judge 2nd Class, Rajanpur are hereby set aside and declared to have been passed without lawful authority and of no legal effect; and, resultantly the petitioner's application for comparison of thumb-impression shall be deemed to be pending before the learned trial Court. The learned trial Court is directed to decide the petitioner's application for comparison of thumb-impression afresh and strictly in accordance with law.

(R.A.) Petition accepted

**2016 P L C (C.S.) 16**
**[Punjab Subordinate Judicial Service Tribunal]**
**Before Mahmood Maqbool Bajwa, Chairman and Shahid Waheed, Member**
**QURBAN ALI**
**Versus**
**REGISTRAR, LAHORE HIGH COURT, LAHORE**

S.A. No.26 of 2011, heard on 19th June, 2015.

**(a) Punjab Subordinate Judiciary Service Tribunal Act (XII of 1991)---**

----S. 5---Punjab Civil Servants (VIII of 1974), S.5(3)---Punjab Civil Judges Departmental Examination Rules, 1991, R.9---Judicial officer---Departmental examination---Grace marks, award of---Word "may" mentioned in R.9 of the Punjab Civil Judges Departmental Examination Rules, 1991---Connotation---Judicial officer, in the present case, could not qualify the departmental examination in four attempts by securing sixty six percent of the maximum marks allocated to each subject for his confirmation in service---Appellant was discharged from service---Validity---Authority had not expressed any reason for declining to award grace marks to the appellant---Word "may" mentioned in R.9 of the Punjab Civil Judges Departmental Examination Rules, 1991 had been used out of deference to the high status of the Administration Committee---Said word would merely connote an enabling or a permissive power in the sense of the usual phrase "it shall be lawful"---No investigation was required into disputed facts with regard to grant of grace marks---Administration Committee was bound to award grace marks in any paper in any examination to a candidate who failed to qualify the examination for want of five percent marks so as to enable him just to qualify the examination---No option was available with the Administration Committee to decide whether a candidate was entitled to get grace marks or not---No discretion with the Authority in the matter of grant of grace marks if a candidate was failing in the examination by short of six marks---Appellant secured 73 marks in Paper V (Accounts) whereas the qualifying marks were 79---Administration Committee could not withhold the grace marks in the present case---Administration Committee was bound to grant 6 grace marks to the appellant---Decision for not awarding the grace marks to the appellant was not valid---Appellant could not be declared fail in Paper V (Accounts) of the Civil Judges Departmental Examination---Self-imposed restraint by the Administration Committee or the Competent Authority on the exercise of its power was invalid as Rules had conferred a power on the same---Each and every case had to be decided on its own merits---Administration Committee was not to fetter its discretion by adopting an inflexible standard to be followed by it uniformly

in all cases---Policy decision for grace marks could not be lawfully made so long as statutory rule making provision for grant of the same was not omitted through amendment to be made by the competent authority---Impugned notification was set aside and Authority was directed to grant grace marks to the appellant and make orders for his reinstatement in service---Service appeal was accepted in circumstances.

Muhammad Saleem v. Punjab Public Service Commission and another 1985 CLC 1544; S. Maruf Ahmad Ali, Advocate v. Punjab Public Service Commission, Lahore and another 1986 PLC (C.S) 335; Punjab Public Service Commission and another v. S. Maruf Ahmad Ali PLD 1988 SC 356; Subah Sadiq Khan v. Punjab Public Service Commission and others 1989 MLD 3859; Mst. Farah Naz v. Board of Intermediate and Secondary Education, Multan through its Chairman and another 1995 CLC 1150; Rao Muhammad Ashraf Khan v. Government of Punjab through Secretary Education, Lahore and 2 others 1997 CLC 43; Government of Pakistan through Collectorate of Customs and another v. Amar Mehmood 1999 SCMR 2268; Zahoor Hussain v. Director Education (Schools) Directorate of Education (Schools) Lahore Division, Lahore and 2 others 2002 YLR 1544 and Bahauddin Zakriya University through Vice Chancellor and another v. Muhammad Waseem Khan 2005 YLR 1197 ref.

Julis v. Bishop of Oxford (1880) 5 AC 214; Messrs Gadoon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641; Muhammad Sadiq and others v. University of Sindh and another PLD 1996 SC 182 and Abu Bakar Siddique and others v Collector of Customs, Lahore and others 2006 SCMR 705 rel.

**(b) Words and phrases---**

----"May"---Connotation---Word "may" generally did not mean "must" or "shall" but same was capable of meaning "must" or "shall" in the light of the context---Where a discretion was conferred upon a public authority coupled with an obligation then the word "may" which would denote discretion should be construed to mean a command.

Syed Ijaz Qutab for Appellant.
Zubda Tul Hussain for Respondent.
Date of hearing; 19th June, 2015.

## JUDGMENT

**SHAHID WAHEED, MEMBER.---** This appeal under section 5 of The Punjab Subordinate Judiciary Service Tribunal Act, 1991 is directed against Notification No.112/RHC/CJJ dated 12.5.2011 whereby the appellant, Qurban Ali, was discharged from service under section 5(3) of The Punjab Civil Servants Act, 1974.

2. Prayer in this appeal is to set aside Notification No.112/RHC/CJJ dated 12.5.2011; that the appellant may be reinstated in service; and, that the appellant may be awarded grace marks or in the alternate thereof a special chance be granted for qualifying Paper V (Accounts).

3. This appeal has arisen in the background that on 23.5.2007 the appellant was appointed as Civil Judge-cum-Judicial Magistrate. According to The Punjab Civil Judges Departmental Examination Rules, 1991, the appellant was required to qualify the departmental examination in four attempts by securing sixty six percent of the maximum marks allocated to each subject for his confirmation in service. The appellant in his three successive attempts qualified all the papers except Paper-V (Accounts). In order to qualify Paper V (Accounts), the appellant, availing his 4th chance, appeared in the 27th departmental examination of Civil Judge-cum-Judicial Magistrate. The appellant secured 73/120 marks in the said paper. He was, therefore, declared fail in the examination. The respondent vide letter No.351/RHC/C-I dated 20.5.2011 informed the appellant about detail of marks obtained by him in Paper-V (Accounts). The said details are as below:

| **Attempt** | **Marks obtained in Paper V** |
|---|---|
| 1st Attempt (24th Departmental Examination) | 58 |
| 2nd Attempt (25th Departmental Examination) | 59 |
| 3rd Attempt 26th Departmental Examination). | 60 |
| 4th Attempt (27th Departmental Examination) | 73 |

4. The appellant vide letter No.320/Ahlmad dated 31.3.2011 made a request before the respondent for grant of special chance to appear in Paper-V (Accounts) of departmental examination of Civil Judges-cum-Judicial Magistrate. This application was rejected and resultantly vide impugned Notification No.112/RHC/CJJ dated 12.5.2011 the appellant was discharged from service under section 5(3) of The Punjab Civil Servants Act, 1974. The appellant submitted a petition and sought review of the said Notification. Getting no response of the review petition, the appellant has filed instant appeal before this Tribunal.

5. It is contended on behalf of the appellant that maximum marks allocated to Paper V (Accounts) are 120; that according to letter No.351/RHC/C-I dated 20.5.2011 the appellant secured 73 marks in Paper-V (Accounts) whereas the qualifying remarks were 79; that the appellant was short by 6 marks; that under Rule 9 of The Punjab Civil Judges Departmental Examination Rules, 1991 the Committee could award 5% marks i.e. 6 marks as grace marks in the Paper V; that the appellant's request for award of grace marks has been declined without expressing any reason; that action of the respondent is discriminatory; and, that non-granting of grace marks is a clear violation of principle laid down in the cases of Muhammad Saleem v. Punjab Public Service Commission and another (1985 CLC 1544), S. Maruf Ahmad Ali, Advocate v. Punjab Public Service Commission, Lahore and another (1986 PLC (C.S) 335), Punjab Public Service Commission and another v. S. Maruf Ahmad Ali (PLD 1988 SC 356), Subah Sadiq Khan v. Punjab Public Service Commission and others (1989 MLD 3859) Mst. Farah Naz v. Board of Intermediate and Secondary Education, Multan through its Chairman and another (1995 CLC 1150), Rao Muhammad Ashraf Khan v. Government of Punjab through Secretary Education, Lahore and 2 others (1997 CLC 43), Government of Pakistan through Collectorate of Customs and another v. Amar Mehmood (1999 SCMR 2268), Zahoor Hussain v. Director Education (Schools) Directorate of Education (Schools) Lahore Division, Lahore and 2 others (2002 YLR 1544) and Bahauddin Zakriya University through Vice Chancellor and another v. Muhammad Waseem Khan (2005 YLR 1197).

6. After hearing above noted arguments we asked the learned counsel for the appellant as to whether the request for grant of grace marks was made in review petition. He replied in the affirmative and drew our attention towards Para 4 of the said review petition. Perusal of said para corroborates the assertions of the appellant's counsel.

7. We confronted the learned counsel for the respondent with the arguments canvassed by the appellant's counsel; and, Rule 9 of the Punjab Civil Judges Departmental Examination Rules, 1991 and asked as to whether the said review petition has been decided by the competent authority. In response, learned counsel for the respondent has placed on record a letter No.189/RHC/C-I dated 5.3.2012 whereby the review petition filed by the appellant has been rejected. The said letter reads as under:

> "I am directed to refer to the subject cited above and to state that the Hon'ble Administration Committee has been pleased to consider and decline your review petition in its meeting held on 18.02.2012."

In the above cited letter the Competent Authority has not expressed any reason for declining to award grace marks to the appellant. We, therefore, asked the learned counsel for the respondent as to what were the grounds on the basis of which the grace marks were not awarded to the appellant. Respondent's counsel submits that

no such ground has been expressed in the letter No.189/RHC/C-I dated 5.3.2012; and, that in the 27th departmental examination of Civil Judges, the Committee or the Competent Authority as a policy did not award grace marks to any candidate.

8. In the present case the appellant was discharged from service under section 5(3) of the\ Punjab Civil Servants Act, 1974 as he was declared fail in the departmental examination of Civil Judges. The appellant was declared fail in the departmental examination for not qualifying Paper V (Accounts). In the said paper the appellant secured 73 marks whereas the qualifying marks were 79. It is the case of the appellant that he was entitled to get 6 grace marks which were illegally withheld by the Committee; and, that after grant of grace marks he could not be declared fail in the departmental examination. Thus the controversy involved in this case is as to whether the appellant was entitled to get grace marks. The resolution of said controversy hinges upon interpretation of Rule 9 of The Punjab Civil Judges Departmental Examination Rules, 1991which reads as under:

> "**9. Grace marks.---** The Committee may award five percent marks as grace marks in any paper in any examination."

The question for our decision is whether the word "may" in the said rule confers the discretion on the Committee, or does the word "may" really mean "shall" or "must". There is no doubt that the word "may" generally does not mean "must" or "shall". But it is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority couple with an obligation, the word "may" which denotes discretion should be construed to mean a command. In Julis v. Bishop of Oxford (1880) 5 AC 214 it was observed by Cairns L.C.at pages 222-223 that " the words "it shall be lawful" conferred a faculty or power, and they did not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefits the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so". Lord Blackburn observed in the same case at pages 244-245 that the enabling words give a power which prima facie might be exercised or not, but the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of whose who have that right when required on their behalf. The above stated principle has been approved by the Hon'ble Supreme Court of Pakistan in the case of Messrs Gadoon Textile Mills and 814 others v. WAPDA and others (1997 SCMR 641) wherein at

page 827 it was observed "in such cases the power is coupled with a duty and the public authority in whom it resides must exercise it for the benefit of those identified by the power-conferring provisions".

9. In the case of Muhammad Sadiq and others v University of Sindh and another (PLD 1996 SC 182) the word "may" has been defined in the following terms:

> "May' involves a choice and 'shall' an order. This is the customary usage of these terms of art when they appear in a statute. Even an enabling word like 'may' may become mandatory, when the object of the power is to effectuate a legal right. (See Reg v. Home Secretary (1995)2 V&R 464, 484 and (1879-80) SAC 214-244)

10. The connotation of word "may" also came up for consideration in the case of Abu Bakar Siddique and others v Collector of Customs, Lahore and others (2006 SCMR 705) wherein it was held as follows:

> "It is well-settled that word 'may' is discretionary and an enabling word and unless the subject-matter shows that the exercise of power given by the provision using the word 'may' was intended to be imperative for the person to whom the power is given, it might not put him under an obligation to necessarily exercise such power but if it is capable of being construed as referring to statutory duty, it will not be entirely for such person to exercise or not to exercise the power given to him under the law. The use of word 'may' in the statute in the plain meanings is to give discretion to the public authorities to act in their option in the manner in which such authorities deem proper but if the public authorities are authorized to discharge their functions in their option in a positive sense, the word 'may' used in the provision would be suggestive of conveying the intention of legislature of imposing an obligation. The word 'may' usually and generally does not mean 'must' or 'shall' but it is always capable of meaning 'must' if the discretionary power is conferred upon a public authority with an obligation under the law. The word 'may' is not always used in the statute with the intention and purpose to give uncontrolled powers to an authority rather oftenly it is used to maintain the status of the authority on whom the discretionary power is conferred as an obligation and thus, the legislative expression in the permissive form, sometimes is construed mandatory. It is, however, only in exceptional circumstances in which a power is conferred on a person by saying that he may do a certain thing in his discretion but from the indication of the relevant provisions and the nature of the duty to be done, it appears that exercise of power is obligatory. This is an accepted

> principle of law that in a case in which the statute authorizes a person for exercise of discretion to advance the cause of justice, the power is not merely optional but it is the duty of such person to act in the manner it is intended."

11. In the light of aforesaid precedents it may be conveniently concluded that the word "may" in Rule 9 of the Punjab Civil Judges Departmental Examination Rules, 1991 has been used out of deference to the high status of the Committee and it connotes merely an enabling or a permissive power in the sense of the usual phrase "it shall be lawful". It is also capable of being construed as referring to compellable duty or a ministerial power in which the law prescribes the function to be performed by concerned authority or Committee in somewhat definite and specific terms, leaving no choice to it and leaving nothing to its discretion or judgment. The function to grant grace marks under Rule 9 of The Punjab Civil Judges Departmental Examination Rules, 1991 involves no investigation into disputed facts; the said rule imposes a simple and definite duty on the Committee to award grace marks in any paper in any examination to a candidate who fails to qualify the examination for want of five percent marks so as to enable him just to qualify the examination. It is not open to the Committee to decide as to whether a candidate is entitled to get grace marks or not. There is no discretion of the Committee in the matter if a candidate is failing in the examination by short of 6 marks. In the present case the appellant secured 73 marks in Paper V (Accounts) whereas the qualifying marks were 79. The Committee could not withhold the grace marks as envisaged in Rule 9 (Supra). It was the compellable duty or the ministerial power of the Committee to grant 6 grace, marks to the appellant. The decision for not awarding the grace marks to the appellant was not valid, and, therefore, he could not be declared fail in Paper V (Accounts) of the Civil Judges Departmental Examination.

12. It has been argued by the respondent's counsel that instead of exercising power under Rule 9 of the Punjab Civil Judges Departmental Examination Rules, 1991 for grant of grace marks the Committee or Competent Authority decided as a matter of policy that no grace marks would be allowed to any candidate. The said self-imposed restraint by the Committee or the Competent Authority on the exercise of its power under Rule 9 (supra) is invalid for the simple reason that when rules confer a power on the Committee, it is expected that it would decide each and every case on its own merits, and not fetter its discretion by adopting an inflexible standard to be followed by it uniformly in all cases. Even otherwise the said policy decision could not lawfully be made so long as the statutory rule making provision

for the grant of grace marks is not omitted through amendment to be made by the competent authority.

13. In the light of above observations, this appeal is allowed Notification No.112/RHC/CJJ dated 12.5.2011 and letter No.189/RHC/C-I dated 5.3.2012 are hereby set aside. The respondent is directed to place the case of the appellant before the Hon'ble Administration Committee of the Lahore High Court for grant of grace marks in the light of Rule 9 of The Punjab Civil Judges Departmental Examination Rules, 1991 and to make orders for appellant's reinstatement into service.

ZC/9/PST Appeal allowed.

**2016 M L D 323**
**[Lahore]**
**Before Shahid Waheed, J**
**JAMIL AHMAD and others---Appellants**
**Versus**
**MUHAMMAD RAFIQUE and others---Respondents**

R.S.A. No.184 of 2005, heard on 7th April, 2014.

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

----S. 12---Qanun-e-Shahadat (10 of 1984), Arts. 17 & 79---Suit for specific performance of contract---Agreement to sell, proof of---Attesting witness---Scope---Contention of defendants was that agreement to sell could not be used as evidence until two attesting witnesses of the same had been called for the purpose of proving execution of such agreement---Suit was decreed concurrently---Validity---Agreement to sell was required to be attested by two witnesses under Art. 17 of Qanun-e-Shahadat, 1984---Document should not be used as evidence until two attesting witnesses were called for proving the execution of the same if such document was required to be attested---Plaintiff was bound to examine at least two attesting witnesses of agreement to sell in order to prove the execution of the same---Scribe of a document could only be a competent witness if he had put his signatures as an attesting witness upon such document and not otherwise---Plaintiff was required to prove agreement to sell under Arts. 17 & 79 of Qanun-e-Shahadat, 1984 for getting a decree in his favour---Plaintiff had produced scribe of agreement to sell and identifier---Evidence of scribe was not sufficient to prove agreement to sell as he had neither attested the same as attesting witness nor he had given any note on such agreement that transaction was concluded and payment was made in his presence---Scribe could not be given the status of attesting witness in such circumstances---Decree could not be passed in favour of plaintiff as agreement to sell had not been proved by producing requisite number of attesting witnesses of said document---Impugned judgments and decrees passed by the courts below were set aside and suit was dismissed---Appeal was accepted in circumstances.

Hafiz Tasadduq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241 rel.

Mian Dilawar Mahmood for Appellants.
Ch. Muhammad Anwar Bhindar for Respondent.
Date of hearing: 7th April, 2014.

## JUDGMENT

**SHAHID WAHEED, J.---**Challenge in this second appeal is to the judgment and decree dated 12.11.2005, passed by the learned District Judge, Kasur who affirmed the judgment and decree dated 13.12.2000 passed by the learned Civil Judge, Ist Class, Kasur whereby the suit of respondent No. 1 for specific performance of agreement to sell was decreed.

2. Muhammad Rafique, respondent No. 1, filed a suit for specific performance of agreement to sell dated 29.9.1991 (Ex.P1) against the petitioners and respondents Nos. 2 to 7 pleading therein that Muhammad Hussain, predecessor-in-interest of respondents Nos. 2 to 7, agreed to sell the suit land to him for consideration of Rs. 277,000/- out of which a sum of Rs. 50,000/- was received by him and pursuant thereto a sum of Rs. 15,000/- was paid before the Sub-registrar, who registered the agreement to sell dated 29.9.1991. It was mentioned in the plaint that the present appellants in connivance with the Patwari maneuvered to enter/attest mutation of exchange No. 341 dated 30.9.1991 regarding the suit land in their favour; and, the refusal on the part of respondent No. 1 to execute the sale-deed gave rise to a cause of action for filing the suit. Muhammad Hussain contested the suit by filing a written statement whereby he denied that he had agreed to sell the suit property to respondent No. 1 or had received any earnest money; and, that the alleged agreement to sell dated 29.9.1991 was based on fraud. During pendency of the suit Muhammad Hussain died and thereupon his legal heirs, that is, respondents No. 2 to 7 were impleaded as defendants in the suit. The present appellants through their joint written statement contested the suit and stated therein that the alleged agreement to sell between respondent No.1 and the predecessor-in-interest of respondents Nos.2 to 7 i.e. Muhammad Hussain was forged, fictitious and based on fraud; that Muhammad Hussain agreed to exchange the suit property with them vide agreement to sell dated 11.9.1991 whereafter the mutation of exchange No. 341 dated 30.9.1991 was validly sanctioned in their favour. On divergent pleadings of the parties, following issues were framed:--

> (1) Whether the impugned agreement to sell is hit by MLR 115 and the suit is not maintainable? OPD
>
> (2) Whether the plaintiff is estopped by his conduct to file the suit? OPD No.1.
>
> (3) Whether the suit is false and frivolous and has been filed with mala fide intention and defendants are entitled to special costs under Section 35-A, C.P.C.? OPD
>
> (4) Whether the suit is not maintainable in its present form? OPD No.2.

(5) Whether the plaintiff has no cause of action and the suit has been filed with mala fide intention.

(6) Whether the defendants Nos.3 and 4 have spent Rs.50,000/- on the improvements and the defendants Nos.3 to 4 are entitled to get Rs.50,000/- in case the suit is decreed? OPD No. 3.

(7) Whether the plaintiff is entitled to the decree as prayed in the plaint? If so, on what terms? OPP (8) Relief.

Parties to the suit, in support of their respective claims, led evidence. After recording evidence, the learned Trial Court decreed the suit vide judgment and decree dated 13.12.2000. Feeling aggrieved, the present appellants assailed the above said judgment and decree through an appeal before the learned Addl. District Judge, Kasur who vide judgment dated 29.9.2003 remanded the case to the learned Trial Court for a fresh decision after framing additional issue regarding possession. The aforesaid judgment was assailed by respondent No.1, Muhammad Rafique, before this Court through FAO No. 241/2003. The above said FAO was accepted vide judgment dated 18.3.2004 and the learned District Judge, Kasur was directed to decide the appeal afresh. In compliance with judgment dated 18.3.2004 passed by this Court in FAO No. 241/2013 the learned District Judge, Kasur passed judgment and decree dated 12.11.2005 and dismissed the appeal.

3. The appellants through this second appeal under Section 100, C.P.C. have called in question the judgments and decrees of the learned courts below whereby the suit brought by respondent No.1 for specific performance of agreement to sell dated 29.9.1991 (Ex.P1) was decreed by raising a question of law, that is, as to whether on the basis of agreement to sell dated 29.9.1991 (Ex.P1) and the evidence available on record a decree could be issued in favour of plaintiff/respondent No.1.

4. Learned counsel for the appellants contends that as enunciated in Article 79 of the Qanun-e-Shahadat Order, 1984 if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses of deed have been called for the purpose of proving its execution, if there be the attesting witness alive, and subject to process of the Court and capable of giving evidence. This requirement of law has not been complied with in the instant case as only one witness i.e. Arshad Ali (PW-3), who is not a marginal witness of the document (Ex.P1) has been produced. He further submits that the respondent No.1/ plaintiff failed in his effort to prove the agreement to sell (Ex.P1) as per provisions of the Qanun-e-Shahadat Order, 1984 for the simple reason that the evidence is certainly short of the requirements of Articles 17 and Article 79 of the Qanun-e-Shahadat Order, 1984 as no attesting witness has been produced.

5. The afore-stated contentions have been controverted by the learned counsel for the respondents. He submits that the respondents by producing Ahmad Din (PW-1) who is scribe of agreement to sell dated 29.9.1991 and Arshad Ali (PW-2) proved the execution of the disputed agreement to sell dated 29.9.1991 (Ex.P1) and thus the learned courts below have validly passed the judgments and decrees.

6. I have considered the arguments canvassed by the learned counsel for the parties. The document Ex.P1 is an agreement to sell dated 29.9.1991 which was executed between respondent No.1, Muhammad Rafique and Muhammad Hussain, predecessor-in-interest of respondent Nos.2 to 7; and, for its specific performance suit was filed by the respondent No.1. Abdul Aziz is the sole attesting witness of this document whereas status of Arshad Ali, Lambardar, who appeared before the learned Trial Court as PW-2 was only identifier ( ). According to Article 17 of the Qanun-e-Shahadat Order, 1984, the agreement to sell requires compulsorily attestation by two witnesses. Article 79 of the Qanun-e-Shahadat Order, 1984 ordains that if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses are called for the purpose of proving its execution. The conjunctive reading of the aforesaid two Articles makes it clear that it is essential for the plaintiff to have examined at least two attesting witnesses of the agreement to sell in order to prove its execution; and, the scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has put his signatures as an attesting witness upon the document and not otherwise. The purpose, scope and requirements of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 have been the subject matter of different judgments of the Hon'ble Supreme Court of Pakistan and last in the series is the judgment passed in the case of Hafiz Tasadduq Hussain v. Muhammad Din through Legal Heirs and others (PLD 2011 SC 241). In the above cited precedent the Hon'ble Supreme Court of Pakistan has discussed the implication of non-compliance of the provisions of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984; and, has held that scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signatures as an attesting witness of the document. The relevant extract of the judgment reads as under:--

> "The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting

witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. See Sheikh Karimullah v. Gudar Koeri and others (AIR 1925 Allahabad 56). The purpose and object of the attestation of a document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, inter alia, in Article 17 of the Order, 1984. (See Ram Samujh Singh v. Mst. Mainath Kuer and others (AIR 1925 Oudh 737). The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise.

Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute for the attesting witnesses: the point on which leave was also granted. It may be held that if such witness is allowed to be considered as the attesting witness it shall be against the very concept, the purpose, object and the mandatory command of the law highlighted above. The question, however, has been examined in catena of judgments and the answer is in the negative.

It has been held in Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639):--

"Attesting witness was the one who had not only seen the document being executed by the executant but also signed same as a witness---Person who wrote or was 'scribe' of a document was as good a witness as any body else, if he had signed the document as a witness (Emphasis supplied) No legal inherent incompetency existed in the writer of a document to be an attesting witness to it".

In N. Kamalam and another v. Ayyasamy and another (2001) 7 Supreme Court cases 503), it has been held:

"Evidence of scribe could not displace statutory requirement as he did not have necessary intent to attest." In Badri Prasad and another v. Abdul Karim and others (1913 (19) IC 451, it is held:--

"The evidence of the scribe of a mortgage deed, who signed the deed in the usual way without any intention of attesting it as a witness, is not sufficient to prove the deed."

An attesting witness is a witness who has seen the deed executed and has signed it as a witness. (Emphasis supplied)."

To the same effect are the judgments reported as Qasim Ali v. Khadim Hussain through legal representatives and others (PLD 2005 Lahore 654) and Shamu Patter v. Abdul Kadir Rowthan and others (1912 (16) IC 250). Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfil and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute."

7. Being conscious of the principle laid down in the above cited precedent, learned counsel for the respondents has contended that the same would not be applicable to the instant case as it was not in field at the time of institution of suit by respondent No.1. I am afraid, this contention has no force for the simple reason that Article 17 and 79 of the Qanun-e-Shahadat Order, 1984 were the relevant provisions of law in force when agreement to sell (Ex.P1) was executed; the suit was filed by respondent No.1; and, the decrees were passed by the learned Trial Court and the first Appellate Court. In the case in hand, the respondent No. 1/plaintiff was required to prove agreement to sell (Ex.P1) through a process provided in Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 for getting a decree in his favour. The respondent No. 1 produced scribe of the agreement (Ex.P1) namely Ahmad Din (PW-1); and the identifier, Arshad Ali (PW-2). The evidence of Ahmad Din (PW-1) was not sufficient to prove agreement to sell (Ex.P1) for the simple reason that he had neither attested Ex.P1 as an attesting witness nor had given any note on Ex.P1 to the effect that transaction was concluded and payment was made in his presence. Thus, PW-1 (Ahmad Din) could not be given status of the attesting witness. In view of afore-stated provisions of law and evidence available on record, I am of the view that decree as prayed for by respondent No. 1 could not be issued for the simple reason that agreement to sell (Ex.P1) had not been proved by producing the requisite number of attesting witnesses of the said document.

8. This appeal is accepted and resultantly the judgment and decree dated 13.12.2000 passed by the learned Civil Judge Ist Class, Kasur and judgment and decree dated 12.11.2005 passed by learned District Judge, Kasur are hereby set aside and suit of respondent No. 1 is dismissed. Parties shall bear their own cost. ZC/J-9/L Appeal allowed.

**2016 P L C (C.S.) 301**
**[Punjab Subordinate Judiciary Service Tribunal]**
**Before Mehmood Maqbool Bajwa, Chairman, Amin-ud-Din Khan and Shahid Waheed, Members**
**ALTAF HUSSAIN ALTAF**
**Versus**
**LAHORE HIGH COURT, LAHORE through Registrar and 30 others**

S.A. No.10 of 2013, decided on 20th March, 2015.

**Punjab Subordinate Judiciary Service Tribunal Act (XII of 1991)---**

----S.5---Notification No.SOR-II(S&GAD) 2-59/78 dated 19-04-2007---Judicial officer---Adverse remarks recorded by the Authority while deciding a matter disposed of by the appellant (judicial officer)---Proforma promotion---Scope---Second representation---Scope---Matter directly and substantially in issue in the present appeal was the same which was directly and substantially in issue in the earlier appeal---Appellant had rightly been deferred for promotion due to fault of his own---Appellant could not claim proforma promotion in the circumstances of the case---Second representation was not competent under the law---Disposal of incompetent petition or representation by the competent authority did not create fresh cause of action---Appeal being not competent before the Tribunal, was dismissed, in circumstances.

Mian Bilal Bashir for Appellant.
Ashfaq Qayyum Cheema for Respondent No.1.
Date of hearing: 20th March, 2015.

**JUDGMENT**

**SHAHID WAHEED, MEMBER:-** Challenge in this appeal is to letter No.276/RHC/C-1 dated 10.6.2013 whereby representation of the appellant for grant of proforma promotion as District and Sessions Judge was declined.

2. The appellant, Altaf Hussain Altaf, retired District & Sessions Judge, through this appeal under section 5 of The Punjab Subordinate Judiciary Service Tribunal Act, 1991 has prayed that by setting aside letter No.276/RHC/C-1 dated 10.06.2013 this appeal be accepted and the respondent No.1 be directed to award him proforma

promotion to the post of District and Sessions Judge from the date when his immediate junior was promoted against the said post with all consequential back benefits.

3. This appeal has arisen in the background that in the year 1983 the appellant was appointed as Civil Judge. He was promoted to the rank of Senior Civil Judge in the year 1997; and, was further promoted to the post of Additional District and Sessions Judge in the year 1999. The appellant became eligible to be promoted to the post of District and Sessions Judge in the year 2007 but the Provincial Judicial Selection Board did not recommend him for promotion to the said post and resultantly vide Notification No.317/RHC/AD&SJJ dated 14.12.2007 the juniors to him, i.e., respondents Nos.2 to 7 were promoted. In the next meeting of the Provincial Judicial Selection Board the name of the appellant was again not recommended and his juniors, i.e., respondents No.8 to 31 were promoted to the post of District and Sessions Judge vide Notification No.110/RAC/AD&SJJ dated 04.05.2009. Feeling anguished, the appellant on 22.5.2009 filed a petition before the respondent No.1 with a request for promotion to the rank of District and Sessions Judge with effect from the date when his juniors were promoted. This request was declined vide letter No.887/RHC/C-1 dated 20.06.2009. The appellant assailed the said letter before this Tribunal through Service Appeal. No.04 of 2009. During pendency of the said appeal the appellant was promoted to the post of District and Sessions Judge with effect froth 16.09.2010. After assuming the charge of the post of District and Sessions Judge the appellant again on 27.10.2010 filed a petition before the respondent No.1 for grant of proforma promotion to the rank of District and Sessions Judge with effect from when his juniors were promoted. This request was declined vide letter No.276/RHC/C-1 dated 10.06.2013. Hence, this appeal.

4. Before proceedings further it is germane to state here that during pendency of this appeal the appellant stood retired on attaining the age of superannuation on 02.05.2014.

5. The question which falls for determination in this appeal is as to whether the appellant is entitled for proforma promotion to the post of District and Sessions

Judge when his immediate junior was promoted to the said post with all consequential back benefits. Learned counsel for the appellant has contended that the appellant had more than 25 years unblemished service at his credit; and, that while considering the case of the appellant, his previous record including the performance evaluation reports and the achievements appreciated by his superiors were ignored. Conversely, the learned counsel for respondent No.1 has opposed the afore stated arguments and submitted that the Competent Authority scrutinized the service record and reviewed the performance and reputation of the appellant before declining his request for proforma promotion; and, that the adverse remarks made against him by the Hon'ble Lahore High Court in Criminal Appeal No.283-J of 2004 titled "Abdul Ghafoor v The State" was the basis for rejecting the representation of the appellant for grant of proforma promotion. Apropos of above arguments we have examined the record and it evinces that the appellant while working as Additional District and Sessions Judge at Lahore passed a judgment dated 26.04.2004 in a criminal case, i.e., F.I.R. dated 11.7.2001 recorded on the complaint of one Shehzad Saleem at Police Station Nishtar Colony, Lahore. One of the accused of said case namely Abdul Ghaffar challenged the appellant's judgment dated 26.04.2004 through Criminal Appeal No.283-J of 2004(titled Abdul Ghaffar v. The State) before the Hon'ble Lahore High Court, Lahore. This appeal was accepted vide judgment dated 29.03.2007 with the following adverse remarks against the appellant:

> "Before parting from this judgment, I am constrained to observe about the judicial approach of Mian Altaf Hussain Mahar, the then Addl. Sessions Judge, Lahore in this case and the Registrar is directed to place the matter before the competent authority, which may consider to proceed against the said Judicial Officer on the administrative side and that whether he would remain in the judicial service to play with the lives and liberty of the innocent citizens."

It is an admitted fact that the appellant was deferred for promotion to the post of District and Sessions Judge: firstly, in the year 2007; and, secondly, in the year

2009 on the basis of afore cited adverse remarks recorded against him. It is also conceded before us that the said adverse remarks still exist on record as no, court of competent jurisdiction had expunged them. The effect of the said adverse remarks for grant of proforma promotion came up for consideration before this Tribunal in the appellant's earlier appeal, that is, S.A. No.04 of 2009 which was dismissed vide judgment dated 27.2.2015 wherein it was held as follows:

We have given anxious thought to the arguments advanced by the learned counsel for the parties. It is settled principle of law that promotion is neither a vested right nor it can be claimed with retrospective effect. Whenever there is a change of grade or post for the better there is an element of selection involved which is considered for promotion and it is not earned automatically but under an order of the Competent Authority to be passed after consideration of comparative suitability and the entitlement of those incumbents [See Muhammad Umar Malik and others v. Federal Service Tribunal and others (PLD 1987 SC 172), Government of the Punjab through Secretary Services, Punjab, Lahore and 4 others v. Muhammad Awais Shahid and 4 others (1991 SCMR 696) and Abid Hussain Sherazi v. Secretary M/o Industries and Production, Government of Pakistan, Islamabad (2005 SCMR 1742). The appellant has conceded before us that he was deferred for promotion to the post of District and Sessions Judge: firstly, in the year 2007; and, secondly, in the year 2009 on the basis of adverse remarks recorded in the judgment dated 29th March, 2007 passed by the Hon'ble Lahore High Court, Lahore. It means that the said remarks were the hurdle in the grant of promotion to the appellant. This is a case of proforma promotion of a retired judicial officer and according to proforma promotion policy circulated by the Government of the Punjab, Services and General Administration Department (Regulation Wing) vide Notification No.SOR-II (S&GAD)2-59/78 dated 19th April, 2007 proforma promotion of a retired officer means a case where a senior officer was deferred for promotion due to' no fault of his own and his junior was promoted and subsequently the senior was also promoted during his service, but could not get proforma promotion during the service and retired. Keeping into consideration the case of the appellant vis-a-vis the above stated proforma promotion policy, it cannot be said that he was refused proforma promotion for no fault of his own, but the hurdle in his way was permanent on account of adverse remarks recorded in the judgment dated 29th March, 2007 in Criminal Appeal No. 283-J of 2004 by the Hon'ble Lahore High Court, Lahore which are still on the record and to which the appellant did not take any exception by not representing his case to the court of competent jurisdiction or

any other Competent Authority. In these attending circumstances, the appellant was rightly deferred for promotion due to fault of his own and thus he could not claim proforma promotion.

The above cited extract of the judgment passed by this Tribunal unfolds that the matter directly and substantially in issue in the present appeal is the same matter which was directly and substantially in issue in the appellant's earlier appeal before this Tribunal, that is, S.A. No.04 of 2009. Thus, judgment dated 27-2-2015 passed by this Tribunal in the appellant's earlier Service Appeal. No.04 of 2009 is fully applicable to the instant case and in view thereof we are clear in our mind that the appellant was rightly deferred for promotion due to fault of his own and, thus, he, as per proforma promotion policy circulated by the Government of the Punjab, Services and General Administration Department (Regulation Wing) vide Notification No. SOR-II (S&GAD)2-59/78 dated 19.4.2007 could not claim proforma promotion. Resultantly, the impugned letter No.276/RHC/C-I dated 10.06.2013 warrants no interference by this Tribunal.

6. There is yet another aspect of the matter which is worth consideration. The Provincial Judicial Selection Board in its meeting held in the year 2007 did not recommend the name of the appellant for promotion to the post of District and Sessions Judge and vide Notification No.317/RHC/AD&SJJ dated 14.12.2007 the juniors to the appellant were promoted. The appellant remained contented with the said Notification and did not raise any claim for promotion. Subsequently, the Provincial Judicial Selection Board again did not recommend the name of the appellant for promotion and the juniors were promoted to the post of District and Sessions Judge vide Notification No.110/RHC/AD&SJJ dated 4.5.2009. This subsequent notification gave a fillip to the appellant to file a representation before respondent No.1 for promotion to the rank a District and Sessions Judge with effect from the date when his juniors were promoted. The appellant's representation could not evoke a favourable response and it was declined vide letter No.887/RHC/C-I dated 20.6.2009. The appellant assailed the said letter dated 20.6.2009 before this Tribunal through appeal (i.e. S.A. No.04 of 2009). During pendency of this appeal, the appellant was promoted to the post of District & Sessions Judge with effect from 16.9.2010. After getting promotion, the appellant on 27.10.2010 filed a second petition before respondent No.1 for rant of proforma promotion to the rank of

District and Sessions Judge with effect from when his juniors were promoted vide Notification No.317/RHC/AD&SJJ dated 14.12.2007. This second representation, under relevant law, was not competent. However, it was declined by the Competent Authority vide letter No.276/RHC/C-I dated 10.6.2013. The disposal of incompetent petition or representation by the Competent Authority did not create fresh cause of action and, therefore, the present appeal before this Tribunal would not be competent.

7. In view of above, this appeal fails and is accordingly dismissed.

ZC/4/PST Appeal dismissed.

**P L D 2016 Lahore 402**
**Before Shahid Waheed, J**
**Sheikh MUBASHAR IRFAN---Petitioner**
**Versus**
**PRESIDENT OF PAKISTAN and 3 others---Respondents**

Writ Petition No.37312 of 2005, decided on 14th December, 2015.

**Constitution of Pakistan---**

----Arts. 47, 63 & 199---Constitutional petition---Maintainability---Impeachment of the President---Petitioner was aggrieved of certain remarks made by the President of Pakistan in a speech and alleged that under Art. 16(g) of the Constitution, the President stood disqualified to hold office--- Validity---Procedure stated in Art.47 of the Constitution did not admit filing of petition under Art.199 of the Constitution for a direction or order to Speaker of National Assembly or Chairman Senate to initiate proceedings on the charge of violating Constitution or gross misconduct against the President at the instance of a lawyer or a citizen---Wisdom in such procedure was that the President as the symbol of unity of Republic was entitled to the highest respect and esteem---High Court under Art. 199 of the Constitution could not take upon itself the exercise to record even a tentative finding that the President had violated the Constitution or committed misconduct warranting initiation of proceedings for his removal or impeachment under Art.47 of the Constitution as it would be contrary to the language and spirit of said Article---Constitutional petition was dismissed in circumstances.

Haji Rana Muhammad Shabbir Ahad Khan v. Federation of Pakistan through Attorney General for Pakistan and another PLD 2001 SC 18; Dr. Azim ur Rehman Khan Meo v. Government of Sindh and another 2004 SCMR 1299 and Suo Motu case No.15 of 2009 (PLD 2012 SC 610) ref.
Shahid Orakzai v. President of Pakistan, Islamabad and another 1999 SCMR 1598 rel. Petitioner in person

**ORDER**

**SHAHID WAHEED, J.---**Prayer in this petition is to issue a direction or order for the removal of respondent No.1 from the Office of the President of the Islamic Republic of Pakistan.

2. The above noted prayer has been made on the basis of following opinion/observation/ remarks made by respondent No.1 in his speech which he delivered at PTEA Export Excellence Awards, 2015 ceremony.

3. The above extract of the speech has piqued the petitioner. It is the case of the petitioner that the said opinion/observation/remarks are against the injunctions of Islam and the Constitution and, therefore, the respondent No.1 stands disqualified under Article 63 (g) of the Constitution of the Islamic Republic of Pakistan, 1973 to hold office of the President

4. At the outset of hearing I confronted the petitioner, who is a practicing Advocate, with Article 47 of the Constitution of the Islamic Republic of Pakistan, 1973 and asked as to how the above noted prayer may be granted. In reply to this question he submits that the opinion/observation/remarks made by respondent No.1 in his speech are against tenets of Islam, provisions of law and the Constitution and, thus, on the basis of principle laid down in the case of Haji Rana Muhammad Shabbir Ahad Khan v Federation of Pakistan through Attorney General for Pakistan and another (PLD 2001 SC 18), Dr. Azim ur Rehman Khan Meo v Government of Sindh and another (2004 SCMR 1299) and Suo Motu case No. 15 of 2009 (PLD 2012 SC 610) every citizen and member of public has the duty to highlight and raise voice with respect to illegal and unconstitutional acts of the Head of the State; and, that this Court being custodian of the Constitution is bound to issue direction as prayed for in this petition.

5. Argument canvassed by the petitioner has not persuaded me to grant relief as prayed for in this petition. The President cannot be removed from his office except in accordance with the provisions of Article 47 of the Constitution of the Islamic Republic of Pakistan, 1973. The procedure as laid down in the said Article is that not less than one half of the total membership of either House, that is, the National Assembly or the Senate, may give to the Speaker of the National Assembly, or, as the case may be, to the Chairman, written notice, containing particulars of incapacity or of the charge, of their intention to move resolution for the removal of

the President. If the notice of removal is received by the Chairman of the Senate, he will transmit it forthwith to the Speaker of the National Assembly. Upon receipt of notice, the Speaker shall within three days cause a copy of the notice to be transmitted to the President. It is made incumbent upon the Speaker to summon joint meeting of the two Houses not earlier than seven days and not later than fourteen days from the receipt of notice by him. The joint sitting may investigate or cause to be investigated the ground or the charge upon which the notice is founded. The President has the right to appear and be represented during the investigation, if any, and before the joint sitting. If, after consideration of the result of the investigation, if any, resolution is passed at the joint sitting by the votes of not less than two-thirds of the total membership of Majlis-e-Shoora (Parliament) declaring that the President is unfit to hold the office due to his incapacity or is guilty of violating the Constitution or of gross misconduct, the President shall cease to hold office immediately on the passing of the resolution. The action of impeaching the President "for violating the Constitution or gross misconduct" is designed to operate as a brake on the natural disposition, inclination or desire of the person holding office of the President, to act in a high-handed and unconstitutional manner or to otherwise misconduct himself. The procedure for the commencement of impeachment proceedings has been designedly made difficult. The afore-stated procedure does not admit filing of a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 for a direction or order to the Speaker of the National Assembly or the Chairman, Senate to initiate proceedings on a charge of violating the Constitution or gross misconduct against the President at the instance of a lawyer or a citizen. The wisdom seems to be that the President as the symbol of the unity of the Republic is entitled to the highest respect and esteem. In this regard reference may be made to the case of Shahid Orakzai v. President of Pakistan, Islamabad and another (1999 SCMR 1598) ,wherein the Hon'ble Supreme Court held: (i) that the procedure prescribed in Article 47 of the Constitution cannot be enforced through Court proceedings; and, (ii) that just for the reason that the Court had struck down any action of the President partially or wholly on the ground that the same was not in accordance with the provisions of the Constitution, it cannot be held that the President is guilty of the charge of violating the Constitution. This Court, therefore, under Article 199 of the Constitution cannot take upon itself the

exercise to record even a tentative finding that the President has violated the Constitution or committed misconduct warranting initiation of proceedings for his removal or impeachment under Article 47 of the Constitution as it will be contrary to the language and spirit of the said Article.

6. In the sequel, this petition is dismissed in limine.

MH/M-46/L Petition dismissed.

**2016 C L D 1059**
**[Lahore]**
**Before Shahid Waheed and M. Sohail Iqbal Bhatti, JJ**
**IMTIAZ RASOOL and another---Appellants**
**Versus**
**DEUTSCHE BANK and 7 others---Respondents**

R.F.A. No. 243 of 2007, heard on 1st June, 2015.

**Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---**
----S. 10---General Clauses Act (X of 1897), S. 24-A---Recovery of finance---Leave to defend the suit, refusal of---Non-speaking order---Effect---Application for leave to appear and defend the suit filed by defendant was dismissed by Banking Court without giving any reasons---Validity--Non-giving of cogent reasons was a material irregularity which vitiated the judgment---Court to accord fair and proper hearing to person sought to be affected by its order and give sufficiently clear and explicit reasons in support of orders made by it---Banking Court dismissed application for leave to defend the suit without giving any reason, therefore, it was not a proper judgment and showed dereliction of duty and complete failure of exercise of jurisdiction---High Court set aside judgment passed by Banking Court and remanded the matter to decide application for leave to defend the suit afresh---Appeal was allowed in circumstances.

Qadir Bakhsh for Appellants.
Pervez Ahmad Barki for Respondents.
Date of hearing: 1st June, 2015.

**JUDGMENT**

**SHAHID WAHEED, J.---**Challenge in this appeal is to the judgment dated 7.12.2006 passed by the learned Judge, Banking Court-III, Lahore.

2. Briefly the facts of the case are that on 18.1.1995 the respondent No.1 (Deutsche Bank) filed a suit for recovery of Rs.35,878,794/- before the learned Banking Court-

III, Lahore. In the said suit the present appellants were arrayed as defendants Nos.8 and 9. The suit was decreed vide judgment and decree dated 10.6.2004. On an application, submitted by the present appellants, the said judgment and decree was set aside to their extent vide order dated 17.5.2006. Subsequently, the present appellants filed an application under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for leave to defend the suit. This application was contested by the respondent No.1. The learned Banking Court, after hearing both the parties, dismissed the said application vide impugned judgment dated 7.12.2006. Hence, this appeal.

3. It is contended on behalf of the appellants that the learned Banking Court has dismissed the appellants' application for leave to defend the suit without giving any cogent reason; that the appellants in their application for leave to defend the suit had disclosed substantial question of law and facts which could be resolved after recording evidence; that the impugned judgment is result of misreading and non-reading of record and also misapplication of provisions of law; and, that learned Judge, Banking Court -III, Lahore, had admitted the liability of the appellants only to the extent of 1.00 million rupee but on the other hand, dismissed the application summarily without any sound reason.

4. On the other hands, learned counsel for the respondent-bank has submitted that the appellants had mortgaged their properties vide mortgage deed dated 3.1.1990; and, that the impugned judgment is valid and does not warrant any interference by this Court.

5. We have heard the learned counsel for the parties and perused the record. In the present case learned Judge, Banking Court-III, Lahore vide judgment dated 7.12.2006 dismissed the appellant's application for leave to defend the suit in following words:

> "8. Heard. In view of the submission raised in the application for leave to defend the suit, no question requires recording of evidence the result of which is that is raised in para 7 can be resolved in arguments as such the application for leave to defend is dismissed."

5(sic.) Perusal of the above said paragraph of the impugned judgment shows that the learned Banking Court has dismissed the appellants' application for leave to defend the suit without giving any reason. Non-giving of cogent reason is a material irregularity which vitiates the judgment. It is settled principle of law that a Judge should accord fair and proper hearing to the person sought to be affected by his order and give sufficiently clear and explicit reasons in supports of orders made by him. After Constitution (Eighteenth Amendment) Act, 2010 this right has become fundamental right under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. The rule requiring reasons to be given in support of his order is, like the principle of audi alteram partem, a basic principle of natural justice and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. In the instant case the learned Banking Court passed the impugned judgment without recording any reason and, thus, same being violative of law and Constitution is not valid.

6. Before parting we deem it necessary to observe that when judicial power is exercised by any Authority normally performing executive or administrative functions the superior Courts insist upon disclosure of reasons in support of order on two grounds; one that the party aggrieved in proceedings before the Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other that obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power. This principle on all fours is also applicable to judicial officers who are trained to look at things objectively and, therefore, he is supposed to excel in this trait of character in view of sacred and sensitive nature of his duties and pivotal position which justice occupies in Islam. Injunctions of Islam also enjoins that those who performs the function of a Judge must not only profess profound knowledge and deep insight but also the man of integrity and capable of holding scale of justice even in all circumstances. The judicial officer is not only expected to guard his reputation jealously but also perform his sensitive duty with due diligence and his conduct should not exhibit dereliction of duty and complete failure of exercise of jurisdiction.

7. Since the learned Banking Court has dismissed the application for leave to defend the suit without giving any reason, the impugned judgment dated 7.12.2006 is not a proper judgment; and, shows dereliction of duty and complete failure of exercise of jurisdiction. In these attending circumstances, we are inclined to allow this appeal, set aside the judgment dated 7.12.2007 and to remit the matter to the learned Judge, Banking Court-III, Lahore, to decide the appellant's application for leave to defend the suit afresh strictly in accordance with law within a period of one month.

8. Parties are directed to appear before the learned Judge, Banking Court-III, Lahore, on 15.6.2015. The learned Judge, Banking Court-III, Lahore, shall submit a compliance report to the Deputy Registrar (Judicial) of this Court on 16.7.2015. No order as to costs.

MH/I-25/L Case remanded.

**2016 M L D 1243**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD IQBAL through L.Rs.---Appellant**
**Versus**
**MEHMOOD HASAN and others---Respondents**

R.S.A. No.20 of 2003, decided on 30th April, 2014.

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

----Ss.211 & 201---Transfer of Property Act (IV of 1882), S.41--- Power of attorney---Scope---Revocation of power of attorney---Modes---Sale of property by the attorney on behalf of principal---Termination of authority of an agent---Requirements---Power of attorney was a creation of an agency whereby the grantor would authorize the grantee to do the acts specified therein on behalf of grantor which when executed would be binding on the grantor as same had been done by him---Power of attorney could be revoked or terminated at any time---Each recital in the power of attorney would constitute a separate power---Power of attorney should be strictly construed and limited to the exact words contained therein---Attorney was inter alia authorized to sell, gift, exchange, mortgage and waqf the suit property in the present case and accept the earnest money of sale of said land---Principal had not conferred plenary powers on his attorney to deal with the suit property---No power of sale and execution of sale deed before the Sub-Registrar was given to the attorney---Agreement for sale of property and execution of conveyance after agreement of sale were different things---Attorney was required to use reasonable diligence in communicating with the principal/original owner of suit property and he should have sought his instructions about the sale---When general power of attorney had been revoked before the sale was made, the sale deed was illegal and without lawful authority---Attorney was aware that principal had cancelled his power of attorney---Power of attorney could be revoked orally---Termination of authority of an agent would be effective when same would become known to him or so far as regards third persons when same had become known to them---Revocation of authority through a registered deed was not necessary and only notice was required to be given to the agent and said notice might be oral---No evidence had been led by the plaintiff that attorney took reasonable steps in communicating with the principal and sold the suit property after getting his instructions---Plaintiff had not led any evidence that after execution of sale deed attorney colluded with the principal---Sub-Registrar with mala fide intention had registered the sale deed after registration of revocation deed---Power of attorney was of no assistance to the plaintiff in the present case---Impugned sale deed was illegal and without authority---Dismissal of earlier suit as withdrawn with permission to file fresh suit would be deemed as same was never brought---Failure to cross-examine statement of witnesses would amount to admission of facts---

Plaintiff/appellant had failed to point out any misreading or non-reading of evidence---Second appeal was dismissed in circumstances.

Muhammad Sadiq v. Muhammad Ramzan and 8 others 2002 SCMR 1821; Mst. Rasheeda Bibi and others v. Mukhtar Ahmad and others 2008 SCMR 1384 and Ahmad Khan and another v. Zaheer Ahmad Khan Tareen and 7 others PLD 1986 Lah. 184 ref.

Muhammad Sadiq v. Muhammad Ramzan and 8 others 2002 SCMR 1821 distinguished.

Basri through L.Rs. and others v. Abdul Hamid through L.Rs. and others 1996 MLD 1123; Raza Munir and another v. Mst. Sardar Bibi and 3 others 2005 SCMR 1315; Janki Parshad Singh and others v. Syed Yahia Hossain and others 13 IC 637; Chottey Lal v. The Collector of Moradabad AIR 1922 PC 279; Ziauddain Siddiqui v. Mrs. Rana Sultana and another 1990 CLC 645; Journalist Publication (Pvt.) Ltd. through Chief Executive v. Mst. Mumtaz Begum alias Mustari Begum through her duly constituted Attorney and others 2004 SCMR 1773; Fida Muhammad v. Pir Muhammad Khan (deceased) through Legal Heirs and others PLD 1985 SC 341 and Muhammad Yamin and others v. Settlement Commissioner and others 1976 SCMR 489 rel.
Ch. Muhammad Anwar Bhindar for Appellant.
Sherjeel Adnan and Haris Azmat for Respondent No.1.
Nemo for Respondents Nos. 2 and 3.

## JUDGMENT

**SHAHID WAHEED, J.---**This judgment will govern R.S.A. No. 20/2003 and C.R. No. 1026/2003 as common questions of law and facts are involved therein.

2. The respondent No.1, Mehmood Hassan, appointed Muhammad Mansha, respondent No.3, as his attorney through general power of attorney (Ex.D3) registered on 2.5.1990 vide document No. 187, Volume No. 1 with the Sub-Registrar, Gujranwala. Muhammad Mansha, respondent No.3, on the basis of above said attorney sold the suit land to the Passban Co-operative Finance Corporation Ltd. (respondent No.2) for a consideration of Rs. 750,000/- vide sale-deed No. 2741(Ex.P-1) which was executed on 11.6.1990 but was registered on 12.6.1990. The respondent No.1, Mehmood Hassan, on 12.6.1990 also got registered Revocation Deed/Abtal Nama (Ex.P3) in respect of general power of attorney (Ex.D3) vide document No. 262. It is pertinent to mention here that on the basis of sale deed dated 11.6.1990 (Ex.P1), Mutation No. 3701 was sanctioned by the A.C-II, Gujranwala vide order dated 13.6.1990 (Ex.D-10) in favour of the Passban Co-operative Finance Corporation Ltd. (respondent-No.2). Thereafter, on 25.8.1990, the respondent No. 2 sold the suit land in favour of the present appellant/ petitioner,

Muhammad Iqbal, for a consideration of Rs.1,000,000/- vide registered sale-deed No. 4114/(Ex.P-4). On the basis of sale-deed No. 4114 dated 25.8.1990 (Ex.P4), Mutation No. 3801(Ex.D-11) was sanctioned on 8.9.1990 in favour of the appellant/petitioner, Muhammad Iqbal.

3. On getting knowledge of sale of suit land in favour of the Passban Co-operative Finance Corporation Ltd.(respondent No.2), the original owner, that is, Mehmood Hassan (respondent No.1) on 5.12.1990 filed revision petition (Ex.D-6) under Section 164 of the Land Revenue Act, 1967 before the District Collector, Gujranwala and assailed the order of AC-II, Gujranwala dated 13.6.1990 whereby Mutation No. 3701 (Ex.D-10) was sanctioned. The District Collector, Gujranwala treated the above said revision as an appeal and accepted the same vide order dated 27.1.1991 (Ex. D-7) by setting aside the order of AC-II, Gujranwala dated 13.6.1990 (Ex.D10). The present appellant/petitioner, Muhammad Iqbal, filed review petition under Section 163 of the Land Revenue Act, 1967 against order dated 27.1.1991 (Ex.D-7) before the District Collector, Gujranwala. Simultaneously, on 30.1.1991, the present appellant/petitioner filed a suit for declaration and permanent injunction and thereby called in question the order dated 27-1-1991(Ex.D-7) passed by the District Collector, Gujranwala; and, in the alternative it was prayed that a decree for recovery of Rs. 1,200,000/- be passed.

4. The original owner of the suit land, Mehmood Hassan (respondent No.1), on 31.7.1991 also filed a suit for declaration and thereby challenged sale-deed dated 12.6.1990 (Ex.P-1) whereby his attorney, Muhamamd Mansha, sold the suit land in favour of respondent No.2, the Passban Co-operative Finance Corporation Ltd. and, sale-deed dated 25.8.1990 (Ex.P-4) whereby the Passban Cooperative Finance Corporation Ltd. sold the suit land in favour of the present appellant/ petitioner.

5. The learned Trial Court consolidated the above said two suits vide order dated 16.2.1993. On divergent pleadings, following issues were framed:--

> 1. Whether the general power of attorney executed by Mehmood Hassan in favour of Mohammad Mansha was cancelled prior in time than the sale deed executed by Muhammad Mansha on the basis of said general power of attorney in favour of Passban Co-operative Finance Corporation Limited? ?OPD-1.
>
> 2. If preceding issue is answered in affirmative whether Muhammad Iqbal is a bona fide purchaser without notice for value from Passban Co-operative Finance Corporation Ltd. and as such the order passed by Collector, Gujranwala cancelling the mutations based on the sale deed in favour of Passban Co-operative Finance Corporation Ltd. and Muhammad Iqbal are liable to be set aside being unlawful illegal and against facts? OPP
>
> 3. If preceding issue is answered against Muhammad Iqbal, whether Muhammad Iqbal is entitled to recover amount of Rs.12,00000? If so, from whom? OPP

4. Whether the suit is not maintainable in its present form? OPD- I
5. Whether the plaintiff has no cause of action? OPD.
6. Whether the suit is based on mala fide intention?OPD-1.
7. Whether the plaintiff has come to this court with unclean hands? OPD-1.
8. Whether the suit is false, frivolous and vexatious and as such the defendant No.1 is entitled to special costs under section 35-A of C.P.C.? OPD-1.
9. Whether this court lacks jurisdiction?
10. Whether the suit is collusive between plaintiff and defendant No.2? OPD-1.
11. Whether the suit filed by Mehmood Hassan is incorrectly valued for the purposes of court fee and jurisdiction, if so, what is the correct valuation? OP-Parties.
12. Whether the suit filed by Mehmood Hassan is not maintainable in its present form? OPP
13. Whether Mehmood Hassan is estopped by way of his words, and conduct to bring the suit OPD-4.
14. Whether Mehmood Hassan has filed the suit to blackmail and harass Mohammad Iqbal and as such Muhammad Iqbal is entitled to special costs? OPP.
15. Whether Mehmood Hassan has filed suit in collusion with Muhammad Mansha? OPD
16. Whether sale-deeds executed by Mohammad Mansha in favour of Passban Co-operative Finance Corporation Ltd. on 12.6.1990 and subsequent sale deed in favour of Muhammad Iqbal dated 25.8.1990 are based on fraud, forgery collusion and as such Mehmood Hassan is not bound by the same? OPD-1.
17. If preceding issue is answered in affirmative, whether Mehmood Hassan is entitled to the decree for possession of the suit property? If so, on what terms? OPD-1.
18. Relief.

6. After recording evidence in respect of above cited issues, the learned Trial Court vide consolidated judgment and decree dated 25.9.1998 dismissed the suit of the present appellant/petitioner to the extent of declaration with costs; and his suit regarding the recovery of amount was also dismissed against respondents except respondent No.3, Muhammad Mansha, and it was partially decreed to the extent of Rs.1,000,000/- against said Muhammad Mansha with cost whereas the suit filed by the original owner of suit property i.e. Mehmood Hassan, was decreed with costs and the sale-deed dated 12.6.1990 (Ex.Pl) and sale-deed dated 25.8.1990 (Ex.P-4) were declared null and void.

7. Feeling aggrieved, Muhammad Iqbal, through RFA No. 419/98 assailed the judgment and decree passed in his suit before this Court. Through a separate appeal

he also assailed the judgment and decree of the learned Trial Court in respect of the suit filed by Mehmood Hassan before the learned Addl. District Judge, Gujranwala. During the proceedings of RFA No. 419/98 this Court withdrew the appeal pending before the learned Addl. District Judge, Gujranwala and after registering it as RFA No. 93/2001 clubbed the same with RFA No.419-1998.Subsequently as per change in law vide Notification No. Legis-13-3/89 dated 26.9-2002 both the above stated RFAs were transmitted to the learned District Court, Gujranwala and the same were entrusted to the learned Addl. District Judge, Gujranwala who vide consolidated judgment and decree dated 14.5.2003 dismissed both the appeals.

8. The petitioner /appellant has assailed the judgments and decrees of the learned courts below in respect of suit filed by Mehmood Hassan/respondent No.1 through C.R. No. 1026/2003 whereas the judgments and decrees passed by the learned courts below in respect of suit filed by him has been assailed through RSA No.20/2003.

9. Before proceeding further it is germane to state here that despite service of notice the respondent No.2 and legal heirs of respondent No.3 did not turn up to oppose this petition/appeal and resultantly vide order dated 4.6.2012 they were proceeded against ex parte. They were also proceeded ex-parte before the learned courts below.

10. The case of the petitioner/appellant is that the respondent No.3 Muhammad Mansha, on the basis of general power of attorney (Ex.D-3), validly sold the suit land in favour of the Passban Cooperative Finance Corporation Ltd. (respondent No.2) vide sale-deed No. 2741(Ex.P1) and, thus, he being a subsequent bona fide purchaser vide sale deed No.4114 dated 25.8.1990 (Ex.P4) is a lawful owner of the suit land. Conversely, the respondent No.1 Mehmood Hassan, has pleaded that he had revoked the attorneyship of Muhammad Mansha, respondent No. 3, prior to execution of sale deed (Ex.P.1) and, therefore, the same; and, the subsequent sale deed dated 25.8.1990 (Ex.P4) were void. The question before this Court, therefore, narrows down to this as to whether, in the present case, the attorney, Muhammad Mansha (respondent No.3) could validly execute sale deed (Ex.P1) in favour of the Passban Co-operative Finance Corporation Ltd. (respondent No.2); and, that as to whether the petitioner/appellant could be declared a bona fide purchaser for value of the suit land.

11. The first question is covered by issue Nos.1 and 16, reproduced in para 5 above. This is a myriad question and thus its each facet requires deeper consideration. In respect of this question, the learned counsel for the petitioner/ appellant has firstly contended that the sale-deed (Ex.P1) in favour of the Passban Co-operative Finance Corporation Ltd. was executed prior to execution of Revocation-Deed/Abtalnama (Ex.P3) and this fact is evident from the dates of execution of sale-deed (Ex.P1) and Revocation Deed/Abtalnama (Ex.P3). He argues that sale-deed was written on

11.6.1990 whereas Revocation-deed was written on 12.6.1990 and, thus, as per principle laid down in the case of "Muhammad Sadiq v. Muhammad Ramzan and 8 others" (2002 SCMR 1821) the sale-deed (Ex.P1) shall be treated to have been executed prior to execution of Revocation-Deed (Ex.P3). This assertion has been controverted by the learned counsel for the respondent No.1 who submits that the evidence available on record does not support the same. The above said contentions may be addressed by examining the statement of Sikandar Hayat (DW-1) who is a marginal witness of sale-deed (Ex.P1); and, the statement of Ashiq Ali (DW-5) who is the scribe of sale-deed (Ex.P 1). Sikandar Hayat (DW-1) has stated that sale-deed (Ex.P1) was scribed at 11/12 noon on 12.6.1990; that on 12.6.1990 at 2.00 p.m. for the purpose of registration of sale deed, he along with Ch. Aman Ullah, Advocate appeared before Sub-Registrar, Mian Muhammad Fazil, who informed them that revocation deed had already been registered at 8.00 a.m; and, that the date 11.6.1990 was not mentioned when he signed the sale-deed. The other witness, Ashiq Ali (DW-5), who is scribe of sale deed (Ex.P1), has stated that certificate qua the exemption of stamp duty was handed over to him on 12.6.1990; that the above certificate was pasted on the reverse of sale deed (Ex.P1); that on 12.6.1990 at 2.00 p.m. after getting above certificate, he scribed the sale deed (Ex.P1); that the date 11.6.1990 is not in his hand-writing; and, that he wrote the date as 12.6.1990 but it was subsequently changed as 11.6.1990. The afore-stated evidence conclusively show that the sale-deed (EX.P1) and the Revocation-Deed (Ex.P3) were both executed on the same date i.e. 12.6.1990. Thus the date and the principle laid down in the case of Muhammad Sadiq (supra) are not helpful to resolve this question or issue No.1.

12. Inconsequentiality of the factor of date qua execution of sale deed (Ex.P.1) and Revocation-Deed (Ex.P3) to decide the question involved in this case or issue No.1 persuades me to examine the other feature of the said two documents. The learned counsel for the petitioner/ appellant submits that this riddle may be resolved by taking into consideration the time at which the documents were registered by the Sub-Registrar. In this context he urges that the sale-deed (Ex.P1) was registered on 12.6.1990 at 9/10 a.m. whereas Revocation-Deed(Ex.P3) was registered on 12.6.1990 at 1.00/2.00 p.m.; that as per principle laid down in the case of "Mst. Rasheeda Bibi and others v. Mukhtar Ahmad and others" (2008 SCMR 1384) the certificate of registration or endorsement on the registered document carries a presumption of truth and, thus, the time mentioned on the documents by the Sub-Registrar shows that sale deed (Ex.P1) was registered prior to revocation of power of attorney; and, that according to dictum laid down in the case of "Ahmad Khan and another v Zaheer Ahmad Kahn Tareen and 7 others" (PLD 1986 Lah. 184) the document registered prior in time has priority. I am not inclined to accept this contention for the reason that the documentary evidence available on record does not support it. Mehmood Hassan, the original owner of the suit property, being aggrieved by the Mutation No. 3701 dated 13.6.1990 (Ex.D10) which was attested by the AC-II Gujranwala on the basis of sale-deed (Ex.P1) filed an appeal before

the District Collector, Gujranwala. The District Collector called for a report from the Sub-Registrar, Gujranwala in respect of the time of execution of sale-deed (Ex.P 1) and Revocation-Deed (Ex:P.3). Pursuant to above said order an inquiry was got conducted through the Naib Tehsildar, Gujranwala who on 24.11.1990 reported as follows:--

> "a) the original copy of the cancellation deed, though registered on 12.6.1990, does not carry any entry regarding the 'time' and 'day' of registration;
>
> b) the original copy of the cancellation deed, which was returned back to the executioner/petitioner, bears serial No. 162, whereas the copy pasted on the official register carries the No.262. This discrepancy is indicative of mala fide intent on the part of the respondents and the revenue staff;
>
> c) the executioner of the cancellation deed (petitioner) was made to write in his own hands on the cancellation deed that it was presented around 1.00 p.m. before the Sub-Registrar, whereas this practice had not been followed for any other document registered in that office."

This report has been incorporated by the District Collector in his order dated 27.01.1991 (Ex.D7) whereby appeal of Mahmood Hassan, respondent No.1, was accepted and the order of AC-II, Gujranwala dated 1.16.1990 with respect to attestation of Mutation No.3701 was set aside. The present petitioner/appellant assailed the above said order dated 27.1.1991(Ex.D7) through a review petition under Section 163 of the Land Revenue Act, 1967 before the District Collector. The review was dismissed by the District Collector vide order dated 8.7.1992 (Ex.D-8). The petitioner/appellant through a revision petition under Section 164 of the Punjab Land Revenue Act, 1967 assailed the afore-stated order dated 8.7.1992 (Ex.D.8) of the District Collector before the Commissioner, Gujranwala Division, Gujranwala. The Commissioner after affording opportunity of hearing to the present petitioner/appellant and respondent No.1, Mehmood Hassan, dismissed the revision vide order dated 26.4.1993 (Ex.D-9). The petitioner/appellant never assailed the order dated 8.7.1992 (Ex.D-8) and order dated 26.4.1993 (E.D-9) before any higher forum or court and thus the findings qua the time mentioned on the sale-deed (Ex.P1) and the Revocation-Deed (Ex.P3) attained finality. Besides above, thereport of Inquiry Officer (Ex.D-2) and the statement of Sikandar Hayat (DW-1); and, Ashiq Ali (DW5), reproduced in preceding paragraph,---who had no malice and enmity against the petitioner/appellant---are sufficient piece of evidence to disbelieve the statement of Sub-Registrar (PW-2). Learned counsel for the petitioner/appellant, in this regard, has also failed to point out any mis-reading and non-reading of evidence by the learned courts below. Thus, in the presence of above stated orders/documentary evidence and statement of witnesses it becomes clear that the Sub-Registrar with mala fide intent mentioned the time on sale deed (Ex.P1) and Revocation-deed (Ex.P.3); and, that the sale deed (Ex.P1) was registered, after the registration of Revocation-Deed (Ex.P3).

13. Although it has become clear that the sale deed No. 2741 (Ex.P1) was registered after the registration of Revocation deed (Ex.P3) yet the validity of said sale-deed may be addressed from another angle, that is, by appraising the attorneyship of Muhammad Mansha, respondent No.3. This may be done either by examining the pleadings of the parties or by perusing the recitals of the power of attorney (Ex.D-3). Now, first I examine the pleadings of the parties. The respondent No. 1 in paragraph 3 of his plaint has specifically stated that before the execution of Revocation-Deed (Ex.P3) he orally informed Muhammad Mansha (respondent No.3) about the revocation or cancellation of general power of attorney (Ex.D3). This fact could only be admitted or denied by Muhammad Mansha. In this regard it would be appropriate to reproduce below paragraph 3 of the plaint, which reads as under:--

The reply of Muhammad Mansha (respondent No.3) of the said paragraph is as below:--

Perusal of afore-cited paragraphs shows that Muhammad Mansha was aware that respondent No. 1 had cancelled his power of attorney. The petitioner/appellant had not led any evidence to the effect that after execution of sale deed (Ex.P1), the attorney, Muhammad Mansha, colluded with the original owner, that is, Mehmood Hassan (respondent No.1). Thus, this admitted fact was not required to be proved and could be basis of decision. Now, an ancillary question arises as to whether the power of attorney could be revoked orally. Answer to this question is in affirmative. The termination of the authority of an agent, so far as regards the agent, takes effect when it becomes known to him, or, so far as regards third persons, when it becomes known to them. There is no provision which requires revocation of authority only through a registered deed. As per provisions of the Contract Act and the principle laid down in the case of "Basri through L.Rs. and others v. Abdul Hamid through L.Rs. and others" (1996 MLD 1123) and Raza Munir and another v. Mst. Sardar Bibi and 3 others (2005 SCMR 1315) only notice of revocation is required to be given to the agent and this notice may be oral. In this perspective it becomes clear that general power of attorney (Ex.D3) of Muhammad Mansha (respondent No.3) stood revoked before the sale made in favour of the Passban Co-operative Finance Corporation Ltd. (respondent No.2) and, thus, the sale deed (Ex.P 1) was illegal and without lawful authority.

14. At this juncture, it would be apposite to examine the implication of the earlier suit (Ex:P11) filed by Mehmood Hassan, respondent No.1, against his attorney, Muhammad Mansha, respondent No.3 for recovery of Rs.750,000/-. Learned counsel for the petitioner/ appellant contends that in the said suit Mehmood Hassan had not challenged the sale-deed executed in favour of the Passban Co-operative Finance Corporation Ltd. (respondent No.2) and thus by virtue of Order II, Rule 2, C.P.C. he could not claim relief of land in the subsequent suit. The above contention sans merit for the reasons firstly, the earlier suit (Ex.P11) was dismissed as

withdrawn with permission to file fresh suit vide order dated 22.9.1990 (Ex.P16) and thus it would be regarded as never brought; and, secondly, the admissions made by Mehmood Hassan in the earlier suit (Ex.P11) could not be used as legal evidence because he was neither confronted with the specific portion of his previous admission/inconsistent statement during his cross-examination nor the modus operendi prescribed in Article 140 of the Qanun-e-Shahadat Order, 1984 was adhered to by the petitioner/appellant.

15. Notwithstanding above, there is another aspect of the matter which is worth consideration. Muhammad Mansha (respondent No.3) on the basis of general power of attorney (Ex.D-3) sold the suit land in favour of the Passban Cooperative Finance Corporation Ltd. (respondent No.2) vide sale-deed (Ex.P1). The said sale-deed would be valid if it is proved that the agent, Muhammad Mansha, had the authority to execute and register the same. In this context an appraisal of the general power of attorney (Ex.D3) is essential. The contents of the power of attorney (Ex.D3) reads as under:--

The power of attorney is a creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of the grantor which when executed will be binding on the grantor as if done by him. it is revocable or terminable at any time. Each recital in the power of attorney constitutes a separate power and thus the power of attorney must be strictly construed and limited to the exact words contained therein. In the above said general power of attorney (Ex.D3) Muhammad Mansha was, inter alia, authorized to sell, gift, exchange, mortgage and waqf the suit land. He was further authorized to accept earnest money in respect of sale of the suit land. There was no clause of a comprehensive character which would show that the principal, Mehmood Hassan, intended to confer plenary powers on his attorney, Muhammad Mansha, to deal with the suit land. Through the above said general power of attorney (Ex.D3) the incidental power of sale, that is, to execute deed of sale and to admit execution thereof before the Registering Officer were not given to the attorney. This power of attorney authorized the attorney, Muhammad Mansha, to sell the property owned by, the principal, Mehmood Hassan. Clearly agreement for the sale of property and the execution of conveyance after the agreement of sale are entirely different things. Consequently the power of attorney (Ex.D3) is of no assistance to the present petitioner/ appellant. In this regard guidance may be had from the case of "Janki Parshad Singh and others v. Syed Yahia Hossain and others" (13 IC 637), "Chottey Lal v. The Collector of Moradabad" (AIR 1922 PC 279), "Ziauddain Siddiqui v. Mrs. Rana Sultana and another" (1990 CLC 645), "Journalist Publication (Pvt.) Ltd through Chief Executive v. Mst. Mumtaz Begum alias Mustari Begum through her duly constituted Attorney and others" (2004 SCMR 1773). Thus, the sale-deed (Ex.P1) executed in favour of the Passban Co-operative Finance Corporation Ltd. (respondent No.2) was illegal and without authority.

16. The general clause conferring incidental power i.e. "to do, perform and carry out all such acts, and deeds whatever as may be considered requisite for the above purpose as amply and effectually as the principal could do in his own proper person if these presents had not been executed", which is usually stated, was not available in the general power of attorney (Ex.D3), therefore, it would mean that the same was susceptible to doubt about its interpretation. In these circumstances, Muhammad Mansha (respondent No.3) as per principle laid down by the Hon'ble Supreme Court of Pakistan in the case of "Fida Muhammad v. Pir Muhammad Khan (deceased) through legal heirs and others" (PLD 1985 SC 341) was required to use reasonable diligence in communicating with the principal/original owner of the suit property, that is, Mehmood Hassan (respondent No.1) and should have sought his instructions about the sale. In the case in hand, no evidence has been led by the petitioner/appellant: that the said attorney, Muhammad Mansha, took reasonable steps in communicating with Mehmood Hassan; and, that he sold the suit land in favour of the Passban Co-operative Finance Corporation Ltd., (respondent No.2) after getting his instructions. In these circumstances, the sale made in favour of the Passban Co-operative Finance Corporation Ltd. (respondent No.2) cannot be held valid.

17. Now, a last question which requires determination is as to whether in the given facts and circumstances of the case the petitioner/ appellant could be declared a bona fide purchaser for value of the suit land. Answer to this question is in negative for the simple reason that Ashiq Ali (DW-5), who is scribe of sale-deed dated. 12.6.1990 (Ex.P1) and respondent No. 1/Mehmood Hassan as DW-7 have categorically stated in their examination-in-chief that the present appellant/petitioner was present along with Muhammad Mansha on 12.6.1990 at the time of registration of sale-deed (Ex.P 1) in favour of the Passban Cooperative Finance Corporation Ltd.(respondent No.2) and this fact has not been controverted or challenged through cross examination. Failure to cross-examine the above mentioned statement of witnesses amounts to admission of the above said fact. The transaction in favour of respondent No.2 (the Passban Co-operative Finance Corporation Ltd.) was a sham transaction. Thus, when the Passban Cooperative Finance Corporation Ltd. (respondent No.2) did not have right, title or interest in the suit land, the present appellant/petitioner cannot claim protection of Section 41 of the Transfer of Property Act as per principle laid down by the Hon'ble Supreme Court of Pakistan in the case of "Muhammad Yamin and others v. Settlement Commissioner and others" (1976 SCMR 489).

18. In view of above, this second appeal and the revision (C.R.No.1026-2003) are dismissed with costs throughout.

ZC/M-280/L Appeal dismissed.

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**P L D 2016 Lahore 602**
**Before Shahid Waheed, J**
**Mst. RASHIDAN BIBI through Legal Heirs and others---Petitioners**
**Versus**
**AMAN ULLAH KHAN BANGSH through Legal Heirs and another---Respondents**

Writ Petition No.26684 of 2015, heard on 14th October, 2015.

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

----S. 33 & O.XX. R.6---Partition Act (IV of 1893), S.4---Court Fees Act (VII of 1870), S.11---Suit for partition---Non-preparation of decree due to non-submission of stamp papers---Effect---Decree was not drawn for non-submission of stamp papers by the court below---Validity---Decree should follow the judgment when same was passed---Drawing up of decree could not be withheld by the court---Certified copy of decree had to be supplied to the parties to enable them to file appeal---Decree would not be executable until court-fee was paid---Court could not stop preparation of final decree of the suit for partition pending payment of stamp duty or other taxes---Impugned orders passed by the courts below were set aside which were passed without lawful authority having no legal effect---Application for drawing up of decree-sheet was allowed---Constitutional petition was accepted in circumstances.

Kedar Nath Goenka v. Chandra Mauleshwar Prasad Sindh AIR 1932 Patna 228; Siri Ram and others v. Jagan Nath and others AIR 1957 Punjab 66; Faqir Muhammad Khan v. Senior Member, Board of Revenue and 5 others 1990 MLD 575; Khawaja Muhammad Arif v. Mrs. Tahira Asif and others PLD 2005 SC 972; Velagala Sriramareddi and others v. Karri Sriramareddi AIR 1941 Mad. 929 and Mirshebmiya Bahadarmiya Sheikh v. State of Gujrat AIR 1981 NOC 215 rel.

Nauman Qureshi for Petitioners.
Muhammad Zia ud Din Ansari for Respondents.
Date of hearing: 14th October, 2015.

**JUDGMENT**

**SHAHID WAHEED, J.--**The question in this petition is whether a court can stop preparation of a final decree, in a suit for partition, pending payment of stamp paper and taxes, etc. This question arises from the judgment dated 23.07.2014 passed by the learned Civil Judge, Ist Class, Lahore in a suit instituted by the predecessor of respondents Nos.1 (i) to 1 (iii), that is, Aman Ullah Khan Bangsh for possession of the suit property through partition. The said suit was decreed by the learned Trial Court vide final judgment dated 23.07.2014 in following terms:

> "It is also relevant to mention here the said local commission was appointed with the consent of the parties. The original report of local commission which is now marked as Ex.P-A is available on file, the report is comprehensive. It also reveals that the parties with mutual consent has already partitioned the suit property by raising a wall, however some share/part of property not in possession of the judgment debtor, on which decree holder still in possession. The report of local commission Ex.P-A along with site plan regarding shares and ownership of the parties is made part and parcel of the final decree of the court. Parties are required to submit requisite stamp paper. Decree sheet be issued subject to payment of stamp paper and taxes under the relevant provision of law. Final decree sheet be prepared accordingly. File be consigned to the record room after its due completion."

Pursuant to said judgment the decree was not drawn by the learned Trial Court for non-submission of requisite stamp papers. The petitioners wanted to assail judgment dated 12.10.2013 but they could not do so due to non-preparation of decree sheet. This led the petitioners filing an application under sections 2(2), 33, 151 and Order XX, Rules 1 to 6, C.P.C. before the Trial Court for drawing up the decree sheet. This application was dismissed vide order dated 28.02.2015 by the learned Civil Judge, 1st Class, Lahore in following terms:

> "As the judgment and decree dated 23.07.2014 was passed in pursuance of mutual consent of the parties, moreover, the parties also did not raise objection qua the report of local commission. Since the judgment and decree dated 23.07.2014 is outcome of the mutual consent of the parties and applicant interestingly has not pointed out that same was not outcome of mutual consent meaning thereby mutual consent holds-field. Moreover the applicant has also failed to justify why he is absolved from the payment of stamp duty etc. to the extent of share given to him. With these observations, instant application is accordingly disposed of, however, applicant is directed to provide requisite stamp duty commensurable to his respective share as directed vide order dated 23.07.2014. This order be attached with main case-file.

2. The petitioners, feeling aggrieved, filed a petition under section 115, C.P.C. before the learned Additional District Judge, Lahore, and sought revision of the order dated 28.02.2015. The learned Additional District Judge dismissed the revision petition vide judgment dated 03.08.2015. Penultimate paragraph of the said judgment reads as under:

> "Admittedly the petitioner has not so far submitted the requisite stamp duty as directed by the learned trial court. The suit filed by the respondent No.1 was a suit for partition of immovable property. It is well settled law that in a

> suit for partition of immovable property the final decree is to be stamped as an instrument of partition under section 2(15) and Article 45 of the Stamp Act. The foregoing circumstances would suggest that the learned trial court has proceeded with matter in accordance with law and the impugned order suffers no infirmity."

3. It is contended on behalf of the petitioners that afore-cited orders of the Courts below are perverse and illegal for the reasons: (a) that whenever a decree is passed by the Civil Court, it is bound to draw a decree sheet as appeal lies against the decree and not against the judgment; (b) that it was imperative for the learned Trial Court to draw up decree sheet and the same could not be postponed due to non-provision of stamp-paper and non-payment of taxes etc; and, (c) that the petitioners cannot be deprived of their right of appeal on account of omission or negligence on the part of the trial court. The above noted arguments have been controverted by the learned counsel for the respondents. He submits that in a suit for partition of immovable property final decree is to be stamped as an instrument of the partition under section 2 (15) read with Article 45 of Schedule I of the Stamp Act, 1899; that the petitioners as per final judgment dated 12.10.2013 is bound to submit requisite stamp paper; and, that without payment of requisite stamp paper final decree sheet cannot be prepared.

4. The arguments canvassed by the petitioners' counsel are persuasive. Section 33 of C.P.C. enjoins upon the Court to pronounce judgment after the case has been heard and requires that on such judgment a decree shall follow. It is the decree of the Court, which is appealable under section 96, C.P.C. Decree has been defined in subsection (2) of section 2, C.P.C. as under:

> "(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively, determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint the determination of any question within section 144 and an order under rules 60, 98, 99, 101 or 103 of Order XXI but shall not include--
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default" .
>
> Explanation-- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

5. Order XX C.P.C. deals with judgments and decrees. Rule 6 of Order XX says that the decree shall agree with the judgment; it shall contain the number of the suit, the names and description of the parties and particulars of the claim and shall

specify clearly the relief granted or other determination of the suit. Rule 20 of Order XX, C.P.C. cast duty upon the Court to furnish to the parties on application and at their expense certified copies of the judgment and decree.

6. Rule 6 of Order XX, C.P.C. deals with contents of the decree. A combined reading of section 33 with Rule 6 of Order XX, C.P.C. makes it clear that on judgment being passed decree automatically follows. Obligation is on the part of the Court to draw up decree in terms of various provisions of Order XX, C.P.C. Drawing up of decree cannot be withheld. Its certified copy has to be supplied to the parties at their expense so as to enable them to file appeal. It may be that due to section 11 of the Court Fee Act, 1870 the decree is not executable until court-fee is paid or under the Stamp Act, 1899 the document is not effective for the purposes of taking proceedings, but in either case there is no reason as to why decree sheet should not be prepared. The Court cannot evade the performance of its duty of drawing up the decree, which may be preliminary or it may be final, and is not concerned whether such a decree will be executable or not. [See Kedar Nath Goenka v. Chandra Mauleshwar Prasad Singh (AIR 1932 Patna 228), Siri Ram and others v. Jagan Nath and others (AIR 1957 Punjab 66), Faqir Muhammad Khan v. Senior Member, Board of Revenue and 5 others (1990 MLD 575) and Khawja Muhammad Arif v. Mrs. Tahira Asif and others (PLD 2005 SC 972)].

7. In view of various provisions of the Code of Civil Procedure, as noticed above, there is no manner of doubt that once a judgment is delivered and signed, there is no option left with the Court except to draw decree in terms of the judgment. Drawing up of a decree cannot be postponed. Thus answer to the question, under discussion, is that the learned Trial Court could not stop preparation of final decree of the suit for partition pending payment of stamp paper and other taxes, etc. In this regard guidance may be had from the cases of Velagala Sriramareddi and others v. Karri Sriramareddi (AIR 1941 Mad 929) and Mirshebmiya Bahadarmiya Sheikh v. State of Gujrat (AIR 191 NOC 215).

8. In the sequel, this petition is accepted, judgment dated 03.8.2015 of the learned Additional District Judge, Lahore, and the order dated 28-2-2015 of the learned Civil Judge, Lahore, are hereby set aside and declared to have been passed without lawful authority and of no legal effect and resultantly the petitioners' application under sections 2(2), 33,151 read with Order XX, Rules 1 to 6, C.P.C. for drawing up of decree-sheet is allowed as prayed for.

ZC/R-46/L Petition allowed.

**2016 Y L R 2444**
**[Lahore]**
**Before Shahid Waheed, J**
**SHAH TARIQ and others---Petitioners**
**Versus**
**TARIQ USMAN and others---Respondents**

W. P. No. 13135 of 2014, heard on 7th April, 2016.

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

----O. XIV, R. 5 & S. 11---Framing of additional issues--- Interim order--- Res judicata, principle of---Applicability---Application for framing of additional issues was moved which was accepted partially and an additional issue was framed---Another application was filed for framing of additional issues which was dismissed concurrently---Validity---Interim order could be altered or varied by subsequent applications for the same relief but only on proof of new facts or new situations which subsequently emerged---Principle of res judicata did not apply to the findings on which such orders were based---If applications were made for relief on the same basis after one had been disposed of then court would be justified in rejecting the same as an abuse of process of law--- Applicants knowing the controversy and issues had led their complete evidence---Second application by pleading the same facts and grounds which were urged in the first was moved---Issues proposed in the second application were also proposed in the first application---Question of facts and law raised in the first application were directly and subsequently involved in the second application---No new ground or fact was urged in the second application---Principle of res judicata was applicable to the second application for framing of additional issues---Second application was neither competent nor could be allowed---Constitutional petition was dismissed in circumstances.
Maharajadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh and others AIR 1924 Privy Council 202; Satyadhan Ghosal v. Sm. Deorajin Debi AIR 1960 SC 941; Arjun Singh v. Mohindra Kumar and others AIR 1964 SC 993; Khialdas and another v. Mahraj Gopi Krishin and others PLD 1969 Kar. 646; Mst. Shahzad Bibi and another v. Gulzar Khan PLD 1973 Lah. 878; Muhammad Ajmal Khan v. Lt. Col. Muhammad Shafaat and 4 others PLD 1976 Lah. 396 and ICIC v. Mian Rafiq Saigol and others PLD 1996 Lah. 528 rel. Maqbool Hussain Sheikh for Petitioners.
Atif Mohtasham Khan for Respondents Nos. 1 to 5. Awais Tauseef and Kh. Tahir Ahmad for Respondents Nos.6(i) to 6(iii). Date of hearing: 7th April, 2016.

**JUDGMENT**

**SHAHID WAHEED, J.---**This constitutional petition calls into question the orders of the learned Courts below whereby petitioners' second application under Order XIV, Rule 5, C.P.C. for framing of additional issue was dismissed.

2. This petition arises from three consolidated suits which related to the land measuring 986-Kanals 16-Marlas situated in village Fateh Jang Singhwala, Tehsil and District Lahore. The suit land which was owned by the predecessors of the petitioners stood transferred in the name of respondents Nos.1 to 6 vide sale mutations Nos.125, 126 and 127. The said three mutations were attested on 16.03.1971 and were challenged through three separate declaratory suits which were instituted on 04.09.2003. The respondents contested the claim set up in the plaint inter alia pleading that the predecessors of the petitioners appointed Shah Nasir Hussain as general attorney vide registered general power of attorney dated 30.01.1962; and, that the said attorney sold the suit land to them vide agreement dated 15.01.1971 and on its basis mutations were sanctioned.

3. On pleadings of the first suit challenging mutation No.125 dated 16.03.1971, the learned Trial Court vide order dated 04.05.2005 framed following issues:-

1. Whether the suit is hopelessly barred by limitation? OPD

2. Whether this Court has no jurisdiction to try the instant suit? OPD

3. Whether the suit is not maintainable in its present form? OPD

4. Whether the suit is barred under sections 42 and 56 of the Specific Relief Act, therefore, the plaint is liable to be rejected under Order VII, Rule 11, C.P.C.? OPD

5. Whether the plaintiffs are estopped by their conduct and by record to file the instant suit? OPD

6. Whether the plaintiffs have not come to this Court with clean hands? OPD

7. Whether the suit is frivolous and vexatious and the defendants are entitled to special costs under section 35 A, C.P.C.? OPD

8. Whether the suit is incorrectly valued for the purposes of court-fee and jurisdiction, if so, what is its correct valuation? OP. Parties

9. Whether the plaintiffs are entitled to get a decree as prayed for? OPP

10. Relief?

4. Subsequently on 09.05.2005 the petitioners filed an application under Order XIV, Rule 5, C.P.C. for framing of additional issues (hereinafter called the first application). It was pleaded in the application that since the respondents/ defendants

Nos.1 to 6 were relying upon forged and fake agreement to sell and power of attorney, the following additional issues were required to be framed (hereinafter called the first proposed issues):-

> "i. Whether the plaintiffs/Predecessor in interest Shah Nasir Hussain sold the land in dispute in favour of the defendants and received consideration thereof? OPD
>
> ii. Whether valid and lawful mutation of sale dated 16.03.1971 was duly entered and sanctioned with respect to the alleged sale relied upon by the defendants? OPD
>
> iii. Whether the plaintiffs/Predecessor in interest Shah Nasir Hussain entered into an agreement to sell dated 15.03.1 in favour of the defendants? OPD
>
> iv. Whether late Shah Nasir Hussain obtained alleged registered power of attorney dated 29.01.1962 in his favour from his brothers namely Shah Badar Hussain and Shah Sadar Hussain as claimed by the defendants and whether the said power of attorney could have been got registered in Sindh with respect to the land in dispute situated at Lahore? OPD"

5. The first application was resisted. The learned Trial Court, however, vide order dated 02.12.2005 partially accepted the first application and framed the following additional issue i.e. issue No.8-A:

> "8-A Whether the oral sale as well as mutation No.125 sanctioned on 16/03/1971 and the entries made in the revenue record on the basis of these mutations are based on fraud, and are without consideration, void ab initio and ineffective on the rights of the plaintiffs? OPP"

6. Later on, the other two declaratory suits challenging mutations Nos.126 and 127 were consolidated with the declaratory suit challenging mutation No.125; and, therefore, the learned Trial Court vide order dated 10.05.2010 settled following consolidated issues:-

> "1. Whether the suit is hopelessly barred by limitation? OPD
>
> 2. Whether this Court has no jurisdiction to try the instant suit? OPD
>
> 3. Whether the suit is not maintainable in its present form? OPD
> 4. Whether the suit is barred under sections 42 and 56 of the Specific Relief Act, therefore, the plaint is liable to be rejected under Order VII, Rule 11, C.P.C.? OPD

5. Whether the plaintiffs are estopped by their conduct and by record to file the instant suit? OPD

6. Whether the plaintiffs have not come to this Court with clean hands? OPD

7. Whether the suit is frivolous and vexatious and the defendants are entitled to special costs under section 35 A, C.P.C.? OPD

8. Whether the suit is incorrectly valued for the purposes of court-fee and jurisdiction, if so, what is its correct valuation? OPP"

9. Whether the oral sale as well as mutation No.126 sanctioned on 16.03.1971 and the entries made in the revenue record on the basis of these mutations are based on fraud and are without consideration, void ab initio and ineffective on the rights of the plaintiffs? OPP

10. Whether the Mutation No.127 sanctioned on 16.07.1971 and the entries made in the revenue record on the basis of these mutations are based on fraud and are without consideration, void ab initio and ineffective on the rights of the plaintiffs? OPP

11. Whether the Mutation No.125 sanctioned on 16.03.1971 and the entries made in the revenue record on the basis of these mutations are based on fraud and are without consideration, void ab initio and ineffective on the rights of the plaintiffs? OPP

12. Whether the suit of the plaintiffs is entitled to a decree as prayed for? OPP

13. Relief?"

7. After framing of consolidated issues the petitioners concluded their evidence on 22.02.2010 and, statements of six witnesses of respondents/defendants were recorded. At this stage, the petitioners on 05.12.2013 filed a second application under Order XIV, Rule 5, C.P.C. (hereinafter called the second application) for framing of additional issue. It was urged in the second application that the main dispute between the parties was with regard to the land which the respondents claimed to have been sold to them through the attorney namely Shah Nasir Hussain on the basis of general power of attorney and, therefore, issue to this effect was required to be framed. On the basis of said assertion it was prayed that the following issue be framed (hereinafter called the second proposed issue):-

> "Whether the General Power of Attorney in favour of Shah Nasir Hussain was duly executed by Shah Sadar Hussain and Shah Mansoor Hussain? OPD"

8. The second application was resisted by the respondents. After appraising record the learned Trial Court dismissed the said application vide order dated 17.12.2013. The petitioners sought revision of the said order by filing a petition under section 115, C.P.C. before the learned Additional District Judge, Lahore. The learned Revisional Court after examining the record upheld the findings of the learned Trial Court. The revision was, therefore, dismissed vide judgment dated 05.05.2014. Hence, this petition.

9. The resume of afore stated facts of the instant case gives rise to a question that whether an issue of fact or law decided even in an interlocutory proceedings could operate as res judicata in a later proceedings or more precisely whether the principle of res judicata was applicable to the petitioners' second application under Order XIV, Rule 5, C.P.C. for framing of additional issue.

10. In order to find out the answer to the said question, it is essential to survey the case law on the subject. In this regard the first case which may be cited is the case of "Maharajadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh and others" (AIR 1924 Privy Council 202) wherein the following principle laid down in the case of Kirpul Shukul v. Mt. Rup Kuari (1884) 6 All.269 was re affirmed:-

> "The question, if the term `res judicata' was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was a binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceedings in that suit, or as a final judgment in a suit as binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon S.13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation."

11. In the case of Satyadhan Ghosal v. Sm. Deorajin Debi, (AIR 1960 SC 941) it was held as follows:-

> "The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter --- whether on a question of fact or on a question of law ---- has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher

Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again... ... ... ....The principle of res judicata applies also as between the two stages in the same litigation to this extent that a court, whether the trial court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

12. The principle settled in the case of Satyadhan Ghosal (supra) was followed by the Indian Supreme Court in the case of "Arjun Singh v. Mohindra Kumar and others" (AIR 1964 Supreme Court 993), and it was held as follows:

"That the question of fact which arose in the two proceedings was identical would not be in doubt. Of course, they were not in successive suits so as to make the provisions of S. 11 of the Civil Procedure Code applicable in terms. That the scope of the principle of res judicata is not confined to what is contained in S. 11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits".

13. In the case of "Khialdas and another v. Mahraj Gopi Krishin and others" (PLD 1969 Karachi 646), it was held as follows:-

"As I have observed, Revision Application No.82 of 1968 has been filed by the plaintiffs-applicants against the judgment of the learned District Judge, by which the learned District Judge dismissed their application for the appointment of a receiver on the ground inter alia that this application was barred by res judicata. Learned counsel for the plaintiffs-applicants conceded that the plaintiffs had filed an application under Order XL, rule 1, C.P.C. in 1966 which had been dismissed on 21st March 1966, and the order dismissing that application had become final. He also admitted that the second application filed by the plaintiffs, which had been allowed by the trial Court on 20th November 1967, had been filed on the same facts as had been relied upon in the earlier application. As the earlier order of dismissal had become final it is clear that the learned District Judge has rightly held that their second application was barred by res judicata. The revision Application is, therefore, without merit and is dismissed."

14. This Court in the case of "Mst. Shahzad Bibi and another v. Gulzar Khan" (PLD 1973 Lahore 878), while examining the provisions of section 11, C.P.C. held as follows: -

"The principle that a party is not to be vexed twice over for the same cause is acknowledged in sections 10 and 11 of the Code of Civil Procedure and even where section 11 does not in terms apply, the general principles of res judicata have always been invoked by Courts of law to achieve finality in litigation. The principle applies as between two stages in the same

> litigation. An issue decided in one way at an earlier stage is not allowed to be re-canvassed at a subsequent stage."

15. The learned Full Bench of this court in the case of "Muhammad Ajmal Khan v. Lt. Col. Muhammad Shafaat and 4 others" (PLD 1976 Lahore 396) also examined applicability of the provisions of section 11, C.P.C. to the interlocutory orders passed in a suit. It was held as follows: -

> "I now proceed to attend to the other limb of the argument of the learned counsel in this respect, namely, whether the principle of res judicata or the principle of finality is confined only to judgments or extends to decisions or orders also. Authorities are not lacking that these principles extend to decisions or orders as well, for instance sec. G. H. Took v. Administrator General of Bengal and others (2) and Sourendru Mohan Sikta and others v. Holi Irshad Singh and others (3) where the Privy Council held that interlocutory order in a suit was res judicata till the conclusion of that suit. Similarly the doctrine has been applied to other decisions for example in execution proceedings, arbitration proceedings, probate proceedings, Insolvency proceedings, and various other proceedings of similar type."

16. The applicability of the principles of res judicata to the interlocutory/interim orders also came under consideration in the case of "I.C.I.C. v. Mian Rafiq Saigol and others" (PLD 1996 Lahore 528) and this Court after examining all the case law on the subject concluded as follows:-

> "That in spite of the fact that strict principles of res judicata are not applicable to interim orders of procedural nature, yet, if a substantial question is decided by an interim order and findings are rendered by the Courts, and became final either without challenge and after challenge before the higher forums, the original Court is precluded to render contradictory findings at a subsequent stage of the same lis particularly when the question in substance is almost the same;"

17. The dictum laid down in the afore referred cases is that interim orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation, the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the Court would be justified in rejecting the same as an abuse in the process of law.

18. Now, the facts of the present case are analysed in the light of above said dictum. In the present case the petitioners had challenged the sale mutations Nos.125, 126

and 127 through which the suit land stood transferred in the name of the respondents Nos.1 to 6 on the ground of fraud whereas the claim of the respondents was that the predecessor of the petitioners had appointed Shah Nasir Hussain as attorney vide registered power of attorney dated 30.01.1962 and the said attorney had sold the suit land to them vide agreement dated 15.01.1971; and, that on the basis of said agreement, mutations Nos.125, 126 and 127 were sanctioned. This rival stance was not reduced into issue and, thus it led the petitioners to file first application under Order XIV, Rule 5, C.P.C. for framing of first proposed issues which included "whether late Shah Nasir Hussain obtained alleged registered power of attorney dated 29.01.1962 in his favour from his brothers namely Shah Badar Hussain and Shah Sadar Hussain as claimed by the defendants and whether the said power of attorney could have been got registered in Sindh with respect to land in dispute situated at Lahore". Since the petitioners/plaintiffs in their plaint had not challenged the validity of General Power of Attorney executed in favour of Shah Nasir Hussain, the learned Trial Court vide order dated 02.12.2005 partially accepted the first application and framed issue with regard to the validity of sale mutations. This order was not challenged by the petitioners and, thus, the same attained finality. After consolidation of all three suits, the learned Trial Court vide order dated 10.05.2010 framed issues Nos.9, 10 and 11 which were about the validity of mutations Nos.125, 126 and 127. The petitioners/plaintiffs knowing the controversy and issues led their complete evidence. At the fag end of recording of defendant's evidence, the petitioners/ plaintiffs filed another application (i.e. second application) under Order XIV, Rule 5, C.P.C. for framing of second proposed issue i.e. "whether the General Power of Attorney in favour of Shah Nasir Hussain was duly executed by Shah Sadar Hussain and Shah Mansoor Hussain", by pleading the same facts and grounds which were urged in the first application. The second proposed issue was also proposed in the first application under Order XIV, Rule 5, C.P.C. The questions of facts and law raised in the first application were directly and substantially involved in the second application. No new ground or fact was urged in the second application. The principle of res judicata was fully applicable to the second application for framing of additional issue, that is, second proposed issue and, therefore, the same was neither competent nor could be allowed.

19. In the sequel, this petition being bereft of any merit is dismissed.

ZC/T-10/L Petition dismissed.

**PLJ 2016 Lahore 747**
**Present: SHAHID WAHEED, J.**
**MUHAMMAD IJAZ--Petitioner**
**versus**
**LIVESTOCK & DAIRY DEVELOPMENT, etc.--Respondents**

W.P. No. 19185 of 2016, decided on 2.6.2016.

**Constitution of Pakistan, 1973--**

----Art. 199--Constitutional petition--Recruitment was declined due to absence from interview--*Mala fide* intention and ulterior motive--Controversy is factual in character--Jurisdiction--Controversy involved in instant petition was factual in character which may only be resolved after recording evidence--Such exercise cannot be undertaken by High Court in exercise of jurisdiction under Art. 199 of Constitutional. [P. 748] A

**Punjab Office of Ombudsman Act, 1997--**

----S. 9--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Representation for recruitment was declined on account of absence from interview--*Prima facie* discloses mal-administration in recruitment process--Since averments made in petition *prima-facie* discloses mal administration in recruitment process, High Court was inclined to invoke Section 9 of Punjab Office of Ombudsman Act, 1997 and remit a copy of petition to Ombudsman, Punjab with a direction that he shall treat it as complaint of petitioner and decide same strictly in accordance with law as expeditiously as possible. [P. 748] B

*Mian Asghar Ali*, Advocate.
Date of hearing: 2.6.2016.

**ORDER**

The petitioner through this petition has called into question the order dated 15.03.2016 of the Secretary, Livestock and Dairy Development Department, Government of Punjab, Lahore whereby his representation for recruitment to the post of Sanitary worker/ Chowkidar was declined on the ground of his absence from interview.

2. It is contended that the petitioner appeared for interview before the departmental selection committee but he was not allowed to mark his attendance; and, that the respondents with *mala fide* intention and ulterior motive want to deprive the petitioner of his legitimate right to get appointment in the government department.

3. The afore noted arguments suggest that the (controversy involved in this petition is factual in character which may only be resolved after recording evidence. This exercise cannot be undertaken by this Court in exercise of jurisdiction under Article 199 of the Constitutional of the Islamic Republic of Pakistan, 1973.

4. Since the averments made in this petition *prima-facie* discloses mal-administration in the recruitment process, I am inclined to invoke Section 9 of the Punjab Office of the Ombudsman Act, 1997 and remit a copy of this petition to the learned Ombudsman, Punjab with a direction that he shall treat it as complaint of the petitioner and decide the same strictly in accordance with law as expeditiously as possible.

5. The petitioner is directed to appear before the learned Ombudsman, Punjab on 13.06.2016 for further proceedings.

6. Disposed of.
(R.A.) Petition disposed of

**PLJ 2016 Lahore 859**
***Present*: SHAHID WAHEED, J.**
**MUHAMMAD AKRAM--Petitioner**
**versus**
**A.D.J., etc.--Respondents**

W.P. No. 8496 and C.M. No. 1 of 2016, decided on 22.3.2016.

**Punjab Rented Premises Act, 2009--**

----Ss. 7, 15 & 28--Civil Procedure Code, (V of 1908), S. 151--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Suspension of warrants of possession--Ejectment petition--Rent was deposited after 10th day of month could not be treated as default--Jurisdiction--Petitioner was bound to pay or tender rent not later than 10th, day of month--Statutory requirement was not complied with, findings of Courts below with respect to default in payment of rent warrants no interference by High Court. [P. 862] A

*Mr. Ashiq Hussain,* Advocate for Petitioner.

Date of hearing: 22.3.2016.

**ORDER**
**C.M. NO. 1 OF 2016**

This is an application under Section 151, CPC seeking suspension of warrants of possession issued by the learned Executing Court *vide* order dated 17.03.2016.

2. The main case is still at limine stage and is fixed for 29.03.2016 for preliminary arguments of the applicant.

3. In view of above said facts I asked the learned counsel for the applicant as to how prayer made in this application may be granted without hearing the main case. In response to said query, the applicant's counsel submits that since the Executing Court has issued warrant of possession, the main petition be fixed and heard today as otherwise the same would become infructuous.

4. Afore noted request of the applicant's counsel is reasonable. Office is, therefore, directed to fix the main case today.

5. CM stands disposed of.

## Main case

6. This constitutional petition is of the tenant and arises from a petition which was filed by Respondents No. 3 to 6 under Section 15 of the Punjab Rented Premises Act, 2009. Through the said petition the Respondents No. 3 to 6 sought eviction of the petitioner from Shop No. 78, Al-Habib Auto Market, 86-Mcleod Road, Lahore (hereinafter called the rented premises) on the ground of default in payment of monthly rent.

7. Petitioner's application for leave to contest was allowed by the learned Special Judge (Rent) *vide* order dated 2.4.2012. On pleadings issues were framed and parties were directed to adduce evidence in support of their respective claims. The Respondents No. 3 to 6 produced, oral as well as documentary evidence. The petitioner was granted opportunities to produce evidence but he failed to do the same and resultantly his right was closed *vide* order dated 23.04.2015.

6. After appraising evidence and on consideration of the matter, learned Special Judge (Rent) returned the following findings in respect of default in payment of rent:

> "Although the right of the respondents to produce evidence was closed, however, some receipt regarding deposit of rent at the rate of Rs. 5500/- per month are available on the record up till May 2013, however no receipt since June 2013 till date is available on record, hence the respondents are held defaulter in payment of rent at least since June 2013 till date. Furthermore, some of the receipts for the year 2010-2011 available on the record shows that the monthly rent in the year 2010-2011 was Rs. 3500/- per month. The tentative rate of rent of the demised premises was fixed by learned predecessor of this Court *vide* order dated 02.04.2012 @ Rs. 5500/- per month. Therefore, relying upon the evidence produced by the petitioners as well as material available on the record, the respondents are held defaulter in payment of rent at the rate of Rs. 5500/- per month since June 2013. Hence, this issue is decided in favour of petitioners and against the respondents."

On the basis of afore-stated, findings the learned Special Judge (Rent) Lahore, *vide* order dated 09.07.2015 accepted the ejectment petition and directed the petitioner to hand over vacant possession of the rented premises within one

month. Through the said order the Respondents No. 3 to 6 were also held entitled to recover rent @ of Rs. 5500/- per month from June 2013 till the vacation of the rented premises.

7. The petitioner, feeling aggrieved, preferred an appeal under Section 28 of the Punjab Rented Premises Act, 2009 before the learned Additional District Judge, Lahore. On appeal the evidence available on record was re-appraised and following findings were recorded:

> "Perusal of record reveals that the appellants submitted copy of receipt for payment of rent for the month of December, 2015 to February 2016 and he deposited an amount of Rs. 11,000/- in the treasury on 23.2.2016. According to law the appellants were bound to pay the rent before 10th of the succeeding month but he paid rent for the month of December 2015 to February 2016 on 23.2.2016 after stipulated period December and January and committed default in the light of receipt submitted before the Court. Photocopy of second receipt for the month of August, 2015 to November 2015 is also produced in the Court and according to this receipt the appellant deposited the rent amount Rs. 22,000/- on 11.11.2015 for the month of August to November 2015. According to this receipt he committed default in payment of rent for the month of August and September and he deposited the rent after stipulated period. Another receipt for payment of rent is also attached with the file and according to this receipt the appellant deposited rent Rs. 22,000/- for the month of April 2015 to July, 2015 on 03.11.2015. This receipt submitted in the Court by the appellant also proves that the appellant committed default in payment of rent for the month of April, May, June and July 2015 and he deposited rent after the stipulated period. The appellant/tenant was bound to pay rent according to stipulated period and in accordance with law but he knowingly and willfully did not pay the rent within stipulated period and committed default."

On the basis of afore-stated findings the appeal was dismissed *vide* order dated 23.02.2016.

8. At the outset of hearing I asked the learned counsel for the petitioners to point out any flaw in the findings of the learned Appellate Court. In response to said query, he submits that the rent deposited after 10th day of month could not be

treated as default and, thus, orders of the learned Courts below are liable to be set aside. I am afraid this argument has no substance. According to Section 7 of the Punjab Rented Premises Act, 2009 the petitioner was bound to pay or tender the rent not later than 10th, day of month. Since the said statutory requirement was not complied with, findings of the learned Courts below with respect to default in payment of rent warrants no interference by this Court.

9. This petition being devoid of any merit is dismissed *in limine.*

(R.A.) Petition dismissed

**2016 C.L.R. 1562**
**[Punjab Subordinate Judiciary Service Tribunal, Lahore]**
***Present:*** **SHAHID WAHEED, CHAIRMAN and FAISAL ZAMAN KHAN, MEMBER**
**Nazir Ahmad Langah**
***Versus***
**Registrar, Lahore High Court, Lahore**

Service Appeal No. 25 of 2011, decided on 17th June, 2016.

***CONCLUSION***
*(1) Non-compliance of the mandatory provision of rules seriously prejudices the party.*
*DISCIPLINARY PROCEEDINGS --- (Flaws)*

**(a) Punjab Subordinate Judiciary Service Tribunals Act (1991)---**
---S. 5---Punjab Civil Servants (Efficiency and Discipline) Rules, 1999, R. 7(7)---Disciplinary proceedings against Judicial Officer---Charge of misconduct---Impugned penalty of compulsory retirement from service was imposed upon appellant---Flaws and discrepancies---Inquiry Officer without imposing minor penalty sent the whole record of case to the Authority for further proceedings---Since Inquiry Officer had not imposed any penalty, the question of dissatisfaction by the Authority for enhancing penalty could not arise---Authority was required to pass an order for enhancement of penalty within 70 days from the receipt of record---After the lapse of stipulated period, the Authority had ceased to have any lawful authority and jurisdiction to pass any order---Proceedings from the stage when the Inquiry Officer transmitted record to the Authority till the imposition of major penalty through impugned notification were not valid for want of jurisdiction, non-compliance of doctrine of procedural justice, non-adherence to the principle of fair trial and due process---Impugned notification was set aside---Appeal was directed to be reinstated in service---Service appeal allowed. *[NON-COMPLIANCE OF MANDATORY PROVISIONS]*
(Para 6)
Ref. PLD 1971 SC 124, 2016 LHC 1208.

***(b) Principle of law---***
*---"Communi Observatia non est recedendum" (where a thing is provided to be done in a particular manner it has to be done in that manner and if not so done, same would not be lawful).*
*(Para 5)*
مذکورہ جوڈیشل آفیسر/اپیلانٹ کے خلاف مسکنڈکٹ کے الزام میں محکمانہ کارروائی کے نتیجہ میں ملازمت سے جبری ریٹائرمنٹ کا حکم صادر ہوا تھا۔ چونکہ مجاز اتھارٹی نے مقررہ تیس روز میں حکم صادر نہ کیا تھا اِس لیے بعد ازاں حکم صادر نہ ہو سکتا تھا۔ ہائی کورٹ میں سروس اپیل منظور ہوئی۔

[As a result of disciplinary proceedings against the said Judicial Officer on charge of misconduct, he was compulsorily retired from service. Since the Authority had not passed order within stipulated period of 30 days, it could not pass order subsequently. High Court allowed Service Appeal].
Appellant in person.
*For the Respondent:* Zubda Tul Hussain, Advocate.
*Date of hearing:* 17th June, 2016.

**JUDGMENT**

**SHAHID WAHEED, CHAIRMAN ---** This appeal arises from the disciplinary proceedings which were initiated against the appellant under the provisions of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999. In these proceedings the appellant stood charged for misconduct. The Authority got inquired into the said charge through a regular inquiry. The Inquiry Officer, after holding a detailed inquiry, in his report dated 26.07.2010 recommended minor penalty of withholding of promotion for a period of four years. Accordingly notice in terms of Rule 7(7)(a) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999 was issued. This notice was replied. The Inquiry Officer, however, without passing any order forwarded the record to the Authority. The recommendations of the Inquiry Officer did not find favour with the Authority and resultantly on 30.08.2010 notice was issued to the appellant to show cause as to why one of the major penalties be not imposed upon him. The appellant accordingly submitted his reply which was not found satisfactory and, thus, *vide* Notification No. 69/RHC/AD&SJ, dated 28.03.2011 a major penalty of compulsory retirement from service was imposed upon him. The appellant by filing a representation sought review of the said penalty. The said representation was not responded and, therefore, the appellant through this appeal under Section 5 of the Punjab Subordinate Judiciary Service Tribunal Act, 1991 has challenged the validity of the Notification No. 69/RHC/AD&SJ, dated 28.03.2011.

2. The question which falls for determination in this case is whether the proceedings from the stage when the Inquiry Officer after getting reply of the show-cause notice for imposition of minor penalty forwarded the record to the Authority till the imposition of major penalty of compulsory retirement were conducted in accordance with rules and, therefore, interference therewith is called for. This is a pure question of law and, therefore, appraisal of the merits of the case and charge is not required.

3. In order to find out the answer to the question. under discussion, it is essential to examine relevant rule, that is, Rule 7(7)(a) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999. According to said Rule the Inquiry Officer within 10 days of the conclusion of the proceedings is required to take following steps: firstly, to afford the accused an opportunity of showing cause against the

action proposed to be taken against him; secondly, to pass order accordingly; thirdly, to inform the Authority of the action taken by him; and, fourthly, to send the whole record of the case to the Authority. Upon receipt of record, the Authority may agree or disagree with the quantum of punishment awarded to the accused. In case of disagreement the Authority may, within 30 days of the receipt of the case, order initiation of *de novo* inquiry or it may enhance the penalty after affording the accused a chance of being heard in person. If no order is passed within the said period of 30 days the minor penalty awarded by the Inquiry Officer attains finality.

4. Now, in the light of above-stated requirements of rules the facts of the present case are analyzed. Perusal of the record of present case unfolds that the Inquiry Officer in his report dated 26.07.2010 had recommended imposition of minor penalty of withholding of his promotion for a period of four years upon the appellant. After making the above recommendations the Inquiry Officer issued notice under Rule 7(7)(a) of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1949 to the appellant to show cause as to why the said penalty be not imposed upon him. This notice was contested by the appellant. The Inquiry Officer, however, without imposing minor penalty sent the whole record of the case to the Authority for further proceedings. This was a procedural injustice. Since the Inquiry Officer had not imposed any minor penalty, the question of dissatisfaction with the quantum of punishment; and, occasion for assuming jurisdiction by the Authority for enhancing the penalty could not arise. It is a fundamental requirement of law that the doctrine of natural justice and procedural justice be complied with and the same has, as a matter of fact, turned out to be integral part of administrative jurisprudence of this country. Infraction of the said requirement is a vice which vitiates the proceedings. This aspect of the matter was also not considered by the Authority while issuing notice for enhancement of penalty. Notwithstanding the said omission, the Authority was required to pass an order for enhancement of penalty within 30 days from the receipt or record. This was a mandatory requirement of the rules. The record suggests that the Authority after the lapse of nine months passed the final order for enhancement of punishment *vide* impugned notification dated 28.03.2011. This was not a valid notification as after the lapse of stipulated period the Authority had ceased to have any lawful authority and jurisdiction to pass any order. The Hon'ble Supreme Court of Pakistan in the case of *Mansab Ali v. Amir and 3 others* (PLD 1971 SC 124) has held that if a mandatory condition for the exercise of jurisdiction by a Court, Tribunal or Authority is not fulfilled, the entire proceedings which follows become illegal and suffer from want of jurisdiction. This principle was followed by this Tribunal in the case of *Abdul Haseeb Sheikh v. The Registrar, Lahore High Court* (2016 LHC 1208) which is available at the website of Lahore High Court (www.lhc.gov.pk). Thus, the proceedings from the stage when the Inquiry Officer transmitted the record to the Authority till the imposition of major penalty through impugned Notification are not valid for want of jurisdiction, non-compliance of the doctrine of procedural justice, non-adherence to the principle of fair trial and due process which have been

guaranteed as fundamental right under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 and the principle of *communi observatia non est recedendum* (where a thing is provided to be done in a particular manner it has to be done in that manner and if not so done, same would not be lawful).

5. Before parting with the judgment it is germane to examine the objection raised by the respondent. Learned counsel appearing on behalf of the respondent, Mr. Zubda-Tul-Hussain, Senior Advocate, in his usual eloquence submitted that the above-noted flaw in the disciplinary proceedings was not fatal as it did not injuriously affect justiciable rights of the appellant; and, that an omission or error in procedure, unless it has occasioned a failure of justice or prejudiced a party in the presentation of his case, is not a sufficient ground for reversing the decision of the Authority. In support of his contention he placed reliance on the case of *The Tariq Transport Company, Lahore v. The Sargodha-Bhera Bus Service,* (2) *Regional Transport Authority, Lahore* and (3) *The Provincial Transport Authority, Lahore* (PLD 1958 SC 437) and *Zafar-ul-Ahsan v. The Republic of Pakistan, through Cabinet Secretary, Government of Pakistan* (PLD 1960 SC 113). The above-noted arguments appear to be convincing at first blush but on deeper analysis of the matter the same are found to be without any substance. It may be seen that the proper course of action in the instant case for the Enquiry Officer was that after he had tentatively decided upon the action he proposed to take against the appellant, he should have passed order after affording the appellant a chance of being heard. This was not done. Non-compliance of the mandatory provisions of rules seriously prejudiced the appellant. In this regard reliance may be placed on the case of *Major Muhammad Nawaz v. Pakistan through Secretary, Communication, Government of Pakistan, Islamabad* (PLD 1970 Lahore 811) wherein it was held that the provisions of the Efficiency and Discipline Rules were mandatory, non-compliance whereof constituted denial of reasonable opportunity which *per se* would vitiate action taken. Besides above, the Authority while disagreeing with the findings of the Inquiry Officer had neither recorded any reason for doing so nor passed the order within the stipulated period of time. The said omissions injuriously affected the rights of the appellant. Thus, the aforesaid failure of the Inquiry Officer invalidates his action and the ultimate order passed on its basis by the Authority against the appellant.

6. In the sequel, this appeal is allowed and the impugned Notification No. 69/RHC/AD&SJ, dated 28.03.2011 is set aside and it is directed that the appellant be reinstated into service with effect from the date he was compulsorily retired. The arrears of pay or other back benefits for the period the appellant remained out of service should be granted to him only if he satisfies the Authority that he was not gainfully employed elsewhere during the said period. Since the impugned Notification/Order is being set aside by us on technical ground, it will be open to the Authority to proceed against the appellant either *de novo* or from the stage from which the error, noted above, could be corrected. Appeal allowed.

**KLR 2016 Civil Cases 321**
**[Lahore]**
***Present:* SHAHID WAHEED and ALI AKBAR QURESHI, JJ.**
**New Jubilee Insurance Company**
***Versus***
**Ravi Steel Company**

R.F.A. No. 992 of 2012, decided on 6th April, 2016.

***CONCLUSION***

*(1) Section 5 of the Limitation Act, 1908 is neither applicable nor attracted to condone delay in filing appeal under special law.*
*TIME-BARRED APPEAL---(Special law)*

***Insurance Ordinance, 2000---***
*---Ss. 124(2), 122---Limitation Act, 1908, S.5---Claim---Impugned decision of Insurance Tribunal---Time-barred appeal---Matter of condonation of delay---Appeal was barred by one day---Special law---As Special law provided a different period of limitation for preferring the first appeal in High Court than the ordinary law, therefore, delay was not condonable---Appeal dismissed. [CONDONATION OF DELAY]*
*(Paras 4,5,6)*
*Ref. 2012 CLD 1112.*
انشورنس ٹربیونل کے زیر تنقید فیصلہ کے خلاف ہائیکورٹ میں اپیل زائد المعیاد تھی جو کہ ناقابل معافی تھی۔ اپیل خارج ہوئی۔
[Appeal against impugned decision of Insurance Tribunal in High Court was time-barred which was not condonable. Appeal was dismissed].
*For the Appellant:* Barrister Tariq Saeed Rana, Advocate.
*For the Respondent:* Zaheer-ud-Din Babar and Ibrar Ahmad, Advocates.
*Date of hearing:* 6th April, 2016.

**ORDER**

**SHAHID WAHEED, J. --** This is an application under Section 5 of the Limitation Act, 1908 for condonation of delay in preferring appeal under Section 124 of the Insurance Ordinance, 2000 against the judgment dated 3.10.2012 passed by the learned Insurance Tribunal, Lahore.

2. Brief facts of the case are that the respondent obtained a marine cargo policy No. 303-1-1-3-06-0010209-08-2005, dated 12.8.2005 against payment of premium of Rs. 51,829/-. The sum insured was Rs. 1,97,34,000/- whereas invoice value of the consignment was U$ 3,00,000/-. The goods of the respondent were damaged during journey and, thus it suffered losses. The respondent, therefore, lodged a

claim but the same was declined. The said refusal was the cause which led the respondent to file an application under Section 122 of the Insurance Ordinance, 2000 against the appellant. The said application was allowed by the learned Insurance Tribunal, Punjab, Lahore *vide* judgment dated 3.10.2012.

3. The applicant as per Section 124(2) of the Insurance Ordinance, 2000 could challenge the impugned judgment through an appeal before this Court within a period of 30 days from the date of the judgment (*i.e.* 3.10.2012) passed by the learned Insurance Tribunal. In other words, the applicant could prefer an appeal before this Court on or before 2.11.2012. On the contrary, the applicant preferred appeal before this Court on 3.11.2012. Thus the appeal was barred by one day.

4. Under ordinary law, a period of 90 days is prescribed for filing of first appeal before this Court while appeal filed under the Insurance Ordinance, 2000 is governed by a Special law and its Section 124(2) prescribes a period of 30 days for filing the first appeal before this Court. As Special law provides different period of limitation for preferring the first appeal in High Court than the ordinary law, therefore, Section 5 of the Limitation Act, 1908 is neither applicable nor attracted to the present case. Thus delay on any score is not condonable under Section 5 of the Limitation Act, 1908. In this regard, reference may be made to the case of "*General Manager v. Mst. Sakina Bibi and others*" (2012 CLD 1112).

5. In the sequel, this application is dismissed.

MAIN CASE

6. Since C.M. No. 1-C of 2012 has been dismissed, this appeal is also dismissed being barred by time.

C.M. NOS. 2-C/14, 3-C/14, 1/C/15 and 1-C/16

7. Since the main appeal has been dismissed, these applications have become redundant and are accordingly dismissed.

Appeal dismissed.

**KLR 2016 Labour & Service 28**
**[Punjab Subordinate Judiciary Service Tribunal]**
**Present: MEHMOOD MAQBOOL BAJWA, CHAIRMAN, SHAHID WAHEED and AMIN-UD-DIN KHAN, MEMBERS**
**Zia-ul-Qamar, AD&SJ, Rahim Yar Khan**
**Versus**
**The Registrar, Lahore High Court, Lahore.**

Service Appeal No. 11 of 2010, decided on 13th November 2015.

**CONCLUSION**

1. It is now well-settled that the evaluation of performance of a subordinate by a Reporting Officer or countersigning officer is a matter of subjective assessment and not an objective evaluation.

ADVERSE REMARKS IN ACR/PER --- (Work and conduct of Judicial Officer)

**Punjab Subordinate Judiciary Service Tribunal Act (1991)---**
---S. 5---Work and conduct of Judicial Officer---Seeking expunction of adverse remarks recorded in ACR/PER of appellant-ASJ---Principle of law---Evaluation of performance of a subordinate by a Reporting Officer or countersigning officer is a matter of subjective assessment and not an objective evaluation and, therefore, the Tribunal cannot substitute the view recorded by the Reporting Officer or countersigning officer---This is, however, subject to two exceptions; firstly, when Reporting Officer or countersigning officer himself does not enjoy good reputation and mala fide is alleged against him with full particulars, and, secondly, when there has been a gross violation of Instructions, which resulted in miscarriage of justice---Principles of fair play, equity and justice---Analysis---In instant case Reporting Officer for a short period of four months had recorded adverse remarks in a sweeping manner against all columns of ACR/PER and rated appellant below average---Reporting Officer in the first report for the said period found appellant an experienced and honest officer and useful for further retention in service ---However, in second report, which was impugned, Reporting Officer rated appellant as below average Judicial Officer---It was a startling contradiction about work and conduct of appellant---Reporting Officer while rating appellant a below average judicial officer, during said period, was therefore, required to state with particularly as to how all of a sudden there occurred a change in conduct and behaviour of appellant, supported by sufficient material---Appellant had otherwise good record and had been receiving commendation certificates but Reporting Officer had made adverse remarks without giving instances of lapse or dereliction on part of appellant---Impugned remarks were recorded in clear violation of Instructions for filling up the PER or ACR and therefore, the same were liable to be expunged---During that period appellant was serving as Addl. District & Sessions Judge---After communication of adverse remarks appellant was promoted as District and Sessions Judge---It showed that overall performance of appellant was very well and

therefore, he was promoted---Impugned adverse remarks recorded in ACR/PER for period in question of appellant were directed to be expunged forthwith---Service appeal allowed.
(Paras 6, 7, 8, 9)
Ref. PLD 2003 SC 86, 1997 SCMR 1749, 2012 PLC (CS) 790, 2011 SCMR 1381, PLD 2004 SC 191.
اپیلانٹ/آیڈیشنل ڈسٹرکٹ وسیشن جج کے کام و رویہ کے متعلق رپورٹنگ آفیسر کی رائے میں نمایاں تضاد تھا۔ ہائی کورٹ نے اپیل منظور کرتے ہوئے PER/ACR میں زیر تنقید مخالفانہ ریمارکس حذف کر دیے۔
[There was a startling contradiction in opinion of the Reporting Officer about the work and conduct of appellant/ASJ. High Court while allowing appeal directed expunction of adverse remarks in the ACR/PER].
*For the Appellant:* Ijaz Ahmad Chaudhry & Talaat Farooq Sheikh, Advocates.
*For the Respondent:* Nayyar Iqbal Ghouri, Advocate.
*Date of hearing:* 13th November, 2015.

**JUDGMENT**

**SHAHID WAHEED, MEMBER ---** Challenge in this appeal is to letter No. 499/RHC/4C-II, dated 26.05.2010 whereby the representation of the appellant for expunction of adverse remarks recorded in his Annual Confidential Report (ACR) or Performance Evaluation Report (PER) for the period with effect from 04.06.2009 to 01.10.2009 was rejected.

2. This appeal under Section 5 of The Punjab Subordinate Judiciary Service Tribunal Act, 1991 has arisen in the background that the respondent *vide* letter No. 83/RHC/4C-II, dated 12.02.2010 communicated to the appellant the following remarks recorded in the ACR or PER on his work and conduct for the period 04.06.2009 to 01.10.2009.

| PART II PERSONAL QUALITIES | | |
|---|---|---|
| 1. | Intelligence | Below Average |
| 2. | Confidence and will power | Below Average |
| 3. | Emotional stability | Poor |
| 4. | Adaptability | Poor |
| 5. | Understanding & Tolerance | Below Average |
| 7. | OVERALL GRADING IN PART-II | Below Average |
| PART-III ATTITUDES | | |
| 3 | Integrity: | |
| | (a) General | Below Average |
| | (b) Intellectual | Below Average |

| | | |
|---|---|---|
| 4 | Acceptance of Responsibility | Below Average |
| 5 | Foresight | Below Average |
| 6 | Initiative and Drive | Below Average |
| 7 | Reliability under pressure | Below Average |
| 8 | Judgment | Below Average |
| 10 | Preservence and devotion to duty | Poor |
| 13 | Relation with: | |
| | (a) Superior | Below Average |
| | (b) Colleagues | Poor |
| | (c) Subordinates | Below Average |
| 14 | Behaviour with public | Below Average |
| 13 | OVERALL GRADING IN PART III | Below Average |
| PART IV PROFICIENCY IN JOB | | |
| 2 | Power of Expression | |
| | (a) Written | Below Average |
| | (b) Oral | Below Average |
| 5. | Ability to take decision | Below Average |
| 6. | Work: | |
| | (a) Output | Below Average |
| | (b) Quality | Below Average |
| 7. | OVERALL GRADING PART IV | Below Average |
| PART V | | |
| | (a) Pen-Picture: An officer who works without taking keen interest & pains in the job. | |
| | (b) Counselling: Time and again but unfortunately no visible improvement was made. | |
| | (c) Assessment of performance: Performed below par. Remained satisfied with earning units by recording | |

| | | |
|---|---|---|
| | confessional statements and extending concessions to the accused making the same. | |
| | (d) Usefulness for further retention in service | Not Useful |
| PART VI | | |
| | (a) Overall Grading | Meets bare minimum standards (Below Average) |
| | (b) Fitness for promotion | Unlikely to progress further |
| | (c) Integrity | Reported to be Corrupt |

3. Feeling aggrieved the appellant on 15.03.2010 through proper channel made a representation for expunction of above-cited remarks. This representation was rejected *vide* impugned letter No. 499/RHC/4C-II, dated 26.05.2010. Having failed to obtain redress of his grievance the appellant has preferred the instant appeal before this Tribunal.

4. It is contended on behalf of the appellant that: (i) adverse remarks are based on surmises and conjecture as the same cannot be corroborated by any cogent, concrete and confidence inspiring material/evidence; (ii) the appellant's work and conduct prior to the impugned remarks as well as after the impugned remarks remained unquestionable; (iii) the appellant has served as Judicial Officer for more than 23 years and except the above-mentioned short period *i.e.* 04.06.2009 to 01.10.2009 all the ACRs/PERs of the appellant are A and A/1; (iv) even the same Reporting Officer in the ACR for the period with effect from 12.06.2007 to 19.11.2007 had appreciated the work and conduct of the appellant; (v) the work and conduct of the appellant was also appreciated by the Lahore High Court, Lahore during 2001 when he was awarded the prize of Rs. 7000/- for exhibiting good performance; (vi) on two times cash awards/certificates regarding integrity/honesty were awarded to the appellant; (vii) the impugned remarks have been recorded in violation of the Instructions about Annual Confidential Reports; (viii) it is not believable that a person having maintained his integrity for decades and having earned cash awards in service suddenly can bring a change into his character; and, (ix) in September, 2009 the appellant requested the Reporting Officer for grant of 10 days earned leave for observing *Aitkaf*. The Reporting Officer was reluctant to grant said leave. However, on the insistence of the appellant six days earned leave was granted but due to said annoyance the impugned remarks were recorded in the ACR/PER.

5. On the other hand, learned counsel for the respondent has vehemently opposed this appeal and submitted that adverse remarks were recorded strictly in accordance with Rules and Instructions; that the adverse remarks can only be expunged if there is an allegation of mala fide and the same stands proved against the Reporting Officer/Countersigning Officer; and, that in the absence of *mala fide* the prayer made in this appeal cannot be allowed. In support of above arguments reference has been made to cases of *Zarif Ahmad Khan and 3 others v. Province of the Punjab and another* (PLD 1986 SC 684) and *Lahore High Court, Lahore through its Registrar v. K.M. Sohel* (2001 PLC (CS) 1253).

6. It is now well-settled that evaluation of performance of a subordinate by a Reporting Officer or Countersigning Officer is a matter of subjective assessment and not an objective evaluation and, therefore, the Tribunal cannot substitute the view recorded by the Reporting Officer or Countersigning Officer. This is, however, subject to two exceptions: firstly, when Reporting Officer or Countersigning Officer himself does not enjoy good reputation and *mala fide* is alleged against him with full particulars; and, secondly, when there has been gross violation of Instructions, which resulted in miscarriage of justice. In this regard reference may be made to the cases of *Ch. Shabbir Hussain and others v. Registrar, Lahore High Court and others* (PLD 2004 SC 191), *Muhammad Yahya Khan Kulachi v. Registrar, Lahore High Court, Lahore* (2011 SCMR 1381) and *Muhammad Qasim Khattak v. Administrative Committee, Peshawar High Court, Peshawar and others* (2012 PLC (CS) 790). Keeping in view the above-stated principle of law, we analyze the facts of the present case.

7. In the case on hands the Reporting Officer for a short period of four months has recorded adverse remarks in a sweeping manner against all columns of ACR/PER and rated the appellant below average. This fact flabbergasted us and gave a fillip to examine the Character Roll Dossier of the appellant. Perusal of the Dossier unfolds: (a) that the appellant joined the judicial service as Civil Judge on 02.08.1988 and since then he is earning good reports; (b) that ACRs/PERs are replete with wholesome remarks about the work and conduct of the appellant; (c) that during the period with effect from 02.8.1988 to 06.05.2009 the appellant was found an honest and conscientious judicial officer; and, (d) that even during the first half of the year 2009 the appellant earned good report. Before proceeding further it is germane to state here that the appellant served under the Reporting Officer on two occasions. Firstly, during period with effect from 12.06.2007 to 19.11.2007; and, secondly, during period from 04.06.2009 to 01.10.2009. The Reporting Officer in the first report for the period from 12.06.2007 to 19.11.2007 found the appellant an experienced and honest Officer; and, useful for further retention in service. However, in the second report, which is impugned in this appeal, the Reporting Officer rated the appellant as a below average judicial officer. This was a startling contradiction about the work and conduct of the appellant. The Reporting Officer, while rating the appellant a below average Judicial officer, during the period from

04.06.2009 to 01.10.2009, was, therefore, required to state with particularity as to how all of a sudden there occurred a change in the conduct and behaviour of the appellant, supported by sufficient material. This was not done by the Reporting Officer. Since it is well- established from record that the appellant has otherwise good record and has been receiving commendation certificates but Reporting Officer has made adverse remarks without giving instances of lapse or dereliction on the part of the appellant, we are of the view: (i) that performance, behaviour, potential, work and conduct of the appellant was not appraised in a proper and lawful manner; (ii) that remarks recorded in ACR or PER for the period from 04.06.2009 to 01.10.2009 do not present the truest possible picture of the appellant; and (iii) that the impugned remarks were recorded in clear violation of the Instructions for filling up the PER or ACR and, therefore, the same are liable to be expunged. In arriving at the said conclusion we stand fortified from the case of *Noor Elahi v. Director of Civilian Personnel, Rear Air Headquarter, Peshawar and 2 others* (1997 SCMR 1749).

8. There is another aspect of the matter which has persuaded us to accede to the prayer made in this appeal. The impugned remarks relate to a period of four months, *i.e.* from 04.06.2009 to 01.10.2009. During this period the appellant was serving as Addl. District & Sessions Judge. After communication of the adverse remarks the appellant was promoted as District & Sessions Judge. This shows that overall performance of the appellant was very well and, therefore, he was promoted. Thus, following the principle of fair play, equity and justice as enunciated by the Hon'ble Supreme Court of Pakistan in the case of *Principal, Government Girls College, Thana Malakan Agency (Now at Saidu Sharif Swat) and 3 others v. Mrs. Bilquis Begum* (PLD 2003 SC 86) the adverse remarks recorded in the ACR or PER for the period from 04.06.2009 to 01.10.2009 of the appellant should be expunged forthwith.

9. In the sequel this appeal is allowed as prayed for.
Service Appeal allowed.

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**[Punjab Subordinate Judiciary Service Tribunal, Lahore]**
***Present:*** **SHAHID WAHEED, CHAIRMAN, FAISAL ZAMAN KHAN and MUHAMMAD TARIQ ABBASI, MEMBERS**
**Sheikh Shahid Rafiq**
***Versus***
**The Registrar, Lahore High Court, Lahore through its Registrar**

S.A. No. 30 of 2011, decided on 22nd January, 2016.

***CONCLUSION***
(1) The rule against bias thus aims at preventing a consideration of the case being sham.

**(a) Maxim---**
---Nemo judex in sua causa (no one should be a Judge in his own cause).
(Para 5)

**(b) Service---**
---Disciplinary proceedings---Doctrine of natural justice---Natural justice in relation to disciplinary proceedings means observance of procedural fairness before holding an officer guilty of misconduct---Procedural fairness demands not only that those whose interests may be affected by act or decision should be given prior notice and an adequate opportunity to be heard but also requires that decision-maker or Authority should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the case presented by the parties.
(Para 4)
MISCONDUCT OF JUDICIAL OFFICER --- (Inquiry and bias)

**(c) Punjab Subordinate Judiciary Service Tribunal Act, 1991---**
---S. 5----Punjab Civil Servants (Efficiency & Discipline) Rules, 1999---Constitution of Pakistan, 1973, Art. 10-A---Misconduct---Appellant while posted as District & Sessions Judge was charge-sheeted---Major penalty of compulsory retirement from service was imposed upon appellant---Inquiry/bias---*Held:* Enquiry Officer could not participate in the meeting of the Administration Committee of the High Court in which case of appellant was considered---Presence of Inquiry Officer in said meeting was not a mere irregularity but an illegality which vitiated whole proceedings culminated in impugned order retiring appellant compulsorily from service---Service appeal accepted.
(Paras 10, 11)

Ref: [(1999) 4 SA 147], [(1986) 161 LAW NOTES 342], [(2001) 161 AC 119], 1993 AC 646, 200 QB 451, PLD 1964 W.P. Lah. 743, PLD 1951 FC 62, 75 L.K.J.B. 198, CC (1892) 1 Q.B. 190, 1 QB 173, 6 QB 753, *(1924) 1 K.B. 256.*

اپیلانٹ جب بطور ڈسٹرکٹ اینڈ سیشن جج تعینات تھا۔ ڈسٹرکٹ بار ایسوسی ایشن نے اپنی قرارداد میں اسے کرپشن کا بادشاہ قرار دیا تھا۔ مسکنڈکٹ کے الزام میں اپیلانٹ کو ملازمت سے جبری ریٹائر کر دیا گیا تھا۔ چونکہ موصوف انکوائری آفیسر ایڈمنسٹریشن کمیٹی کے اجلاس میں شرکت نہ کر سکتا تھا۔ لہذا تمام کاروائی باعمل ہوچکی تھی۔ ہائیکورٹ نے سروس اپیل منظور کی۔

[Appellant while posted as District and Sessions Judge, he was declared as King of Corruption through resolution passed by the District Bar Association. On allegation of such misconduct appellant was compulsorily retired from service. Since said inquiry officer could not participate in meeting of the Administration Committee, the entire proceedings were vitiated. High Court allowed service appeal].

*For the Appellant:* Muzammil Akhtar Shabbir and Muqtadir Akhtar Shabbir, Advocates.

*For the Respondent:* Zubda-Tul-Hussain, Advocate.

*Date of hearing:* 22nd January, 2016.

## JUDGMENT

**SHAHID WAHEED, CHAIRMAN** --- This appeal under Section 5 of the Punjab Subordinate Judiciary Service Tribunal Act, 1991 has arisen from the disciplinary proceedings initiated against the appellant, Sh. Shahid Rafiq, under the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999 which culminated in the impugned Notification No. 151/RHC/D&SJJ, dated 13.06.2011 whereby major penalty of compulsory retirement from service was imposed upon the appellant.

2. In the case on hands, the appellant, while working as District & Sessions Judge was charged with following misconduct:---

(a) That you while posted as Chairman Drug Court, Multan in July, 2009 invited Ch. Abdur Rehman, Advocate of Khanewal, spouse of Ms. Tahira DDPP of your Court when you were posted as Addl. D & S.J., Khanewal, in your chamber and directed your Court staff to persuade accused of cases in Drug Court, Multan to engage said Ch. Abdul Rehman, Advocate as their counsel for favourable decisions who was ultimately engaged in 33 cases pending in your Court and you never recorded convection in the said cases which amounts to misconduct;

(b) That while conducting sham proceedings Under Section 87 of Cr.P.C. you managed fake and fictitious reports through your Court Staff to consign the files of almost 450 cases to the record room without completing legal formalities, even without mentioning the name of the police station and without initiating proceedings u/S. 88, Cr.P.C. which amounts to misconduct.

(c) That you declared accused of different cases as proclaimed offenders without issuing perpetual/non-bailable warrants of arrest to the respective police stations for making entries in Register No. IV and thereby chance of arrest of these accused by the police was scuttled and this was done after accepting illegal gratification in each case and you received Rs. 25,000/- per case in lieu of dumping every such file and as such provided chance to the accused to escape from legal proceedings and thus committed corruption.

*(d) That you conducted the Court in violation of Section 31 of the Drugs Act* when the quorum was snot complete so as to constitute a Drug Court and in the same proceedings you recorded acquittal of the accused which was in contravention of Section 31 of the said Act thus rendering the proceedings illegal which amounts to abuse of judicial powers.

(e) That you did not entertain the challans, sent by the prosecution for trial in February and March, 2010 which remained unattended in your Court till the day of inspection by the M.I.T. Lahore High Court, Lahore i.e. 26-06-2010, which reflects your inefficiency and negligence.

(f) That you never conducted your Court on Saturdays and Mondays in Multan and in fact, you always enjoyed French leave on both these days during your tenure in the said Court and as such remained absent without leave which amounts to misconduct.

(g) That your attitude towards the members of the Bar is very harsh and you have a persistent reputation of being corrupt and the members of Lahore High Court Bar Association, Multan, District Bar Association, Multan and District Bar Association, Dera Ghazi Khan passed resolution against you and declared you as king of corruption and your Court has been boycotted by the said Bar Associations for many days and as such your attitude is unbecoming *of a Judicial Officer."*

The appellant on 23.08.2010 submitted reply and denied the allegations. The Inquiry Officer, Hon'ble Mr. Justice Sh. Najam-ul-Hassan, in his report dated 17.01.2011 found the appellant guilty of misconduct and proposed that he be awarded major penalty of reduction to a lower post from the rank of District & Sessions Judge to Addl. District & Sessions Judge for one year. The disciplinary authority *viz.* the Administration Committee, Lahore High Court, Lahore disagreeing with the proposed punishment, issued show-cause notice dated 20.05.2011 to the appellant to explain as to why major penalty of dismissal from service be not imposed upon him. After affording opportunity of hearing to the appellant, the Authority imposed upon him major penalty of compulsory retirement *vide* impugned Notification dated 15.06.2011. Feeling aggrieved, the appellant through a petition under Rule 18 of the Punjab Civil Servants (Efficiency & Discipline) Rules, 1999 sought review of the Notification dated 15.06.2011. This review was not responded and, therefore, after lapse of 90 days the appellant filed the instant appeal before this Tribunal.

3. For the order to be proposed in this appeal we are not touching merits of the case.

4. It is admitted on all hands that the case of the appellant was put up for consideration in the meeting of the Administration Committee of the High Court on the 9th of June, 2011 headed by the Hon'ble Chief Justice and attended by other six Hon'ble Members. The Hon'ble Mr. Justice Sh. Najam-ul Hassan, one of the Hon'ble Members of the Administration Committee, in his capacity as the Enquiry Officer had already formed an opinion against the appellant and with all due respect

it cannot be said that he sat in the meeting of the Administration Committee with an unbiased mind. By his report dated 17.01.2011 he had pre-judged the issue against the appellant before participating in the meeting. It is a fundamental requirement of law that the doctrine of natural justice be complied with and the same has, as a matter of fact, turned out to be an integral part of administrative jurisprudence of this country. It is now well-settled that natural justice in relation to disciplinary proceedings means observance of procedural fairness before holding an officer guilty of misconduct. Procedural fairness demands not only that those whose interests may be affected by an act or decision should be given prior notice and an adequate opportunity to be heard, but also requires that the decision-maker or Authority should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the case presented by the parties. The rule against bias thus aims at preventing a consideration of the case being sham. The law disqualifies a person or Authority from adjudicating whenever circumstances point to a real possibility that his decision may be pre-determined in favour of one of the parties.

5. Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 is also of course relevant here which states that for *the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.* One of the essential requirements of fair trial is that the rights of a person be determined by an independent and impartial Court/Tribunal/Authority. The principle expressed in the maxim nemo judex in sua causa (no one should be a Judge in his own cause) refers not only to the fact that no one shall adjudicate his own case; it also refers to the fact that no one should adjudicate a matter in which he has formed an opinion adversely to the party. In order to give effect to the said two aspects of the principle, the concern is not only to prevent the distorting influence of actual bias, but also to protect the integrity of the decision-making process by ensuring that, however, disinterested the Court/Tribunal/Authority is in fact, the circumstances should not give rise to the appearance of bias. As has been famously said by Lord Hewart in the case of *R. v. Sussex Justice Ex.P Mc Carthy* (1924) 1 K.B 256 at 259 that justice should not only done, but should manifestly and undoubtedly be seen to be done.

6. It has been held in the cases of *R. v. Hertfordshire JJ.* (6 Q.B.753), *R. v. Middlesex JJ.* (1 QBD 173) *R. v. Lond.* C.C. (1892) 1.Q.B.190; and *R v. Lancashire* JJ (75 L.J.K.B 198) that the presence of one interested justice renders the Court improperly constituted, and vitiates the proceedings; it is immaterial that there was a majority in favour of the decision, without reckoning the vote of the interested justice.

7. In *Ghulam Rasul and others v. Crown* (PLD 1951 F.C. 62) a Legal Remembrance to the Government advised the Crown to file an appeal against an order of acquittal. Subsequently after he was appointed as Judge of the High Court,

the appeal was decided by a Bench of which he was a member. In these circumstances it was held that the impropriety in the constitution of the Bench was not a mere irregularity but an illegality and that it was highly undesirable for a judicial officer whatever be his rank or position that he should act judicially in a case in which he had formed an opinion adversely to the party against whom he had directed a prosecution or institution of an appeal or review and that nothing should be allowed to happen in a case which may give rise to a reasonable apprehension to an accused person that he would not or did not have fair trial.

8. The learned Division Bench of the Lahore High Court in the case of *Mian Muhammad Abdullah, District Manager, Government Transport Service, Lyallpur v. The Road Transport Corporation, Lahore through its Secretary, etc*. (PLD 1964 (W.P) Lahore 743) has observed that if one of the members of a tribunal is biased or, which is the same thing, has pre-judged the issue against a party, it is bound to cause reasonable apprehension in the mind of the party that he is not likely to get a fair and impartial deal at the hands of tribunal. If one of the authority or any one of the authorities hearing a case has any pecuniary or otherwise substantial interest or is biased, the defect goes to the root of the constitution of the tribunal which becomes improperly constituted.

9. The Court of Appeal in the case of Locabail (U.K) Ltd. v. Bayfield Properties Ltd. (200 Q.B. 451) upon a detail analysis of decision in R.v. Gough (1993 AC 646) together with Dimes' case (3 House of Lords Cases 759), Pinochet case [ (2001) 161 I AC 119], J.R.L; exp. C.J.L; Re [(1986) 161 LAW NOTES 342] and President of the Republic of South Africa v. South African Rugby Fortbal Union [(1999) 4SA 147] stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything will depend upon facts which may include the nature of the issue to be decided. It further observed:---

"By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the case of the case; or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to through doubt on his ability to try the issue with an objective judicial mind (see Vakuta v. Kelly); or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues

before him. The mere fact that a Judge, earlier in the same or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."
(underlining is for emphasis)

10. In view of the above discussion we hold, with all due respect, that the Enquiry Officer could not participate in the meeting of the Administration Committee of the High Court held on the 9th of June, 2011, in which the case of the appellant was considered. Presence of the Inquiry Officer in the said meeting was not a mere irregularity but an illegality which vitiated the whole proceedings culminated in the impugned order retiring the appellant compulsorily from service.

11. In the sequel, while setting aside the impugned Notification No. 151/RHC/D&SJJ, dated 13th June, 2011, this appeal is accepted and the Registrar of the Lahore High
Court is directed to place the matter before the Authority *i.e.* (Administration Committee) for reconsideration of the case of the appellant for a fresh decision.

Service appeal accepted.

**K.L.R. 2016 Civil Cases 128**
**[Lahore]**
***Present:* SHAHID WAHEED and ALI AKBAR QURESHI, JJ.**
**Muhammad Iqbal Khan**
***Versus***
**Mst. Farhat Nisa**

RFA No. 214 of 2011, decided on 17th February, 2016.

CONCLUSION
(1) It is essential for the plaintiff to have examined at least two attesting witnesses of the agreement to sell in order to prove its execution; and, to get a decree for its specific performance.

**(a) Transaction of pardahnashin lady---**
---Onus of proof---Principle of law---Burden of proof in respect of genuineness of a transaction with an ignorant/illiterate/pardha observing lady and a document allegedly executed by such a lady lies on the person who claims benefit from the transaction or under the document--- The beneficiary of a document is legally obliged to prove and satisfy the Court firstly, that the document was executed by an ignorant/illiterate/pardha observing lady; secondly, that she had complete knowledge and full understanding about the contents of the document; thirdly, that document/deed was read over to her and terms of the same were adequately explained to her; and, fourthly, that she had independent and disinterested advice in the matter before entering into the transaction and executing the document. [PARDANASHIN LADY TRANSACTION]
(Para 14)
Ref: PLD 1990 SC 642, 2001 SCMR 609, 2004 SCMR 1259, 2013 SCMR 868.
AGREEMENT TO SELL --- (Non-production of marginal witnesses)

**(b) Civil Procedure Code (V of 1908)---**
---S. 96---Specific Relief Act, 1877, S. 12---Qanun-e-Shahadat Order, 1984, Arts. 17, 79---Agreement to sell---Suit for specific performance---Ex parte evidence---Non-production of marginal witnesses---Trial Court dismissed suit---Appeal---Pleadings and evidence---Assertion was that there was no denial to execution of agreement to sell in question and therefore, appellant/plaintiff was not required to produce attesting witnesses of agreement to sell---Validity--- A decree could not be granted without taking evidence simply on defendant's non-appearance and upon verification in plaint---In instant case, there was no statement of respondent-defendant as he had not appeared before Trial Court and therefore, it could not be said that agreement to sell was not specifically denied relieving appellant to prove the same by calling its two attesting witnesses---Appellant had not produced the attesting witnesses of agreement to sell and therefore, Trial Court was justified in declining to issue decree---In instant case, appellant was beneficiary of alleged

agreement to sell and thus, he was required to satisfy the stated principle of law to get decree as prayed for in plaint---Said omission was fatal and disentitled appellant to get a decree for specific performance---RFA dismissed. [EXECUTION OF AGREEMENT TO SELL]
(Paras 3, 4, 5)
Ref: PLD 1990 SC 642, 2001 SCMR 609, 2004 SCMR 1259, 2013 SCMR 868, PLD 2015 SC 187.
اگرچہ یکطرفہ شہادت تھی تاہم مبینہ اقرار نامہ بیع کے ثبوت میں گواہان حاشیہ پیش نہ کئے گئے تھے۔
ٹرائل کورٹ نے درست طور پر دعوی تعمیل مختص خارج کیا۔ ہائیکورٹ نے اپیل خارج کر دی۔

[Though *ex parte* evidence was recorded but marginal witnesses were not produced in proof of alleged agreement to sell. Trial Court had rightly dismissed suit for specific performance. High Court dismissed appeal].
*For the Appellant:* Mian Muhammad Ilyas and Muhammad Nawaz, Advocates.
*For the Respondent:* Nemo.
*Date of hearing:* 17th February, 2016.

**JUDGMENT**

**SHAHID WAHEED, J. ---** This first appeal under Section 96, CPC arises from a suit which was instituted by the appellant to get a decree for specific performance of an agreement to sell dated 28.02.1996 (Ex.P1). The said agreement related to the sale of plot No. 868, Block R-1, M.A. Johar Town, Lahore; and, it was attested by two persons *i.e*. Najam Alam Siddiqui and Javed Mirza. Non- compliance of the terms and conditions of the alleged agreement to sell (Ex.P1) was the cause of action to institute the above-said suit in which the respondent had not appeared and thus was proceeded against *ex parte vide* order dated 06.03.2009. The appellant produced *ex parte* evidence. The appellant got himself examined as PW-1 and produced Muhammad Azhar Iqbal as PW-2. In documentary evidence the appellant tendered original agreement to sell (Ex.P1), site plan (Ex.P2), general power-of-attorney (Ex.P3) and some other documents, including general attorney (Ex.P4 to Ex.P7). Since the appellant had failed to produce attesting witnesses of the alleged agreement to sell (Ex.P1), the learned Trial Court dismissed the suit *vide* judgment and decree dated 19.01.2011. Hence, this appeal.

2. According to Article 17 of the Qanun-e-Shahadat, 1984 an agreement to sell requires compulsorily attestation by two witnesses, whereas Article 79 *ibid* ordains that if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses are called for the purpose of proving its execution. The conjoint reading of the aforesaid two Articles makes it clear that it is essential for the plaintiff to have examined at least two attesting witnesses of the agreement to sell in order to prove its execution; and, to get a decree for its specific performance. This is exactly the same which was held by the Hon'ble Supreme Court of Pakistan in the case of *Farzand Ali v. Khuda Bakhsh and others* (PLD 2015 SC 187).

3. We confronted the appellant's counsel with the afore-noted principle of law and asked as to how the appellant without producing two attesting witnesses of alleged agreement to sell (Ex.P1) could claim a decree as prayed for in the plaint. In response to said query, he submitted that: (a) since the respondent/defendant had not appeared before the learned Trial Court, there was no denial to the execution of agreement to sell (Ex.P1) and, therefore, the appellant by virtue of proviso to Article 79 of the Qanun-e-Shahadat, 1984 was not required to produce attesting witnesses of the agreement to sell (Ex.P1); and, (b) the evidence available on record was sufficient to decree the suit. The above arguments sans merit. It is an elementary principle, which forms the basis of all legal procedure, that no litigant is entitled to obtain relief form a Court unless he establishes to the satisfaction of the Court that his claim is well founded. The proviso to Article 79 of the Qanun-e-Shahadat, 1984 does not dispense with altogether proof of the document and claim. If a document is taken to be executed and proved simply because defendant does not appear and deny it, it may follow that every suit may be decreed against the defendant when he does not appear and deny the claim. But a decree cannot be granted without taking evidence simply on defendant's non-appearance and upon verification in the plaint. According to proviso to Article 79 of the Qanun-e-Shahadat, 1984 it is not necessary to call attesting witnesses in proof of the execution of any document, not being Will, which has been registered in accordance with the provisions of the Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied. This proviso does not contemplate admission of execution of document by implication. It attracts where, there is no specific denial to the execution of registered document. A document can be said to be admitted or specifically denied only when defendant appears before the Court and makes statement to this effect. The proviso to Article 79 of the Qanun-e-Shahadat, 1984, therefore, does not apply where there is no defendant's statement at all. In the present case, there was no statement of the respondent-defendant as he had not appeared before the learned Trial Court and, therefore, it could not be said that the agreement to sell (Ex.P1) was not specifically denied relieving the appellant to prove the same by calling its two attesting witnesses. Even otherwise, the agreement to sell (Esx.P1) being not registered in accordance with provisions of the Registration Act, 1908 was extraneous to the proviso to the Article 79 of the Qanun-e-Shahadat, 1984. Thus, absence of the respondent-defendant did not absolve the appellant to prove the execution of the agreement to sell (Ex.P1) by calling its two attesting witnesses. The appellant had not produced the attesting witnesses of the agreement to sell (Ex.P1) and, therefore, the learned Trial Court was justified in declining to issue decree.

4. There is another aspect of the matter which has dissuaded us to grant relief as prayed for in the plaint. This is a case where appellant sought a decree for specific performance of an agreement to sell dated 28.02.1996 (Ex.P1) which was allegedly executed by the respondent lady. It is by now well-established principle of law that burden of proof in respect of genuineness of a transaction with an

ignorant/illiterate/pardha observing lady and a document allegedly executed by such a lady lies on the person who claims benefit from the transaction or under the document. The beneficiary of a document is legally obliged to prove and satisfy the Court: firstly, that the document was executed by an ignorant/illiterate/pardha observing lady; secondly, that she had complete knowledge and full understanding about the contents of the document; thirdly, that document/deed was read over to her and terms of the same were adequately explained to her; and, fourthly, that she had independent and disinterested advice in the matter before entering into the transaction and executing the document. In this regard reference may be made to the cases of *Janat Bibi v. Sikandar Ali and others* (PLD 1990 SC 642), *Amirzada Khan and another v. Itbar Khan and others* (2001 SCMR 609), *Khawas Khan through Legal Heirs v. Sabir Hussain Shah and others* (2004 SCMR 1259) and *Mian Allah Ditta through L.Rs v. Mst. Sakina Bibi and others* (2013 SCMR 868). In the case on hands the appellant was the beneficiary of the agreement to sell dated 28.02.1996 (Ex.P1) and thus, he was required to satisfy the afore stated principle of law to get the decree as prayed for in the plaint. Neither the appellant nor his witness, *i.e*. Muhammad Azhar Iqbal (PW2) in their evidence had stated anything about the compliance of afore-stated principle of law. This omission was fatal and disentitled the appellant to get a decree for specific performance of the alleged agreement to sell dated 28.02.1996 (Ex.P1).

5. In the sequel, this appeal being bereft of any merit is dismissed with no order as to costs.

RFA dismissed.

**2017 Y L R 182**
**[Lahore]**
**Before Shahid Waheed, J**
**PROVINCE OF PUNJAB through District Co-ordination Officer, Gujrat and others---Petitioners**
**Versus**
**Malik GHULAM SARWAR AWAN and others---Respondents**

W.P. No.765 of 2011, heard on 19th November, 2015.

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

----S. 54---Civil Procedure Code (V of 1908), O. XXI, R. 32 & O. XXXIX, R.2---Suit for permanent injunction---Disobeying of decree---Enforcement, procedure of---Suit filed by respondents (plaintiffs) was disposed of on the basis of statement made by petitioners (defendants)---Later on, respondents (plaintiffs) filed application under O. XXI, R. 32, C.P.C., to initiate appropriate proceedings against petitioners (defendants) for non-compliance of the decree---Trial Court framed issues and during recording of evidence directed petitioners (defendants) to issue a cheque in favour of respondents (plaintiffs) but petitioners (defendants) did not comply with the order resultantly proceedings under O. XXXIX, R. 2, C.P.C., were initiated by Trial Court---Order passed by Trial Court was maintained by lower appellate court---Validity---Divergent stances of parties led Trial Court to frame issues---Trial Court without returning findings regarding issues framed by it could neither direct petitioners (defendants) to pay any amount to respondents (plaintiffs) nor could initiate any proceedings under O.XXXIX, R. 2, C.P.C., for recovery of any amount---Trial Court while passing orders acted in exercise of its jurisdiction illegally and with material irregularity, which fact was not appreciated by lower appellate court and it fell in error while maintaining the order passed by Trial Court---High Court set aside order passed by both the courts below as the same were passed without lawful authority and of no legal effect---High Court directed Trial Court to decide application of respondents (plaintiffs) under O. XXI, R. 32, C.P.C., after recording complete evidence and in accordance with law---Constitutional petition was allowed in circumstances.

Muhammad Arif Raja, Addl. A.G. for Petitioners.
Malik Amjad Hussain, Mehdi Khan Chohan and Muhammad Mehmood Ch. for Respondents Nos. 1 and 2.
Date of hearing: 19th November, 2015.

## JUDGMENT

**SHAHID WAHEED, J.---**This petition has been filed with a prayer to set aside orders dated 03.02.2009 and 25.11.2010 of the learned Trial Court; and order dated 21.12.2010 of the learned Additional District Judge, Gujrat, with a direction to the learned Trial Court, Gujrat, to proceed to record evidence of the parties and to decide the matter in accordance with law.

2. This petition has arisen in the background that on 19.03.2005 the respondents Nos.1 and 2 instituted a suit for permanent injunction so as to restrain the present petitioners from interfering in their possession and to raise illegal construction over the suit property. The present petitioners contested the suit by filing a written statement. However, on 04.04.2005 the Executive Engineer, Highway, District Gujrat/petitioner No.3 appeared before the learned Trial Court and got recorded his statement to the effect that save legally acquiring the land neither any interference in the possession of respondents Nos.1 and 2 would be made nor any construction would be raised over the suit property. On the basis of said statement the learned Trial Court vide order dated 04.04.2005 disposed of the suit. The said order reads as under:--

3. After a lapse of one month, that is, on 25.05.2005 the respondents Nos.1 and 2 filed an application under Order XXI, Rule 32, C.P.C. for initiating appropriate proceedings against the present petitioners. It was asserted in the said application that the present petitioners had violated the undertaking recorded in the order dated 04.04.2005. The petitioners resisted the said application by filing reply. In view of divergent stances of the parties the learned Trial Court vide order dated 06.02.2006 framed following issues and directed the parties to adduce evidence in support of their respective claims.

> 1. Whether this application is false frivolous and liable to be dismissed? OPR
>
> 2. Whether the contempt has been committed by respondents as respondents have acted with consent of petitioners? OPR
>
> 3. Whether respondents have violated the order of Court dated 4.4.05? If so, its effect? OPA
>
> 4. Whether application is liable to be accepted as prayed for? OPA
>
> 5. Relief.

4. During the course of recording evidence the learned Trial Court vide order dated 03.02.2009 directed the petitioners to issue a cheque of Rs.3,066,000/- in favour of respondents Nos.1 and 2. The order dated 03.02.3009 reads as under:--

5. The petitioners did not comply with the order dated 03.02.2009 and resultantly the learned Trial Court vide order dated 25.11:2010 issued a show cause notice to the petitioners requiring them to pay above said amount without further loss of time otherwise to explain as to why the said amount be not recovered through process of law as provided under Order XXXIX, Rule 2, C.P.C. The petitioners assailed the said order through a revision petition before the learned Additional District Judge, Gujrat. This revision petition was dismissed vide order dated 21.12.2010. Hence, this petition.

5.(sic) Learned Additional Advocate General submits that the impugned orders are illegal and void ab initio; that the proceedings under Order XXI, Rule 32, C.P.C. could be initiated only where the parties against whom a decree had been passed whereas in the present case no such decree against the petitioners was passed and in fact the petitioner No.3 had made a statement and on the said statement the suit was disposed of; and, that the learned Trial Court without recording evidence could not pass the impugned order. On the other hand, learned counsel for respondents Nos.1 and 2 have vehemently opposed this petition. It is contended that the present petitioners in their written statement had admitted the claim of the respondents Nos.1 and 2 and, thus, they could not be allowed to wriggle out the admission/ undertaking.

6. I have heard the learned counsel for the parties and perused the record. It is an admitted fact that the suit for permanent injunction of respondents Nos.1 and 2 was disposed of by the learned Trial Court vide order dated 04.04.2005, reproduced hereinabove, on the statement of petitioner No.3. The respondents Nos.1 and 2 filed an application under Order XXI, Rule 32, C.P.C. with the plea that the present petitioners had violated the order dated 04.04.2005. The assertions made in the application were traversed by the present petitioners. The divergent stances of the parties led the learned Trial Court to frame issues. The learned Trial Court, without returning findings qua the issues framed by it, could neither direct the petitioners to pay any amount to respondents Nos.1 and 2 nor initiate any proceedings under Order XXXIX Rule 2, C.P.C. for recovery of any amount. It is thus clear that the learned Trial Court while passing the orders dated 03.02.2009 and 25.11.2010 acted in exercise of its jurisdiction illegally and with material irregularity. This fact was also not properly appreciated by the learned Revisional Court and, thus, it also fell into error while passing the impugned order dated 21.12.2010.

7. In the sequel this petition is accepted, orders dated 03.02.2009 and 25.11.2010 of the learned Trial Court and the order dated 21.12.2010 of the learned Additional District Judge, Gujrat are set aside and declared to have been passed without lawful authority and of no legal effect. Resultantly the learned Trial Court is directed to decide the application of the respondents Nos.1 and 2 under Order XXI, Rule 32, C.P.C. after recording complete evidence and in accordance with law.

MH/P-40/L Petition allowed.

**2017 Y L R 224**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD ARIF---Petitioner**
**Versus**
**Haji WAHEED-UL-HAQ---Respondent**

C.R. No.3765 of 2014, decided on 22nd December, 2014.

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

----S. 42---Suit for declaration---Benami transaction---Essential elements---Motive for benami transaction---Contention of plaintiff was that suit property was got transferred in the name of defendant as he was government servant---Suit was dismissed concurrently--- Validity---Essential elements to establish benami transaction were agreement either express or implied between the ostensible owner and the purchaser for the purchase of property in the name of ostensible owner for the benefit of the person who had to make payment of the consideration and transaction actually entered between the real purchaser and seller to which ostensible owner was not party---Plaintiff could not prove agreement with regard to transfer of the suit property in his name by the defendant from the evidence available on record---No specific motive for transfer of suit land in favour of defendant was on record---If motive for benami transaction was to make assets through money earned illegally, the same could not be valid---Discretionary and equitable jurisdiction under S. 42 of Specific Relief Act, 1877 could not be exercised in favour of plaintiff to allow him to reap benefit of his illegal gains---Plaintiff was in government service at the time of transaction of suit property and could not get the suit property transferred in his own name---Plaintiff having not proved the nature of transaction as benami suit was rightly dismissed---Plaintiff who could not explain the source of his income, could not purchase suit property---No illegality or procedural irregularity was pointed out in the judgments and decrees passed by the courts below---Revision was dismissed in limine.
Ch.Ghulam Rasool v. Mrs. Nusrat Rasool and 4 others PLD 2008 SC 146 rel.

**(b) Benami transaction---**

----Essential elements---Essential elements to establish benami transaction were agreement either express or implied between the ostensible owner and the purchaser for the purchase of property in the name of ostensible owner for the benefit of the person who had to make payment of the consideration and transaction actually entered between the real purchaser and seller to which ostensible owner was not party
Ch.Ghulam Rasool v. Mrs. Nusrat Rasool and 4 others PLD 2008 SC 146 rel.
Javed Mahmood Sindhu for Petitioner.

## ORDER

**SHAHID WAHEED, J.---**This is a civil revision under Section 115, C.P.C., by the plaintiff against the judgment and decree dated 3.12.2014 passed by the learned Addl. District Judge, Faisalabad (camp at Samundri) confirming the judgment and decree dated 12.4.2012 of the learned Trial Court whereby his suit for declaration along with permanent injunction was dismissed. The case of the plaintiff was that the suit land falling in Khata No. 25 Khatuni Nos. 42 and 43 measuring 82 Kanals 16 Marlas situated in Chak No. 50/GB Tehsil Samundri, District Faisalabad was purchased by him from Rehmat Ali and Yousaf Ali for a consideration of Rs.2,500,000/-; that he paid Rs. 1,700,000/- through bank draft No. OP 09333188 dated 10.16.2004 and Rs.800,000/- in cash in presence of the witnesses; that owing to personal reason, that is, being Government employee he got the sale-deed No. 622/1 dated 10.6.2004 (Ex.P1) in the benami of his real brother-defendant who was living abroad at that time; that it was settled between the parties that as and when required the defendant would get the suit land transferred in plaintiff's name; that defendant also got executed general power of attorney No. 228/4 dated 26.5.2005 (Ex.P2) in his favour; that the said power of attorney was illegally cancelled vide deed No. 110/4 dated 15.3.2007; and, that the defendant had illegally and without any lawful justification refused to transfer the suit land in his name.

2. The defendant contested the suit by filing a written statement with the assertion that all the sale consideration and requisite expenses were paid by him through his own bank account and he handed over the possession of the suit land to his brother Javed Iqbal (PW-4) while going abroad and, that the general power of attorney was rightly cancelled due to mala fide and misconduct on the part of the plaintiff. He, therefore, prayed for dismissal of the suit filed by the plaintiff.

3. On divergent pleadings the learned Trial Court framed 5 issues and ultimately on his analysis of the evidence dismissed the suit vide judgment and decree dated 12.4.2012. The plaintiff assailed the above said judgment and decree through an appeal under Section 96, C.P.C. before the learned Addl. District Judge, Faisalabad (Camp at Samundri). The said appeal was dismissed vide judgment and decree dated 3.12.2014. Hence, this petition.

4. It has been argued on behalf of the petitioner that the reasons given by the learned courts below are not borne out by the evidence on record; and, that the judgments and decrees of the courts below suffer from misreading and non-reading of evidence and, therefore, the same are not sustainable in the eye of law. I have examined the evidence and I am satisfied that there is no substance in the contentions raised by the petitioner's counsel.

5. The Hon'ble Supreme Court of Pakistan in the case of Ch.Ghulam Rasool v. Mrs. Nusrat Rasool and 4 others (PLD 2008 SC 146) has held that two essential elements

must exist to establish the benami status of the transaction. The first element is that there must be an agreement, express or implied, between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the person who has to make payment of the consideration; and, second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party. In the instant case the plaintiff in paragraph No. 3 of the plaint had stated that it was settled between the parties that as and when required, the defendant would get the suit land transferred in plaintiff's name. This agreement is not proved from the evidence available on record. Even the plaintiff while appearing before the learned Trial Court as PW-1 had not stated a single word about the said agreement. This fact alone is sufficient to disbelieve the allegations made in the plaint and to uphold the judgments and decrees of the courts below.

6. The other question for consideration is the motive for benami transaction. The plaintiff in his plaint had not stated any specific motive for transfer of suit property in favour of the defendant. It was maintained that it was on account of "personal reason". The personal reason, however, was explained by the plaintiff when he appeared before the learned Trial Court as PW-1. In his examination in chief the plaintiffs stated that suit property was got transferred in the name of the defendant as he was a government servant. It is a common practice that where public servant would indulge in corruption and corrupt practices and makes assets through money earned illegally he would never purchase property in his own name to avoid charges of corruption. If that was the motive for benami transaction then it was not valid and the discretionary and equitable jurisdiction under Section 42 of the Specific Relief Act, 1877 could not be exercised in favour of the plaintiff so as to allow him to reap benefit of his illegal gains. Notwithstanding above, the motive as explained by the plaintiff is not convincing. The plaintiff in his statement had stated that his three sons were adult/major at the time of execution of sale-deed. The plaintiff had not explained the reason for ignoring his sons while transferring the suit property in favour of the defendant. It is also noted that at the time of recording of statement as PW-1 the plaintiff was in government service. It means that the factor which precluded the plaintiff to get the property in his own name was in existence at the time of institution of the suit. Therefore, the plaintiff on that account should have not made an effort to get the suit property in his own name. This is not the case here. In fact the motive for benami transaction in the instant case shrouds in mystery. The plaintiff could not discharge the onus of proving the benami transaction and, therefore, the suit was rightly dismissed by the learned Trial Court.

7. The next question for consideration was to find out the source of the consideration. The plaintiff who is an employee of LDA/WASA in BPS-10 had not explained the source of his income. He, however, has admitted that his tax is deducted from his salary and he does not have any other National Tax Number. In these attending circumstances it is not believable that an employee of BPS-10 could

purchase the suit property amounting to Rs.250,000/- from his only source of income, that is, salary. Thus, this factor also remained unproved.

8. In view of above, the judgments and decrees of the courts below do not call for any interference by this Court as the same do not suffer from any illegality or procedural irregularity. This petition being devoid of any merits is dismissed in limine.

ZC/M-48/L Revision dismissed.

**2017 C L C 66**
**[Lahore]**
**Before Shahid Waheed and Ali Akbar Qureshi, JJ**
**ANWAR-UL-HAQ CHAUDHRY----Appellant**
**Versus**
**DISTRICT OFFICER (REVENUE), NAROWAL and 4 others----Respondents**

R.F.A. No.275 of 2013, heard on 26th September, 2016.

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

----S. 18---Reference---Limitation, determination of---Jurisdiction of court---Principle---Once Collector had made reference, the court would be incompetent to go beyond the reference to see whether petition under S.18 of Land Acquisition Act, 1894, was filed within time prescribed in proviso to S.18 of Land Acquisition Act, 1894.
Government of West Pakistan (Now Government of N.-W.F.P.) through Collector, Peshawar v. Arbab Haji Ahmed Ali Jan and others PLD 1981 SC 516 rel.

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

----Ss. 18, 30 & 31(2)---Acquisition of land---Reference to court---Landowner accepted compensation without any protest and a reference was filed for enhancing the same---Trial Court dismissed the reference on the ground that the same was barred by limitation--- Validity--- Landlord had accepted compensation without any protest and such aspect of the matter was important and could not be ignored---Landowner having received awarded compensation without protest had no lawful right even to file reference under S.18 read with Ss.30 & 31(2) of Land Acquisition Act, 1894---High Court set aside judgment and decree passed by Trial Court as the matter of landlord's receiving the compensation without protest was not considered by Trial Court---Matter was remanded for decision afresh.

Government of N.-W.F.P. and others v. Akbar Shah and others 2010 SCMR 1408 ref.
Muhammad Zain Qazi for Appellant.
Naveed Saeed Khan, Addl. A.G. for Respondents.
Date of hearing: 26th September, 2016.

**JUDGMENT**

**SHAHID WAHEED, J.---** This appeal under Section 54 of the Land Acquisition Act, 1894 (herein after called the Act) calls into question the judgment dated 07.12.2012 of the learned Senior Civil Judge, Narowal whereby the reference filed by the appellant for enhancement of compensation for his land, which was acquired for the construction of District Headquarter Hospital, Narowal, was dismissed.

2. The background of the case is that on 01.05.1999 the District Collector, Narowal published under Section 4 of the Act a notification that 119 kanals, 15 marlas of land was intended to be acquired for the purpose of construction of District Headquarter Hospital, Narowal. Consequent upon the said notification the Land Acquisition Collector initiated process to make his award determining the compensation for the acquired land. During said process the present appellant moved this Court through a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 i.e. Writ Petition No.7368 of 2000 with a prayer that a direction be issued to the Land Acquisition Collector to look into his grievance/request while determining the price of the land. This petition was disposed of vide order dated 28.04.2000 with the observation that the contention/evidence of the appellant as to the quantum of compensation, would be duly considered by the competent authority while assessing the compensation for the appellant's land. Pursuant to the said order the appellant along with another land owner, i.e. Professor Inam son of Jan Muhammad appeared before the Land Acquisition Collector and led evidence for determination of compensation. The Land Acquisition Collector after recording evidence dismissed the objections raised by the land owners including the present appellant and made the award (Ex.D-16) under Section 11 of the Act. After the announcement of award, the present appellant made an application dated 21.04.2001 (Ex.D-17) before the Assistant Commissioner/Collector, Narowal for the payment of compensation. This application was allowed and the appellant accordingly vide voucher No.31 (Ex.D-18) received the compensation without any protest.

3. Before proceeding further it is worth mentioning here that the other land owner, that is, Muhammad Inam being aggrieved by the compensation determined by the Land Acquisition Collector filed a reference under Section 18 of the Act. This reference was dismissed by the Referee Court vide judgment dated 16.03.2006 (Mark-A). On the contrary, the appellant on 27.02.2001 instituted a suit for permanent injunction against the respondents. This suit was, however, dismissed as withdrawn vide order dated 18.11.2006. After the dismissal of the said suit, the appellant on 15.01.2007 for enhancement of compensation for his land measuring 09 kanals, 10 marlas filed a petition under section 18 of the Act before the Collector praying therein to refer the matter to the learned Senior Civil Judge. Since this petition was filed after 06 years, the Collector sought opinion of the Executive District Officer (Law) as to whether the same was within time and maintainable? The record does not show as to whether the Executive District Officer (Law) had made any opinion; and, as to whether the Collector allowed the petition through any order. This fact was not adverted to by the learned Trial Court while passing the impugned judgment. The claim set up in the reference was, however, controverted by the present respondents. On pleadings the learned trial Court framed following issues and directed the parties to adduce evidence in support of their respective claims:--

**ISSUES:**

1. Whether the application is within time? OPA.

2. Whether the award in dispute is liable to be modified on account of improper assessment of compensation? OPA.

3. Relief.

4. In compliance with the direction of the learned Trial Court parties to the reference led oral as well as documentary evidence in support of their respective claims. On consideration of the matter the learned Senior Civil Judge while returning findings in respect of issue No.1 held that the reference filed by the appellant was beyond the period of limitation as prescribed in Section 18 of the Act, therefore, the same was barred by time. On the basis of said findings the reference was dismissed being barred by time vide judgment dated 07.12.2012.

5. The appellant through this appeal has assailed the judgment dated 07.12.2012 on the ground that the Trial Court had no jurisdiction to dismiss the reference under Section 18 of the Act on the ground of limitation. We confronted the learned Additional Advocate General with the said objection and asked as to how the learned Trial Court could dismiss the reference under Section 18 of the Act on the ground of limitation. He could not give any plausible reply. After hearing both sides we find substance in the above noted ground. It is now well settled that once the Collector has made reference to the Court, the Court would be incompetent to go beyond the reference to see whether the petition under Section 18 of the Act had been filed within time as prescribed in proviso to Section 18 of the Act. In this regard reference may be made to the case of "Government of West Pakistan (Now Government of N.W.F.P.) through Collector, Peshawar v. Arbab Haji Ahmed Ali Jan and others" (PLD 1981 Supreme Court 516).

6. Notwithstanding above there is another aspect of the matter which has engaged our attention. In the present case the Land Acquisition Collector after evaluating the evidence led by the appellant determined the compensation of the land vide his award (Ex.D-16). Subsequently, the present appellant on 21.04.2001 moved an application (Ex.D-17) before the Collector for the payment of said compensation. It is evident from the evidence that the appellant received the compensation without any protest vide voucher No. 31 (Ex.D-18). We also asked learned counsel for the appellant as to whether any protest was raised by the appellant while receiving the compensation. He replied in the negative. This aspect of the matter was important and, therefore; could not be ignored particularly in view of the principle settled by the Hon'ble Supreme Court of Pakistan in the case of "Government of N.W.F.P. and other v. Akbar Shah and others" (2010 SCMR 1408). It was held in the said precedent case that land owner after having received awarded compensation without

protest had no lawful right even to file reference under Section 18 read with Sections 30 and 31(2) of the Act.

7. We confronted learned counsel for the parties with the principle settled by the Hon'ble Supreme Court of Pakistan in the case of Akbar Shah (Supra) and sought their assistance for the order to be proposed in this appeal. Learned counsel for the parties jointly submit that since the above noted aspect of the matter was neither considered by the learned Trial Court nor an opportunity was given to the parties to explain their position, it would be appropriate to remit the case to the learned Trial Court with the direction to decide the same afresh in accordance with law. It is also jointly submitted that while remitting the matter the learned Trial Court be also directed to record its findings on the following questions/issues:-

(a) Whether the Collector had decided the appellant's petition under Section 18 of the Act through any order?

(b) Whether the Collector had sent the reference to the Court through any letter/memorandum etc.?

(c) Whether the appellant after having received awarded compensation without protest had any lawful right to claim enhancement in compensation?

8. In view of the joint request made by the learned counsel for the parties this appeal is allowed and judgment dated 07.12.2012 of the learned Senior Civil Judge, Narowal is hereby set-aside. Consequently the matter is remitted to the learned Senior Civil Judge, Narowal who shall decide the same afresh in accordance with law. The learned Trial Court is also directed to decide the above noted questions/issues (recorded in para 7 hereinabove) while deciding the reference under Section 18 of the Act. Parties shall appear before the learned Senior Civil Judge, Narowal on 04.11.2016. No order as to costs.

MH/A-99/L Case remanded.

**2017 C L C 70**
**[Lahore]**
**Before Shahid Waheed, J**
**MANZOOR HUSSAIN----Appellant**
**Versus**
**Haji KHUSHI MUHAMMAD----Respondent**

R.S.A. No.108 of 2006, heard on 21st May, 2015.

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

----Art. 129(g)---Withholding of best evidence---If best piece of evidence was withheld by party, it was to be presumed that said party had some sinister motive behind it---Presumption under Art.129(g) of Qanun-e-Shahadat, 1984 had to be drawn that said evidence if produced would have not been favourable to the party concerned.
Muhammad Rafique and others v. State and others 2010 SCMR 385 rel.

**(b) Contract Act (IX of 1972)---**

----S. 10---Contract---Scope---Where a contract was reduced in writing, not only it should be founded upon imperative elements of offer and acceptance but its proof was also dependent upon execution of contract by both contracting parties i.e. by signing or affixing their thumb impression so that it should reflect and establish their "consensus ad idem" which was the inherent and basic element of meeting of minds which connoted mutuality of assent and proved intention of parties.
Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

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

----S. 13---Agreement---Execution of---Requirements---Parties and witnesses though should execute document at the end, but parties must also sign each page if document was written out on more than one page.
N.S. Bindras' Conveyancing Draftsman and Interpretation of Deeds, 7th Edition, Delhi Law House, Delhi, 2008 322 rel.

**(d) Contract Act (IX of 1872)---**

----S. 13---Specific Relief Act (I of 1877), S.12---Specific performance of agreement---Party to agreement was required to bring on record evidence to connect two pages of document exhibited with each other---Failure of party to connect the pages---Effect---Such deficiency did not establish "consensus ad idem" and on basis of such type of document which was non-compliant of said principle of law, a decree for specific performance could not be issued.

Zafar Iqbal and others v. Mst. Nasim Akhtar and others PLD 2012 Lah. 386 rel.

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

----Art. 17(2)(a)---Agreement to sell, attestation of---According to Art.17(2)(a) of Qanun-e-Shahadat, 1984, agreement to sell was required to be attested by two male or one male and two female witnesses.

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

----Art. 79---Execution of agreement to sell---Proof---According to Art.79 of Qanun-e-Shahadat, 1984 agreement to sell could not be used as evidence until at least two attesting witnesses had been called for purposes of proving its execution, if there be two attesting witnesses alive and subject to process of court and capable of giving evidence.
Mst. Rasheeda Begum and others v. Muhammad Yousaf and others 2002 SCMR 1089 rel.

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

----Art. 79---"Attesting witness"--- Meaning---Attesting witness was person who in presence of executant of a document puts his signature or mark on it after he had seen executant or someone by executant's direction sign or affix his mark to it or after he had received from executant a personal acknowledgement of his signature or mark or his signature or mark of such other person.
Muhammad Tahir Chaudhry for Appellant.
Ch. Baleegh-uz-Zaman for Respondent.
Date of hearing: 21st May, 2015.

**JUDGMENT**

**SHAHID WAHEED, J.-** Unsuccessful plaintiff has brought this second appeal under Section 100 C.P.C. to challenge the judgment and decree dated 28.03.2006 of the learned District Judge, Gujranwala affirming the judgment and decree dated 31.01.2002 of the learned Trial Court whereby his suit was dismissed.
2. The appellant, Manzoor Hussain, on 24.11.1998 had brought a suit against respondent, Haji Khushi Muhammad, for possession of the suit property on the basis of agreement to sell dated 5.5.1998 (Ex.P1). It was maintained in the plaint that the respondent being an owner of a shop No.BX11-5S-43 vide agreement dated 5.5.1998 (Ex.P-1) sold the same to the appellant for a consideration of Rs.1,800,000/-; out of which an amount of Rs.1,200,000/- was paid; and, that remaining amount was agreed to be paid upto 5.11.1998. In response to summon the respondent entered appearance before the learned Trial Court and contested the suit by filing a written statement. The respondent in his written statement denied the

execution of agreement to sell dated 5.5.1998 (Ex.P-1). On pleadings issues were framed and evidence was led. After recording evidence the learned Trial Court dismissed the suit vide judgment and decree dated 31.01.2002. The appellant assailed the said judgment and decree through an appeal under Section 96, C.P.C. before the learned District Judge, Gujranwala. The first appeal could not evoke a favourable response and the same was dismissed vide judgment and decree dated 28.03.2006. Hence, this second appeal.

3. Learned counsel for the appellant has contended that two marginal witnesses of the agreement to sell dated 5.5.1998 (Ex.P-1) were produced before the learned Trial Court and from their statements the execution of agreement to sell stood proved; and, that the judgments and decrees of the learned courts below suffer from misreading and non-reading of evidence and, therefore, same are not sustainable in the eye of law. In support of above contention reference is made to the case of Ghanshamsing Tirathsing and another v. Muhammad Yacoob (AIR 1933 Sind 257), Muhammad Anwar v. Haji Muhammad Ismail and others (1992 MLD 860), Nazir Ahmad v. Muhammad Rafique (1993 CLC 257), Dil Murad and others v. Akbar Shah (1986 SCMR 306), Mst. Daulan v. Muhammad Hayat (2002 YLR 3247).
4. On the other hand, learned counsel for the respondent has vehemently opposed this appeal and submitted that the appellant had failed to prove the execution of the agreement and, therefore, judgments and decrees of the learned courts below warrant no interference by this Court.
5. The pivotal question in this case is as to whether the appellant was entitled to the decree for specific performance of the agreement dated 5.5.1998 (Ex.P-1) and as a result thereof to take possession of the suit property. In order to find out the answer to the said question, it is essential to first examine the features of the alleged agreement to sell dated 5.5.1998 (Ex.P-1). This document consists of two pages. The first page of the document (Ex.P-1) reads as under:-
The second page of the document (Ex.P.1) reads as follows:---
Perusal of the document (Ex.P-1) unfolds: (a) that its stamp papers were purchased from M. Sharif Chaudhary, Stamp Vendor; (ii) that according to statement of the said Stamp Vendor, written on the reverse of first page of the document, the stamp papers were sold to Khushi Muhammad; (iii) that its stamp papers do not bear the signatures or thumb impression of Khushi Muhammad on their reverse to show that the same were purchased by Khushi Muhammad; (iv) that it was drafted by Ch. Tayyab Tair Ahmad, Advocate; (v) its first page contains all the terms and conditions of sale but it does not bear the signatures or thumb impression of the vendor, vendee and the witnesses; (vi) its first page only bears the signatures of deed writer, Ch. Tayyab Tair Ahmad, Advocate; and, (vii) its second page does not contain any term and condition of sale but it bears the signature of vendor, vendee, witnesses and deed-writer. The execution of the document (Ex.P-1) was denied by Khushi Muhammad in his written statement. In these attending circumstances, the appellant being vendee was required to prove that: (a) the stamp-papers of the document (Ex.P-1) were purchased by Haji Khushi Muhammad; (b) the document

(Ex.P-1) consisted of two pages; (c) that on the first page of the document terms and conditions of sale were written; (d) that first page of the document was not signed by the vendor, vendee and witnesses; (e) that the second page of the document was signed by the vendor, vendee, witnesses and deed writer; and, (f) that the first page of the document was signed by deed writer. The primary witness to prove the above facts were the stamp vendor (M. Sharif Chaudhary); and, the deed writer (Ch. Tayyab Tair Ahmad, Advocate). Through the statement of the stamp-vendor and entries of his register the facts which could be proved were: the serial numbers of the stamp-papers; date of issuance/sale of stamp papers; purpose of sale of stamp papers; and, the name of the person to whom the stamp-papers of the document (Ex.P-1) were sold. On the other hand, the appellant by producing the deed-writer could prove that the document (Ex.P-1) consisted of two pages; that terms and conditions of the agreement to sell the suit property were drafted on the instructions of the parties; that he signed both pages of the document (Ex.P-1); and, that the parties to the agreement and witnesses signed the second page of the document (Ex.P-1). The said two persons were not produced. It means that best evidence to prove the valid execution of document was withheld. No explanation of the non-production of said two persons was furnished. This omission was fatal to the case of the appellant as it is a settled principle of law that if a best piece of evidence is withheld by a party, then it is to be presumed that said party had some sinister motive behind it and a presumption under illustration (g) of Art.129 of the Qanun-e-Shahadat, 1984 has to be drawn that the said evidence if produced, it would have not been favourable to the party concerned [See Muhammad Rafique, etc. v. State and others (2010 SCMR 385). The appellant produced two witnesses, that is, Mehmood-ul-Hassan (PW-1); and, Muhammad Ijaz Butt (PW-2). The appellant as his own witness appeared before the learned Trial Court as PW-3. None of the appellant's witnesses in their respective, statements had stated a single word about the above said facts. In these attending circumstances, the appellant was not entitled to the discretionary relief; and, his suit for specific performance of the agreement (Ex.P-1) could not be decreed.

6. Notwithstanding above, it is settled principle of law that where a contract is reduced into writing, not only should it be founded upon the imperative elements of offer and acceptance, but its proof is also dependent upon the execution of the contract by both the contracting parties i.e. by signing or affixing their thumb impression. So that it should reflect and establish their "consensus ad idem", which obviously is the inherent and basic element of the meeting of the minds, which connotes the mutuality of assent, and reflects and proves the intention of the parties thereto [See Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187)]. In the present case, the first page of the document (Ex.P-1) is signed by the deed-writer only whereas its second page which bears the signatures of the vendor, vendee and deed writer does not contain the terms and conditions of sale. Although the parties and the witnesses should execute the document at the end, but parties must also sign each page if the document is written out on more than., one page. [See N.S. Bindras' Conveyancing Draftsman and Interpretation of Deeds, 7th

Edition, Delhi Law House, Delhi, 2008 at page 322]. This was not done and, therefore, appellant was required to bring on record the evidence to connect the two pages of the document (Ex.P-1) with each other. The appellant had not produced any evidence to connect the two pages of the document (Ex.P-1) with each other and this deficiency does not establish "consensus ad idem". Thus, on the basis of such type of document, which is non-compliant to the said principle of law, a decree for specific performance could not be issued. This view finds support from the case of Zafar Iqbal and others v. Mst. Nasim Akhtar and others (PLD 2012 Lah. 386) which has been approved by the Hon'ble Supreme Court of Pakistan in Civil Petition No. 391-L of 2012 vide order dated 22.3.2013.

7. There is another aspect of the matter which has engaged my attention; and, that is, the requirements of Articles 17 and 79 of the Qanun-e-Shahadat, 1984. Agreement to sell as per Article 17(2)(a) of the Qanun-e-Shahadat, 1984 is required to be attested by two male or one male and two female witnesses, as the case may be; and, the same according to Article 79 ibid cannot be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence [See Mst. Rasheeda Begum and others v. Muhammad Yousaf and others (2002 SCMR 1089)]. In the case on hands, the document (Ex.P-1) bears the signatures of two witnesses, that is, Mehmood-ul-Hassan (PW-1) and Muhammad Ijaz Butt (PW-2). An ancillary question arises as to whether the said two witnesses may be called "attesting witnesses" of the document (Ex.P-1). An attesting witness is a person who in the presence of the executant of a document puts his signature or mark on it after he has seen the executant or someone by his (executant's) direction sign or affix his mark to it, or after he has received from the executant a personal acknowledgement of his signature or mark or of his signature or mark of such other person. In this regard it would be apposite to cite the following extract from the judgment of this court handed down in the case of Sarfraz Ahmad v. Iftikhar Ahmad (2012 YLR 1729):-

> "The attesting witness in terms of Article 79 of Qanun-e-Shahadat Order, 1984 read with section 3 of the Transfer of Property Act,1882 is a person who had witnessed the execution of an instrument by the executant and also signed the instrument for the purpose of attesting signature of the executant. It has been held in the case of Riaz-ur-Rehman and others v. Muhammad Urus (2005 MLD 1954 ) that attesting witness is one who not only writes or sees a document being executed and appends his name at the end of document, but is a person who also signs it as a witness. It is well settled principle that attestation in relation to instrument means attested by two or more witnesses each of whom has seen the executant, sign, or affix his mark to the instrument, or has seen other person sign the instrument in the presence and by the direction of the executant or has received from the executant a personal acknowledgement of his signature or mark or of the signatures of such other persons and each of whom has signed the instrument in presence of the executant. The word "attested" means that

person has signed the document by way of testimony to the fact that he saw it executed. The necessary conditions for a witness attesting the deed are: firstly, that he has seen the executant; and, secondly, he has signed the instrument in the presence of the executant. If these two conditions are fulfilled by the witness, there can be no doubt about his being attesting witness. In this regard reliance is placed on Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639), Rai Ganga Pershad Singh and others v. Ishri Pershad Singh and others (AIR 1918 Privy Council 3), Banarsi Das and others v. Collector of Saharanpur and others (AIR 1936 Allahabad 712) and Zaharul Hussain v Mahadeo Ramji Deshmukh and others (AIR (36) 1949 Nagpur 149).

Now, I examine the statements of said two witnesses. Before proceeding further it is germane to state here that document (Ex.P-1) was firstly drafted by Ch. Tayyab Tair Ahmad, Advocate and thereafter it was got typed. Mehmood-ul-Hassan (PW-1) in his examination-in-chief stated as follows:-

The other witness i.e. Muhammad Ijaz Butt (PW-2) in his examination-in-chief stated that:

During cross-examination he made the following statement:-

The cumulative reading of the statements of above stated two witnesses reveals that Mehmood-ul-Hassan (PW-1) had not signed the document (Ex.P-1) in presence of the alleged executant after seeing the execution of the document (Ex.P-1). In view of above, this witness does not fall within the ambit of "attesting witness" and, therefore, his statement is inconsequential to prove the execution of the document (Ex.P-1). Since the appellant had failed to produce two attesting witnesses, the execution of the document (Ex.P-1) was not proved. Thus, the arguments canvassed by the appellant's counsel sans merit and the precedent cited by him are inapt; and, resultantly a decree for specific performance of unproved document (Ex.P-1) could not be issued.

8. Last but not least the factor for consideration is the title of Haji Khushi Muhammad qua the suit property which is a shop bearing No.BX11-5S-43. According to the disputed document (Ex.P-1) Haji Khushi Muhammad, respondent was the exclusive owner of the suit property. This was incorrect recital. Haji Khushi Muhammad, the respondent, appeared before the learned Trial Court as DW-1 and during the course of cross-examination stated that he was not the exclusive owner of the suit property. The respondent in his documentary evidence tendered his title document i.e. sale deed dated 25.2.1997 (Ex.D-1). This document shows that Haji Khushi Muhammad is owner to the extent of half portion of the suit property. It means that the respondent, Haji Khushi Muhammad, could not sell the whole suit property to the appellant. The alleged agreement (Ex.P-1) to sell whole of the suit property in favour of the appellant was not valid and, therefore, on its basis a decree for specific performance could not be issued.

9. In the sequel, this second appeal being devoid of any merit is dismissed with no order as to costs.

RR/M-200/L Appeal dismissed.

**2017 M L D 572**
**[Lahore]**
**Before Shahid Waheed, Shams Mehmood Mirza and Shahid Karim, JJ**
**MUHAMMAD SIDDIQUE---Petitioner**
**Versus**
**M.B.R./C.S.C., PUNJAB and others---Respondents**

W.P. No.11687 of 2009, decided on 18th November, 2015.

**(a) Evacuee Property and Displaced Persons Laws (Repeal) Act (XIV of 1975)---**

----S.2---Notified officer---Jurisdiction---After promulgation of Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975, consequently upon repeal of all laws relating to evacuees and displaced persons, all proceedings which immediately before such repeal, were pending before authorities appointed thereunder were transferred for final disposal to such officers as notified by Provincial Government in official gazette---All cases decided by the Supreme Court or High Court after such repeal which would have been remanded to any such Authority in the absence of such repeal also stood remanded to the officers so notified---Any proceedings transferred or remanded to the notified officer were required to be disposed of by said officer in accordance with the provision of repealed Act or Regulations to which proceedings related.

**(b) Evacuee Property and Displaced Persons Laws (Repeal) Act (XIV of 1975)---**

----S.2---Punjab Government Notification No.1996-2008/564-Admn (I) dated 24-4-2008---Notified officer---Jurisdiction---Petitioners assailed authority of Chief Settlement Commissioner on the ground that after repeal of evacuee laws he could not act as such---Validity---Chief Settlement Commissioner in view of Punjab Government Notification No.1996-2008/564-Admn(I) dated 24-4-2008 was the officer who was lawfully notified to decide/dispose of pending or remanded cases relating to displaced persons and evacuee property as contemplated in S.2(2) of Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975---Appellation of Chief Settlement Commissioner in the said notification did not mean that the offices created under repealed Act and Regulations were resurrected---Appellation in question neither conferred additional powers nor altered status of Notified Officer---Notwithstanding the appellation/designation in question status of Chief Settlement Commissioner remained as Notified Officer---Mentioning of any appellation did not affect validity of notification in question.

Pakistan Tobacco Board and another v. Tahir Raza and others 2007 SCMR 97; Province of Punjab through Member Board of Revenue (Residual Properties) Lahore and others v. Muhammad Hussain through Legal Heirs and others PLD 1993 SC 147; Sagheer Muhammad Khan and 5 others v. Member Judicial (V) Board of Revenue, Punjab and 4 others 2009 YLR 1255 and Dr. Muhammad Iqbal and 9 others v. Member, Board of Revenue/Chief Settlement Commissioner, Lahore and another PLD 2010 Lah. 249 ref.

C.P. No.709-L of 2009 rel.
Malik Noor Muhammad Awan for Petitioner.
Mehmood A. Sheikh for Respondent.
Ch. Rashid Abdullah for Petitioner.
Maqbul Sadiq and Khalil Ahmad Ali for Petitioner (in W.Ps. Nos.158/R/2008, 172/R/2010 and 173/R/2010).
Hafiz M. Yousaf for Appellant (in I.C.As. Nos.566/2011, 559/2011, 558/2011, 98/2010, 461/2010 and 769/2014).
Mian Luqman for Petitioner (in W.P. No.11-R/2012).
Bashir Ahmad Mirza for Petitioner (in W.P. No.45-R/2009).
Ch. Iqbal Ahmad Khan for Petitioner (in I.C.A. No.31/2012).
Naseem Sabir Ch. for Respondents in connected petition.
Ch. M. Shafique for Respondents (in W.Ps. Nos. 96-R/2011, 17-R/2011 and 124-R/2008).
Hafiz M. Yousaf for Respondent (in W.Ps. Nos.11687/2009, 187-R/2009, 85-R/2009, 6332/2009, 5735/2014 and 138-R/2014 and Crl. Orig. No. 344/W/2009).
Kh. Waseem Abbas and Imran Humayun Chheena for Respondents in connected petitions.
Mian Shahid Iqbal for Respondent in connected petition.
M. Sohail Tipu for Respondent (in W.P. No.124-R/2008).
Muhammad Sharif Chohan and Hafiz Muhammad Yousaf for respondents.
Rana Shmshad Khan, A.A.G.
Gazanfar Khalid Saeed for Settlement Department.
Ashfaq Quyyam Cheema for Applicant in connected matter.
Mian Rafaqat Ali for Petitioner (in W.P.No.5735/2014)
Ch. Arshad Hussain, for Petitioner (in W.P.No.7911-R-2011)
Sh. Naveed Sheharyar for Petitioner (in W.P.No.85-R-2009).
Mr. Sagheer Muhammad Khan for respondent No.3 (in W.P. No.101-R-2009).
Muhammad Afzal for Petitioner (in W.P.No.88-R-2011).
Malik Amjad Pervaiz for Petitioner (in W.P.No.18-R-2012).
Anwar A. Qureshi for Petitioner (in W.P.No.6676/2015).

## ORDER

**SHAHID WAHEED, J.---**This order shall govern this petition as well as those cases which have been mentioned in Schedule-A hereto as in all the said cases questions of law, referred to this Full Bench, are involved.

2. Prayer in this petition is that the respondent, Dr. Nazir Saeed, Member (Judicial-V)/Chief Settlement Commissioner, Board of Revenue, Punjab be called upon to show cause under what authority of law he is holding the office of Chief Settlement Commissioner and exercising power in that capacity; and, thereafter declaration be issued that the said respondent is neither competent nor has authority to hold office of Chief Settlement Commissioner and be restrained from holding that office.

3. Preceded by the above noted prayer the petitioner has maintained in this petition that to provide for the permanent settlement of displaced persons on land in order to compensate them for the losses suffered by them on account of expropriation by the Government of India of their rights in property in India, or any area occupied by India and for matters incidental thereto or connected therewith two laws were promulgated: firstly, the Displaced Persons (Compensation and Rehabilitation) Act, 1958 (XXVIII of 1958); and, secondly; the Displaced Persons (Land Settlement) Act, 1958 (XLVII of 1958); that for the management of the rehabilitation work four tier system was introduced which according to section 2(6) of the Displaced Persons (Land Settlement) Act, 1958 was Assistant Settlement Commissioner, Deputy Settlement Commissioner, Addl. Settlement Commissioner and Chief Settlement Commissioner and also other officers appointed under any other law for the time being in force relating to the settlement of displaced persons on land; that for the disposal of settlement and rehabilitation work, the matter was to be decided by lower authority, and thereafter, appeal, revision, review were provided in Chapter-VI of the Displaced Persons (Land Settlement) Act, 1958; that the afore-stated laws were repealed in the year 1974 by the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975 and residual work was transferred to the Board of Revenue according to section 4 of the Repeal Act; that however, according to provisions of section 2(2) of the aforesaid Act the pending proceedings were transferred for final disposal to such an officer to be notified by the Provincial Government in the official Gazette; that the cases which were pending before the authorities or remanded by the Supreme Court or a High Court after such repeal were to be decided by the officer notified as aforesaid; that the office of Chief Settlement Commissioner or other Settlement Commissioners, i.e. Deputy Settlement Commissioner, Additional Settlement Commissioner or Assistant Settlement Commissioner ceased to exist and no person thereafter could claim either as Settlement Commissioner or Chief Settlement Commissioner; that the Government of Punjab was required to notify such officers in the official Gazette to decide the pending cases or cases remanded by the Supreme Court or a High Court

but had no authority at all to initiate new proceedings or to deal with the matters already settled under the settlement laws or to reopen the cases; that the respondent styled himself as Chief Settlement Commissioner and passed order and exercised jurisdiction as Chief Settlement Commissioner which power did not vest in him; and, that as there is no provision in the Repeal Act for appointment of Chief Settlement Commissioner so the claim of the respondent to be Chief Settlement Commissioner without any posting is without lawful authority.

4. This petition came up for peremptory hearing before the learned Single Bench of this Court on 11.06.2009. On the said date the matter, with the following observations, was referred to the Hon'ble Chief Justice to constitute a larger Bench:--

> "The petitioner lays information that the respondent has no lawful authority to claim himself to be the Chief Settlement Commissioner, Punjab and to hold the said office. Learned counsel explains with reference to Section 2 of Evacuee Properties Displaced Persons Laws (Repeal) Act, 1975 that all the offices and authorities created under the Displaced Persons (Compensation and Rehabilitation) Act, 1958 as also Displaced Persons (Land Settlement) Act, 1958 ceased to exist upon promulgation of the said Act which took effect w.e.f. from 17.7.1974. Precise contention is that said office does not exist at all and there is no question of appointment of the respondent to the said post. Also refers to the case of Pakistan Tobacco Board and another v. Tahir Raza and others (2007 SCMR 97) to urge that the writ petition is competent. Notice be issued to the respondent calling upon him to explain as to under what lawful authority is he claiming himself to be the Chief Settlement Commissioner and purporting to perform as, such, within three weeks.
>
> 2. I have express myself on this question in some judgments. Even otherwise, in view of the importance of the question as the respondent is purportedly acting as Chief Settlement Commissioner vis- -vis the entire province, office to put up this file before the Hon'ble Chief Justice to consider the constitution of a larger Bench for hearing this case."

5. Pursuant to said order the Hon'ble Chief Justice constituted a Full Bench. Subsequently, the cases mentioned in Schedule-'A' hereto were clubbed with this petition. It is pertinent to mention here that in the said order the questions, to be determined by the Full Bench, were not framed. This omission required us to frame the questions so as to determine the precincts of this Full Bench. In the sequel, following questions with concurrence of the learned counsel for the parties were framed vide order dated 05.11.2015 (this order is available in the file of connected petition i.e. W.P. No.45/R/2009):--

i) Whether the Provincial Government in exercise of powers conferred upon it under subsection (2) of Section 2 of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975 has notified an officer for disposal of pending proceedings?

ii) Whether the Notification issued by the Provincial Government for the disposal of cases qua the evacuee property, if any, is valid?

After framing the afore-noted questions we invited the learned counsel to address their arguments.

6. Learned counsel for the petitioners contend that in the old settlement laws there was provision of appeal and revision, as such, the hierarchy of settlement authorities was created; that after repeal of the aforesaid law by virtue of Act No.XIV of 1975 there is no such provision and all the powers have been given to the Notified Officer duly notified by the Provincial Government and there is no provision in the Repeal Act for the post of Chief Settlement Commissioner, as such, the respondent is non-entity and cannot claim the aforesaid office on the basis of any notification. Reliance is placed on cases of Province of Punjab through Member Board of Revenue (Residual Properties) Lahore and others v. Muhammad Hussain through Legal Heirs and others (PLD 1993 SC 147), Sagheer Muhammad Khan and 5 others v. Member Judicial (V) Board of Revenue, Punjab and 4 others (2009 YLR 1255) and Dr. Muhammad Iqbal and 9 others v. Member, Board of Revenue/Chief Settlement Commissioner, Lahore and another (PLD 2010 Lahore 249). It is further contended that no rule or policy could be framed against the provisions of the Act. According to section 2(2) of the Repeal Act all pending proceedings before various authorities stood transferred for final disposal to such officer who was notified by the Provincial Government. The decision of the Notified Officer is not amenable to an appeal or revision, therefore, framing of scheme known as Scheme for Management and Disposal of available Urban Properties providing, Deputy Administrator and the Administrator and the provision of revision and other thing are against the Act. Even on this score the respondent cannot act either as Chief Settlement Commissioner or in any other capacity because the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975 do not allow him to work in that capacity.

7. On the other hand, learned counsel for the respondent have vehemently refuted the afore-noted arguments and submitted that Government of the Punjab in exercise of power conferred upon it under subsection (2) of section 2 of the Evacuee

Property and Displaced Persons Laws (Repeal) Act, 1975 appointed the respondent as Notified Officer vide Notification No. 1996-2008/564-Admn (I) dated 24.04.2008; that the said notification is free from any flaw and, therefore, the respondent validly decided the cases qua the evacuee property and grievances of the displaced persons; and, that designation of Chief Settlement Commissioner/Rehabilitation Commissioner/ Claims Commissioner of the said Office does not affect the legality of the said notification.

8. Heard. The questions under discussions are interlinked and, therefore, the same are taken up together. It is an admitted fact that the Registration of Claims (Displaced Persons) Act, 1956 (III of 1956); The Pakistan Rehabilitation Act, 1956 (XLII of 1956); The Pakistan (Administration of Evacuee Property) Act, 1957 (XII of 1957); The Displaced Persons (Compensation and Rehabilitation) Act, 1958 (XXVIII of 1958); The Displaced Persons (Land Settlement) Act, 1958 (XLVII of 1958); The Scrutiny of Claims (Evacuee Property), Regulations, 1961; and, The Price of Evacuee Property and Public Dues (Recovery) Regulations, 1971 stood repealed by virtue of section 2(1) of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975. Upon the repeal of the aforesaid Acts and Regulations, all proceedings which, immediately before such repeal, were pending before the authorities appointed thereunder transferred for final disposal to such officers as notified by the Provincial Government in the official Gazette and all cases decided by the Supreme Court or a High Court after such repeal which would have been remanded to any such authority in the absence of such repeal were also stood remanded to the officers notified as aforesaid. Any proceedings transferred or remanded to the said officer were required to be disposed of by the said officer in accordance with the provisions of repealed Act or Regulation to which proceedings related. It means that upon repeal of the afore-stated laws relating to evacuee property and displaced persons the Provincial Government had to notify any officer in the official Gazette to decide or dispose of those cases about which a reference has been made in subsection (2) of section 2 of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975. The said provision of law reads as under:--

> (2) Upon the repeal of the aforesaid Acts and Regulations, all proceedings which immediately before such repeal, may be pending before the authorities appointed thereunder shall stand transferred for final disposal of such officers as may be notified by the Provincial government in the official Gazette and all cases decided by the Supreme Court or a High Court after such repeal which would have been remanded to any such authority in the absence of such repeal shall be remanded to the officers notified as aforesaid."

The afore-cited provision of law contemplates twofold conditions for the valid appointment of an officer to decide the pending or remanded cases. Firstly, the said officer should be notified by the Provincial government; and, secondly, the said notification should be made in the official Gazette. In order to satisfy ourselves, we asked the learned counsel for the respondents to produce copy of the notification regarding the appointment of the respondent. In compliance with the said order the learned counsel for the respondent produced before us Notification No.1996-2008/564-Admn (I) dated 24.04.2008. The said notification was published on 10.09.2008 in the Punjab Weekly Gazette and the same reads as under:--

> "No.1996-2008/564-Admn(I)---In exercise of the powers conferred upon him under Subsection (2) of section 2 of the Evacuee Property and Displaced Persons Law (Repeal) Act, 1975 (Federal Act XIV of 1975) the Governor of the Punjab, is pleased to notify Dr. Nazir Saeed, Member (Judicial-V), Board of Revenue, Punjab, as the Chief Settlement Commissioner, Rehabilitation Commissioner and Claims Commissioner for the province of Punjab, with immediate effect for the purposes mentioned in Subsection (2) of section 2 ibid."

Perusal of the said notification unfolds that the same was issued by the Governor of the Punjab in exercise of powers conferred upon him under subsection (2) of section 2 of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975; and, that Dr. Nazir Saeed, Member (Judicial-V), Board of Revenue, Punjab was notified as Chief Settlement Commissioner, Rehabilitation Commissioner and Claims Commissioner for the Province of Punjab for the purposes mentioned in subsection (2) of section 2 of the said Act. Since the said notification was published in the Gazette, we have no hesitation in holding that Dr. Nazir Saeed, Member (Judicial-V), Board of Revenue, Punjab was the officer who was lawfully notified to decide/dispose of pending or remanded cases relating to displaced persons and evacuee property as contemplated in subsection (2) of section 2 of the Evacuee Property and Displaced Persons (Repeal) Act, 1975. In the said notification appellation of the respondent as Chief Settlement Commissioner, Rehabilitation Commissioner, and Claims Commissioner, does not mean that the offices created under the repealed Act and Regulations were resurrected. The said appellation neither confers additional powers nor alters the status of the Notified Officer. It is made clear that notwithstanding the said appellation/designation the status of the respondent remained as Notified Officer. Thus, mentioning of any appellation does not affect the validity of the said notification. In this regard we stand fortified from

the order dated 02.01.2015 passed by the Hon'ble Supreme Court in C.P. No.709-L-2009. Upshot of the above discussion is that answer to the questions, under discussion, are in the affirmative.

9. Since the questions referred to this Full Bench have been answered, office is directed to fix this case and all the cases mentioned in Schedule-`A' hereto before appropriate Benches of this Court for decision of individual, factual and legal merits.

**[Appendix listing numbers of Writ Petitions omitted].**

MH/M-9/L Order accordingly.

**2017 C L C Note 110**
**[Lahore]**
**Before Shahid Waheed, J**
**MEHMOOD ALAM---Petitioner**
**Versus**
**MUSHTAQ AHMED and 5 others---Respondents**

Civil Revision No. 1593 of 2012, heard on 30th January, 2017.

**Punjab Pre-emption Act (IX of 1991)---**
----S. 13---Talbs---Requirements---Fulfillment of requirements of Talb-i-Muwathibat and Talb-i-Ishhad---Scope---Plaintiff contended that he made immediate demand to exercise his right of pre-emption which stood established from his statement before Trial Court---Vendee claimed that the plaintiff had failed to make requisite Talbs in accordance with law---Validity---Though no express formula was necessary yet the assertion of the right/demand must be expressed in unequivocal language---Language used by the plaintiff in his examination-in-chief did not evince any desire on the part of plaintiff to avail himself of his right of pre-emption---Failure of the plaintiff to perform first demand i.e. Talb-i-Muwathibat would defeat his claim---Date of knowledge as expressed by plaintiff's witness did not tally with the date on which plaintiff allegedly got knowledge of sale of suit property; it was imperative for the plaintiff to produce evidence including the postman to prove fulfillment of Talb-i-Ishhad---Concerned postman stated in his examination-in-chief that postal receipts were issued from post office to the vendee but he did not produce record as the same had allegedly been destroyed---Plaintiff was required to produce concerned postman to prove service of notice of Talb-i-Ishhad in circumstances, could not be done---Such omission indicated that notices of Talb-i-Ishhad were not served upon the vendees and, therefore, making of said Talb was not proved---Decrees of two courts below were maintained---Revision was dismissed accordingly. [Paras. 5, 6 & 7 of the judgment]
Bashir Ahmad v. Ghulam Rasool 2011 SCMR 762; Allah Ditta through his L.Rs. and others v. Muhammad Anar 2013 SCMR 866 and Khan Afsar v. Afsar Khan and others 2015 SCMR 311 rel.

Muqtedir Akhtar Shabir for Petitioner.
Muhammad Yaqoob Sidhu and Ihsan Ahmad Bhinder for Respondents.
Date of hearing: 30th January, 2017.

**JUDGMENT**

**SHAHID WAHEED, J.---**Undaunted by failure in two Courts below the pre-emptor has filed this petition under section 115, C.P.C. to seek revision of the decrees whereby his suit for possession through pre-emption was dismissed.

2. Dispute in this case related to land measuring 16-kanals comprising khewat No.53 khatuni Nos.149 to 159 situated at Mauza Boray Outhi, Tehsil Ferozewala, which was owned by one Riasat Ali. The suit property was sold to the respondents vide registered sale deed No.6822 dated 28.11.1998 for a consideration of Rs.160,000/-. The sale was sought to be pre-empted by the petitioner on the ground of his superior right with the assertion that he had made requisite Talbs in accordance with law. The claim set up in the plaint was controverted by the respondents-vendees through a written statement. It was maintained in the written statement that since the petitioner had failed to make requisite Talb in accordance with law, he was not entitled to the decree as prayed for in the plaint.

3. On pleadings issues were framed and parties were directed to adduce evidence in support of their respective claims. Evidence was accordingly led before the learned Trial Court. Pivotal issue in the instant case was additional issue No.2, that is, "whether the plaintiff has fulfilled the requirements of Talbs in accordance with law". On consideration of the matter, the learned Trial Court came to the conclusion that the petitioner after getting knowledge of the sale of the suit property had not made his immediate demand declaring intention to exercise the right of pre-emption in accordance with section 13 of the Punjab Pre-emption Act, 1991. On the basis of said conclusion learned Trial Court decided the said additional issue No.2 against the petitioner; and, as a result thereof the suit was dismissed vide decree dated 25.04.2011 through judgment of even date. The petitioner appealed against the decree of the learned Trial Court, which met the same fate. The learned first Appellate Court while concurring with the findings of the learned Trial Court dismissed the appeal vide decree dated 24.01.2012.

4. The ground to challenge the decrees of the learned Courts below is that the petitioner/pre-emptor after getting knowledge of the sale of the suit property had made immediate demand, that is, Talb-i-Muwathibat, by declaring his intention to exercise his right of pre-emption and this fact stands established from his statement which he made before the learned Trial Court while appearing as PW-5; and, that since the statement of the petitioner and other witnesses was misread and non-read, the decrees of the Court below are not sustainable in law.

5. The above stated ground raises a mixed question of law and facts. The law on the subject is that a person who intends to advance a claim based on the right of pre-emption qua the property which has been sold to another, must immediately on receiving information of the sale, express in explicit terms his intention to claim the property. The intention must be formulated in the shape of a demand. Though no express formula is necessary yet the assertion of the right (or what is called a demand) must be expressed in unequivocal language. Now in the light of above stated principle of law, the statement which was made by the petitioner/pre-emptor in his examination-in-chief is evaluated. The petitioner while appearing before the learned Trial Court as PW-5 stated that he got knowledge of the sale of the suit

property on 07.03.1999 at 4:00 p.m. at his Dera through Karamat Ali, (PW-1) in the presence of Nisar Ahmad (PW-4) and Asghar Ali (PW-2); that after getting information he declared that he had a superior right of pre-emption; and, that he was in need of the land. The exact words uttered by the petitioner in his examination-in-chief are as follows:

The above statement does not evince any desire on the part of the petitioner to avail himself of his right. Since the right to pre-emption is strictissimi juris, failure to perform first demand, that is, Talb-i-Muwathibat by the petitioner declaring his intention to exercise the right of pre-emption in accordance with requirement of the law would defeat the claim.

6. There is another aspect of the matter. In the present case the suit property was sold to the respondents vide registered sale deed No.6822 dated 28.11.1998 for a consideration of Rs.160,000/-. It was the claim of the petitioner that he got knowledge of the said sale on 07.03.1999 through Karamat Ali (PW-1) at his Dera. In order to prove this assertion the petitioner got examined Karamat Ali. This witness in his cross-examination admitted that after 2/2-1/2 months of sale he got information about the sale of the suit property through his sister; and, that on the same date he informed the petitioner about the sale of suit property. The afore said statement suggests that Karamat Ali (PW-1), computing the period from the date of registration of sale deed, got knowledge of the sale somewhere in mid-February 1999; and, that the petitioner also got knowledge of the sale of the suit property on the same date. This date did not tally with the date (i.e 07.03.1999) on which allegedly the petitioner got knowledge of the sale of the suit property. This creates doubt in respect of making of Talb-i-Muwathibat in accordance with law and, thus, benefit thereof must go to the vendees-respondents.

7. The second Talb which was required to be proved by the petitioner was Talb-i-Ishhad. It was maintained in the plaint that on 15.03.1999 notices of Talb-i-Ishhad duly attested by two truthful witnesses under registered cover acknowledgement due were sent to the respondents. It is now well-settled that it is imperative for the plaintiff/pre-emptor, in order to succeed in a suit for pre-emption, to produce evidence, including concerned postman to prove that in fact notices of Talb-i-Ishhad were served upon the vendees or that they refused to accept the notices, which were sent at their correct addresses. In this regard reference may be made to the cases of Bashir Ahmad v. Ghulam Rasool (2011 SCMR 762) and Allah Ditta through his LRs and others v. Muhammad Anar (2013 SCMR 866) and Khan Afsar v. Afsar Khan and others (2015 SCMR 311). The petitioner being conscious of the said requirement of law produced Abdul Hameed, postman, post office Shahdara (PW-3) before the learned Trial Court. The said witness in his examination-in-chief stated that postal receipts bearing Nos.813 to 818 were issued from his post office. The said witness, however, did not produce record as the same had allegedly been

destroyed. Thus statement of this witness was inconsequential. The petitioner was required to produce concerned postman to prove service of notice of Talb-i-Ishhad which was not done. This omission indicates that notices of Talb-i-Ishhad were not served upon the respondents-vendees and, therefore, making of second Talb is not proved.

8. Since the petitioner had failed to make Talbs in accordance with section 13 of the Punjab Pre-emption Act, 1991, he was not entitled to the decree for possession of the suit property as prayed for in the plaint. The decrees of the Courts below do not suffer from any jurisdictional defect or procedural irregularity and, thus, no interference therewith is called for.

. In the sequel, this petition is dismissed with no order as to costs.
MQ/M-37/L Revision dismissed.

**2017 M L D 1304**
**[Lahore]**
**Before Shahid Waheed, J**
**NATIONAL TRANSMISSION AND DISPATCH COMPANY LIMITED (NTDC) through Dul Authorized Legal Advisor---Petitioner**
**Versus**
**TRUST INVESTMENT BANK LTD.---Respondent**

F.A.O. No.117 of 2016, heard on 1st February, 2017.

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

----O.VII, R.10 & O.XXXVII, R.2---Appeal---Return of plaint---Application of leave to defend---Trial Court without granting leave to defend the suit to defendant company, returned the plaint to be filed before proper court---Validity---Trial Court without deciding application for leave to appear and defend the suit, could not return the plaint under O. VII, R. 10, C.P.C. for its presentation before an appropriate forum---High Court set aside the order passed by Trial Court and remanded the case for decision afresh on application of defendant seeking leave to appear and defend the suit---Appeal was allowed in circumstances.

Cotton Export Corporation of Pakistan (Pvt.) Ltd. v. Messrs Nagina Cotton Industries Ginning Pressing and Oil Mills and 6 others 1993 CLC 2217; Sh. Muhammad Irfan and others v. Sitrar Commission Shop and others 2005 MLD 85 and Naeem Iqbal v. Mst. Zarina 1996 SCMR 1530 rel.

Ashar Elahi for Appellant.
Javaid Mehmood Sandhu for Respondent.
Date of hearing: 1st February, 2017.

**JUDGMENT**

**SHAHID WAHEED, J.---**This appeal is of the plaintiff and arises from a summary suit which was instituted by it under Order XXXVII, C.P.C. for recovery of Rs.118,796,252/- on the basis of certificates of investment and certificates of deposit. The defendant-respondent after having received summons filed an

application before the learned Trial Court seeking leave to appear and defend the said suit. It was maintained in the application that certificates of investment/certificates of deposit did not fall within the ambit of negotiable instrument; that the subject matter of the suit was exclusively triable by a Banking Court under the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001; and, that the suit under Order XXXVII, C.P.C. was not competent. The averments made in the above said application were controverted by the plaintiff-appellant. The learned Trial Court while hearing arguments on the application for leave to appear and defend the suit passed the impugned order dated 27.11.2015 whereby the plaint was returned under Order VII, Rule 10, C.P.C. for its presentation before an appropriate forum on the ground of bar of jurisdiction.

2. The above facts of this case give rise to a question of law whether the learned Trial Court without deciding the application for leave to appear and defend a summary suit could return the plaint under Order VII, Rule 10, C.P.C. for its presentation before an appropriate forum.

3. In order to provide the peg on which the above referred question is to be hung, it is necessary to examine the relevant provisions of law. The plaintiff instituted suit under Order XXXVII, C.P.C. which is procedural in nature and provides for a speedy, efficacious and summary remedy, for recovery of money on the basis of bill of exchange, etc. This provision is a departure from the procedure provided for ordinary suits. Order XXXVII, C.P.C. is, however, only an enabling provision and a plaintiff wishing to enforce a bill of exchange etc. may at his option bring a summary suit under this Order or may institute a suit under ordinary procedure. The advantage to the plaintiff for adopting such a procedure is provided under Order XXXVII, Rule 2, C.P.C. which contemplates that without leave of the Court a defendant cannot appear and defend the suit, as a matter of right. He has to apply for leave to appear and defend the suit. Without obtaining leave to appear and defend, a defendant will not be heard by the Court in defence of the action. A defendant may apply for leave within 10 days of the service of summons upon him. If he does not apply for such a leave or if leave is refused the plaintiff will be

entitled to a decree and all the allegations made in the plaint are deemed to be admitted.

4. Now, on the basis of above analysis of the provisions of Order XXXVII, C.P.C., I advert to the case on hands. The defendant-respondent in his application for leave to appear and defend the suit raised, inter alia, the issues: (i) whether on the basis of certificates of investment and certificates of deposit a summary suit under Order XXXVII, C.P.C. could be instituted?; (ii) whether the certificates of investment/certificates of deposit fell within the ambit of definition of "finance" as provided in Section 2 (d) of the Financial Institutions (Recovery of Finances) Ordinance, 2001?; (iii) whether the plaintiff-appellant could be held as customer as defined in Section 2(c) of the Financial Institutions (Recovery of Finances) Ordinance, 2001?; and, (iv) whether the controversy between the parties was exclusively triable by a Banking Court? These issues constituted a root question relating to the jurisdiction of the Trial Court and might be relevant for granting leave to the defendant-respondent to defend the suit. Though this question should have been decided at the earliest but after granting application for leave to appear and defend the suit as prior to that stage neither the defendant-respondent had locus standi to attack maintainability of suit nor question of jurisdiction could be considered in depth. In this regard guidance may be had from the cases of Cotton Export Corporation of Pakistan (Pvt.) Ltd. v. Messrs Nagina Cotton Industries Ginning Pressing and Oil Mills and 6 others (1993 CLC 2217), Sh. Muhammad Irfan and others v. Sitrar Commission Shop and others (2005 MLD 851) and Naeem Iqbal v. Mst. Zarina (1996 SCMR 1530).

5. In view of above, answer to the question, under reference, is given in the negative and it is held that learned Trial Court without deciding the application for leave to appear and defend the suit could not return the plaint under Order VII Rule 10, C.P.C. for its presentation before an appropriate forum. Thus, order dated 27.11.2015 of the learned Trial Court is not valid.

6. In the sequel, this appeal succeeds. Order dated 27.11.2015 of the learned Trial Court is hereby set aside. Consequently, the case is remanded to the learned

Additional District Judge, Lahore, who shall first decide the application of the respondent-defendant seeking leave to appear and defend the suit and thereafter proceed with the suit in accordance with law. Parties are directed to appear before the learned Additional District Judge, Lahore, on 20.02.2017. No order as to costs.
MH/N-7/L Case remanded.

**2017 C L C 1254**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD ARSHAD----Petitioner**
**Versus**
**MUHAMMAD NAWAZ----Respondent**

Civil Revision No.3543 of 2014, decided on 9th February, 2017.

**(a) Civil Procedure Code (V of 1908)---**
----O. XVII, Rr. 1(3) & 3 & S. 115---Limitation Act (IX of 1908), S.12---Punjab Pre-emption Act (IX of 1991), S. 13---Suit for possession through pre-emption---Closure of evidence---Revision, filing of---Requirements---Limitation---Condonation of delay---Scope---Trial Court granted adequate opportunities to the plaintiff to produce evidence in support of his claim---Conduct of plaintiff was not only carefree or negligent but also contumacious---No reason had been disclosed which caused hindrance in the way of plaintiff to produce evidence before the Trial Court---When plaintiff was not ready with his evidence then Trial Court under O.XVII, R.1(3), C.P.C. could close his evidence so as to get to the next stage in the trial---Evidence of plaintiff was rightly closed by the Trial Court---Revision petitioner was not bound to furnish certified copies of judgments along with petition---Benefit of S.12 of Limitation Act, 1908 could not be extended to the plaintiff---Court below was bound to provide a copy of impugned decision within three days thereof which might be uncertified---Plaintiff should have approached the court below to obtain copy of impugned decision---Once application was made to the court below and there was failure to provide copy within prescribed period of three days then revision petitioner could have sought condonation of delay on the ground that it was beyond his control to obtain a copy---Revision petitioner had not filed an application before the court below for compliance of mandate of second proviso of S.115(1), C.P.C.---Revision was dismissed in circumstances.
Pirzada Amir Hassan and others v. Mrs. Shamim Shah Nawaz and others 1984 CLC 3080; The Administrator, Lahore Municipal Corporation, Lahore v. Abdul Hamid and others 1987 CLC 1261; Province of Punjab through District Officer Revenue Rawalpindi and others v. Muhammad Sarwar 2014 SCMR 1358; Said Muhammad v. Sher Muhammad and 2 others 2001 MLD 1546 and Sultan Khan and 3 others v. Sultan Khan 2004 MLD 918 rel.
**(b) Civil Procedure Code (V of 1908)---**
----S. 115---Revision, filing of---Requirements---Revision petitioner had to furnish copies of pleadings, documents and order of subordinate Court along with revision petition. Sohail Qaiser Farooq Tarar for Petitioner.

**ORDER**

**SHAHID WAHEED, J.---** This revision petition is of the plaintiff and arises from a suit for possession of the disputed property through pre-emption. This suit was contested by the respondent. On pleadings issues were framed and parties were

directed to adduce evidence in support of their respective claims. The petitioner/pre-emptor despite availing numerous opportunities could not produce evidence and, thus, the learned Trial Court closed his right to produce evidence. The suit was dismissed for want of evidence vide decree dated 12.02.2014. The petitioner assailed the decree of the learned Trial Court through an appeal before the learned Additional District Judge, Phalia. It was pleaded before the learned first Appellate Court that another case having the same title i.e. Arshad v. Nawaz was also pending on 15.01.2014, which was adjourned to 13.02.2014 and, therefore, the petitioner misconstrued that his suit, from which instant revision petition arises, also adjourned to 13.02.2014; and, that due to said reason neither petitioner nor his counsel could appear before the learned Trial Court on 12.02.2014 the date fixed in his suit and on the said date his right to produce evidence was closed. This argument did not prevail upon the learned first Appellate Court as the same was found contrary to the record. The appeal was, therefore, dismissed vide decree dated 09.07.2014.

2. The petitioner through this petition seeks revision of the afore noted decrees of the learned Courts below. Since this petition was not filed within prescribed period of 90 days, the petitioner has filed an application (i.e. C.M. No.02 of 2014) for condonation of delay. The petitioner has also filed an application (i.e. C.M.No.1 of 2014) under section 151, C.P.C. for grant of interim relief.

3. The prime question for consideration in this petition is whether the learned Trial Court had rightly exercised its jurisdiction while closing right of the petitioner to produce evidence. The answer to this question may be given by examining the proceedings of the learned Trial Court. Summary of the proceedings of the learned Trial Court has been given by the learned first Appellate Court in paragraph 4 of its judgment dated 09.07.2014. The facts recorded in paragraph 4 are in consonance with order sheet of the learned Trial Court which is available on this file as Annex-D. Thus, in order to avoid any repetition, paragraph 4 of the appellate judgment dated 09.07.2014 is reproduced below:

> "The case was adjourned for recording of evidence on 11.1.2012 when evidence was not available, then the case was adjourned to 10.3.2012 when an application was filed and subsequent dates 7.4.2012, 26.4.2012, 23.5.2012 fixed for reply and order on the application. Then again case was fixed for recording of evidence. On 10.7.2012 evidence was not available, then the case adjourned to 12.8.2012. On the said date position was same, then the case was adjourned for 7.11.2012 when the witnesses were present, however learned counsel was not ready for cross-examination when case was adjourned for 8.12.2012. On the said date evidence was available. The case was adjourned for 19.1.2013 on the said date evidence was not available and again case was adjourned to 13.3.2013. On the said date evidence was available but learned defence counsel was not present. Then case was adjourned for 17.4.2013. On the said date evidence was not available, then the case was adjourned for 13.5.2013, 14.6.2013, 10.7.2013, 11.9.2013, 23.10.2013, 20.11.2013, 15.1.2014 and 23.1.2014. On all dates

the evidence was not available. On 23.1.2014 the learned trial court extended final and last opportunity for production of evidence and case was adjourned for 8.2.2014. On the date again last and final opportunity was extended and case was adjourned for 12.2.2014 when right was struck off under Order XVII, rule 3, C.P.C."

4. Perusal of the above cited paragraph and proceedings of the learned Trial Court leads to conclusion that learned Trial Court showed extra ordinary indulgence in the matter and granted adequate opportunities to the petitioner to produce evidence in support of his claim. The benevolence shown by the learned Trial Court was misconstrued by the petitioner. In fact the conduct of the petitioner was not only carefree or negligent but also contumacious. The petitioner neither before the learned Courts below nor in the memorandum of instant revision petition has disclosed any reason which caused hindrance in his way to produce evidence before the learned Trial Court on 14.6.2013, 10.7.2013, 11.9.2013, 23.10.2013, 20.11.2013, 15.1.2014, 23.1.2014, 8.2.2014 and 12.2.2014. After examining the record of the case, I am of the view that the learned Trial Court was confronted with a situation where the petitioner was not ready with his evidence. In these attending circumstances, learned Trial Court while proceeding with the suit under sub-rule (3) of Rule 1 of Order XVII, C.P.C. could close his evidence so as to get to the next stage in the trial. This is what the learned Trial Court precisely did in the present case. The citation of the Order XVII, Rule 3, C.P.C. in judgment dated 12.02.2014 does not make any difference because substance of the said judgment shows that the learned Trial Court meant to close the evidence under Order XVII, Rule 1(3), C.P.C. Accordingly I hold that evidence of the petitioner was rightly closed. In arriving at this conclusion I stand fortified from the judgment rendered in the cases of Pirzada Amir Hassan and others v. Mrs. Shamim Shah Nawaz and others (1984 CLC 3080) and The Administrator, Lahore Municipal Corporation, Lahore v. Abdul Hamid and others (1987 CLC 1261).

5. Another aspect of the matter which dissuaded me to interfere with the concurrent findings of the learned Courts below is delay in filing revision petition. Hon'ble Supreme Court in the case of Province of Punjab through District Officer Revenue Rawalpindi and others v. Muhammad Sarwar (2014 SCMR 1358) has held that where an aggrieved party seeks redressal against the judgment or order through the revisional powers of the Court under Section 115, C.P.C., he has ninety days to make the petition, failing which the petition is liable to be dismissed. On being confronted with the said principle of law, learned counsel for the petitioner submits that the petitioner on 11.08.2014 applied for obtaining certified copy of the impugned decree dated 09.07.2014; that the petitioner had been regularly visiting the copying branch for obtaining certified copy of the decree but the same was delayed; that the certified copy of the decree which though was prepared on 11.08.2014 but was delivered to the petitioner on 01.11.2014; and, that after getting the certified copy of the impugned decree, the petitioner filed revision petition before this Court on 25.11.2014. On the basis of said facts he contends that revision petition is not barred by time; and, that since office had raised objection, the

petitioner filed an application (C.M.No.2 of 2014) for condonation of delay. He requests that if there is any delay, same may be condoned on the basis of afore stated facts.

6. The afore noted arguments sans merit. The relevant provision governing the above said argument is proviso to section 115(1), C.P.C. which reads as under:

> "Provided that, where a person makes an application under this subsection, he shall, in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court, and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court.
>
> Provided that such application shall be made with ninety days of the decision of the Subordinate Court which shall provide a copy of such decision within three days thereof and the High Court shall dispose of such application within three months."

7. The above cited provision of law makes it obligatory for the petitioner to furnish copies of the pleadings, documents and order of the subordinate Court along with revision petition. The word "certified" is absent in the above proviso to section 115(1), C.P.C. Inference from the omission of word "certified" clearly absolves the petitioner from filing certified copies of the, impugned judgments etc. along with revision petition. Approaching the Copying Agency for obtaining certified copy of the impugned judgment, therefore, would not in any manner extend the benefit of section 12 of the Limitation Act to the petitioner. The second proviso to section 115(1), C.P.C. makes it obligatory for the subordinate Court to provide a copy of the impugned decision within three days thereof. Here again there is no requirement of law that such a copy shall be a certified copy. It was, thus, duty of the petitioner to have approached the lower Court which passed the impugned judgment and decree to obtain copy of the same. Once the application was made to the subordinate Court and there was failure of the lower Court to provide copy within prescribed period of three days, revision petitioner could have sought condonation of delay on the ground that it was beyond his control to obtain a copy from the lower forum. It is not the case of the petitioner that he filed an application before the learned subordinate Court for compliance of mandate of second proviso to section 115(1), C.P.C. and, therefore, the petitioner cannot be held entitled to get the benefit of section 12 of the Limitation Act for the time spent in obtaining certified copy of impugned decree from Copying Agency. In this regard reliance is placed on the cases of Said Muhammad v. Sher Muhammad and 2 others (2001 MLD 1546) and Sultan Khan and 3 others v. Sultan Khan (2004 MLD 918).

8. In view of above, prayer made in C.M.No.02 of 2014 as well as in the main revision petition cannot be granted. Thus, prayer for interim relief also cannot be granted.

9. In the sequel, revision petition along with C.M.No.1 of 2014 and C.M.No.2 of 2014 are dismissed with no order as to costs.

ZC/M-64/L Petition dismissed.

**PLJ 2017 Lahore 84**
**Present: SHAHID WAHEED, J.**
**NOOR DIN and another--Petitioners**
**versus**
**MEMBER (JUDICIAL-VI), BOARD OF REVENUE, PUNJAB, LAHORE and others--Respondents**

W.P. Nos. 14626 and 27117 of 2014, heard on 9.11.2016.

**Board of Revenue Act, 1957--**

----S. 8--Punjab Land Revenue Act, 1967, S. 161--Constitution of Pakistan, 1973--Art. 199--Constitutional petition--Mutation--review petition--Entries made in revenue record--Challenge to--Patently barred by time--Revenue hierarchy--Question of--Whether orders passed by M.B.R. were sustainale as same were bereft of any reason--Validity--Such perfunctory disposal leads to wastage of judicial time and time of litigants as well and, therefore, is always, regarded as imporer judgments and is of doubtful validity--It is an established principle of law that a judicial order must be speaking order manifesting by itself that Court has made an endeavor to marshal facts for resolution of issues involved for proper adjudication--Result may be reached by diligent effort, but if final order does not bear on imprint of that effort, and on contrary discloses arbitrariness of thought and action, feeling with painful result, that justice has neither been done nor seems to have been done is inescapable--Board of revenue is superior forum in revenue hierarchy and it is expected from it that it would promote culture of justification instead of culture of authority--Orders of M.B.R. do not exhibit judicious treatment and determination of dispute and therefore, cannot be held valid order--Petitions were allowed. [P. 87] A & B

2012 CLC 1663, *ref.*

*Mr. Saad Tariq,* Advocate for Petitioners.
*Mr. Naveed Saeed Khan,* Addl. A.G. for Respondents No. 2 & 3.
*Mian Asmat Ullah,* Advocate for Respondents No. 4 to 9.
Nemo for Respondent No. 1.
Date of hearing: 9.11.2016.

**JUDGMENT**

This order shall govern Writ Petition No. 14626 of 2014 and Writ Petition No. 27117 of 2014 as through them challenge has been made to the common orders passed by the learned Member, Board of Revenue, Punjab.

2. Dispute in this case relates to the entries made in Mutation No. 182 which was sanctioned on 31.05.1971. The Respondents No. 4 to 9 on 15.07.2010 challenged the said mutation through an appeal under Section 161 of the Punjab Land Revenue

Act, 1967 before the Collector, Lahore. This appeal was accepted *vide* order dated 09.12.2010 by holding that the land measuring 10 *kanals* comprising khasra No. 38, 330/2 and 556 was part of the said mutation. Validity of the said order was assailed by the petitioners (i.e. Noor Din, etc,) by preferring an appeal before the Executive District Officer (Revenue), Lahore. This appeal was treated as revision petition and the same was accepted *vide* order dated 15.09.2011 and the case was remanded to the Collector for a fresh decision. On remand, the Collector *vide* order dated 22.03.2012 again accepted the appeal and directed the R.O. Halqa to implement the order in letter and spirit by cancelling Mutation No. 182. On 29.03.2012 the petitioners (i.e. Noor Din, etc.) through an appeal challenged the order dated 22.03.2012 before the Additional Commissioner. This appeal was dismissed *vide* order dated 23.02.2013. The said order was assailed through a revision i.e. ROR No. 696 of 2013 before the learned Member, Board of Revenue, Punjab. This revision was dismissed *vide* order dated 02.04.2013. The penultimate paragraph of the said order reads as under:

> "I have heard the preliminary arguments of the learned counsel for the petitioners and gone through the record carefully. It is evident that the learned counsel has emphasized upon the same arguments, which he had brought before the learned Additional Commissioner (Revenue), Lahore, who fully addressed all points, while passing the impugned order. The impugned order is a speaking order and covers all aspects of the case. Besides this, the learned counsel for the petitioners has failed to point out any material irregularity in the impugned orders as well as in the order of Extra Assistant Settlement Officer, Lahore Cantt. Therefore, I find no justification to interfere with the concurrent findings of two lowers Courts in exercise of revisional jurisdiction u/S. 164 of Land Revenue Act, 1967. The impugned order, dated 23.2.2013 passed by the Additional Commissioner (Revenue), Lahore along with order dated 22.3.2012, 29.6.2011 passed by EASO, Lahore Cantt is hereby upheld. Resultantly the instant revision petition is dismissed in limine being devoid of force. The file of this Court be consigned to the record room after fulfillment of its due completion."

3. Since the learned Member, Board of Revenue, Lahore had decided the revision petition (i.e. ROR No. 696 of 2013) without assigning any cogent reason, the petitioners (i.e. Noor Din, etc.) through a petition under Section 8 of the Board of Revenue Act, 1957 sought review of the order dated 02.04.2013. This review petition was dismissed by the learned Member (Judicial-VI) Eioard of Revenue, Punjab *vide* order dated 22.04.2014 by recording the following findings:

> "I have considered the review petition, written arguments of learned counsels for the parties, as well as record of case file carefully. The petitioners failed to produce any new and important matter or evidence

before the Court. The contention of the learned counsel for the petitioners has already been discussed in detail in the order under review. I find no reason to interfere in the order under review dated 02.04.2013 which is upheld and the instant review petition is dismissed.".

4. The petitioners are aggrieved by the orders dated 2.4.2013 and 22.04.2014 of the learned Member (Judicial-VI) Board of Revenue Punjab. It is contended on behalf of the petitioners that the orders impugned in this petition are not valid *inter-alia* for the reasons that the appeal preferred by the Respondents No. 4 to 9 before the Collector challenging the entries made in mutation No. 182 was patently barred by time but this fact was not taken into consideration while passing the impugned orders; that during pendency of the civil suit instituted by Zafar Ahmad (petitioner of Writ Petition No. 27117 of 2014) challenging the entries made in the revenue record, the revenue hierarchy had no lawful authority to set-aside Mutation No. 182; and, that the learned Member Board of Revenue while passing the impugned orders had not assigned any cogent reason.

5. After hearing the afore noted arguments I asked learned counsel appearing on behalf of private respondents (i.e. Din Muhammad, etc.) as to whether the orders passed by the learned Member Board of Revenue are sustainable as the same are bereft of any reason. In response to said query the learned counsel appearing on behalf of the private respondents could not offer any convincing reply. The perusal of penultimate paragraphs of the impugned orders which have been reproduced hereinabove unfolds that the learned Member, Board of Revenue, Punjab while passing the same had neither apprised the arguments canvassed before him nor recoded his own independent findings. Such a perfunctory disposal leads to wastage of judicial time and the time of the litigants as well, and therefore, is always, regarded as improper judgment and is of doubtful validity. It is an established principle of law that a judicial order must be speaking order manifesting by itself that the Court has made an endeavor to marshal the facts for the resolution of the issues involved for their proper adjudication. The ultimate result may be reached by a diligent effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, the feeling with the painful results, that justice has neither been done nor seems to have beep done is inescapable. In this regard reference may be made to the case of *"Muhammad Ameer and others versus Mst. Fajjan and ethers"* (2012 CLC 1663).

6. Needless to observe here that Board of Revenue is the superior forum in the revenue hierarchy and it is expected from it that it would promote the culture of justification instead of culture of authority. In the instant case the orders recorded by the learned Member Board of Revenue, Punjab do not exhibit a judicious treatment of the case and the determination of dispute and, therefore, cannot be held a valid orders. Thus without going into the merit of the case these petitions are

hereby allowed and orders dated 02.04.2013 and order dated 22.04.2014 are hereby set-aside and declared to have been passed without lawful authority and of no legal effect. Resultantly the revision petition i.e. ROR No. 696 of 2013 shall be deemed to be pending before the learned Member (Judicial-VI), Board of Revenue, Punjab who shall decide the same afresh after affording opportunity of hearing to all the parties and through a well-reasoned speaking order as expeditiously as possible preferable within a period of two (02) months. Parties are directed to appear before the learned Member Board of Revenue, Punjab on 14.12.2016.

(R.A.) Petitions allowed

**PLJ 2017 Lahore 286**
**Present: SHAHID WAHEED, J.**
**Rana MUHAMMAD ASLAM--Petitioner**
**Versus**
**ADDITIONAL SESSIONS JUDGE/APPELLATE AUTHORITY, FAISALABAD and 5 others--Respondents**

W.P. No. 33263 of 2016, decided on 27.10.2016.

**Punjab Local Govt. Act, 2013--**

----S. 27--Pakistan Penal Code, (XLV of 1860), S. 21--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Stamp vendor--Disqualified--Nomination paper--Seat reserved for category of peasant--Issuance of license by D.C. stamp vendor fell within definition of public servant--Validity--Petitioner was in service of Government' entrusted with performance of public duty falls within ambit of public servant and thus, stood disqualified to contest election for seat reserved for category of peasant/worker. [P. 288] A

*Mr. Shahid Shaukat Chaudhary,* Advocate for Petitioner.
*Hafiz Muhammad Saleem,* Advocate/Legal Adivsor of ECP.
*Mr. A.D. Bhatti,* Advocate for Respondent No. 5.
*Mr. Khalid Mehmood,* ARO.
Date of hearing: 27.10.2016.

**ORDER**

This constitutional petition calls into question the decision dated 22.10.2016 of the learned Appellate Authority reversing the decision dated 17.10.2016 of the Returning Officer whereby the nomination paper of the petitioner was accepted.

2. Briefly the facts of the case are that name of the petitioner was proposed for election to the seat reserved for the category of Peasant/Worker. On scrutiny the Returning Officer accepted the nomination papers of the petitioner. Against the said decision the Respondent No. 5 preferred an appeal before the learned Appellate Authority on the ground that the petitioner being a stamp vendor could not be allowed to contest the election for the seat reserved for the category of Peasant/Worker. This plea prevailed upon the learned Appellate Authority and consequently the appeal was accepted and nomination paper of the petitioner was rejected *vide* decision dated 22.10.2016.

3. The petitioner is aggrieved by the afore noted decision. Learned counsel for the petitioner has pleaded that although the petitioner is a stamp vendor yet does not fall within the category of public servant as defined in Section 21 of the Pakistan Penal

Code; and, that the nomination papers of the petitioner have been erroneously rejected by the learned Appellate Authority. He places reliance upon the case law titled *"M. Nazir Ahmad versus Muhammad Aslam and others"*(2013 SCMR 363) and *"Munawar Hussain Bukhari versus Appellate Authority/Tribunal Alipur District Muzaffargarh and others"* (2016 SCMR 1087).

4. On the other hand learned counsel appearing on behalf of the Respondent No. 5 has vehemently opposed this petition and submitted that since the petitioner is a stamp vendor, he stood disqualified under Section 27 of the Punjab Local Government Act, 2013.

5. The arguments canvassed by learned counsel for the Respondent No. 5 are seconded by the learned legal advisor appearing on behalf of Election Commission of Pakistan.

6. After hearing I have found no substance in the arguments canvassed by the learned counsel for the petitioner. Admittedly the petitioner is a stamp vendor. It has been held by this Court in the case of *"Abdul Ghaffar versus The State and another"* (2012 P.Cr.LJ. 255) that a stamp vendor appointed by the District Collector receives the stamp from the Government Treasury for sale to the public and receives commission out of the public revenue for performance of his work. He is also duty bound to maintain the correct account and record of all such receipts and sale of stamp papers on the register prescribed for this purpose. On the basis of above it was concluded that with the issuance of license by the District Collector the stamp vendor fell within the definition of public servant in terms of clause ninth of Section 21, PPC. According to the principle settled in the case of Abdul Ghaffar (*Supra*) it can be easily held that the petitioner is in the service of the Government entrusted with performance of public duty falls within the ambit of public servant and thus, stood disqualified to contest the election for the seat reserved for the category of Peasant/worker. The decision rendered by the learned Appellate Authority is, thus, free from any legal defect and, therefore, no interference therewith is called for.

7. In the sequel this petition is dismissed.

(R.A.) Petition dismissed

**2018 C L C 176**
**[Lahore]**
**Before Shahid Waheed, J**
**GHULAM MUHAMMAD----Petitioner**
**Versus**
**SECRETARY HOUSING, URBAN DEVELOPMENT PUBLIC HEALTH ENGINEERING DEPARTMENT OF PUNJAB and 3 others----Respondents**

W.P. No.15807 of 2016, heard on 13th September, 2017.

**(a) Constitution of Pakistan---**

----Arts. 199, 9, 10-A, 23, 25 & 201---Allotment of plot, cancellation of--- Show-cause notice---Requirement---Non-issuance of show-cause notice--- Effect---Order without reasons--- Scope--- Constitutional petition--- Maintainability--- Findings of fact by second appellate authority at variance with first appellate authority---Effect---Allotment of plot was cancelled due to non-fulfilment of conditions by the allottee---Contention of petitioner was that no show-cause notice was issued---Validity---If findings of fact by second appellate authority was at variance with that of first appellate authority then former would prevail---Findings of second appellate authority were immune from interference in constitutional petition if same were substantiated by evidence on record and supported by reasoning---If findings of second appellate authority could not be supported by evidence on record or the Authority had failed to take into account a material evidence on record or if it did not record a basis for differing from the findings of first appellate authority or was otherwise found to be arbitrary, then the same could be set aside in constitutional petition---First appellate authority set aside the order for cancellation of allotment which was made without issuing show-cause notice---Second appellate authority was bound to address all the issues of law and facts and decide the matter by giving reasoning---High Court had issued directions in the earlier round of litigation which were binding on the authorities---Authorities had not only disregarded the said directions but also passed the impugned order without appraising the record/evidence which was in excess of jurisdiction---Petitioner could not be refused relief by throwing him again on the mercy of authorities by remanding the case---Authorities were required to issue notice calling upon the petitioner to show-cause as to why his allotment was not cancelled---Show-cause notice must state the act complained of attracting adverse action to be taken, source of power under which said action was proposed and it must prescribe the date, time and place of hearing and period within which reply to the show-cause notice was to be filed---Show-cause notice issued to the petitioner did not contain the date, time and place of hearing which was an inadequate notice---Notice issued to the petitioner was received back to the authorities as undelivered---Authorities were required to effect of service of notice through publication in the local press in circumstances---No such notice was effected on the petitioner---Cancellation of allotment of plot could

not be held to be valid as being violative of principles of natural justice---Authorities were not only required to record reasons or the cancellation of allotment but also to supply copy of said order to the petitioner---Authorities had only recorded 'issue cancellation order' without any reasons---Secretary Housing, Provincial Government, was final authority on the administrative side and was bound to check such malpractices and maladministration---Secretary Housing had failed to discharge his duty and he did not follow the directions of High Court---Impugned order was result of mis-reading and non-reading of record which was a misconduct---Non-completion of building within a period of four years could not be made basis for cancellation of allotment---Petitioner had been discriminated which was not permissible under Art.25 of the Constitution---Discrimination was a blemish which would not only eclipse the integrity of public Authority but also vitiate its action---Impugned order passed by the authorities being violative of Fundamental Right guaranteed under Art.25 of the Constitution was not valid---Valuable right having accrued in favour of the petitioner as he had not only paid the entire outstanding dues along with penalty but had also raised construction on the suit plot---Valuable right could not be allowed to be trampled on mere technicalities of law---Competent authority was directed by the High Court to initiate disciplinary proceedings against the delinquent officers and pay compensation as costs/exemplary damages to the petitioner---Order for cancellation of allotment was set aside---Constitutional petition was allowed in circumstances.

Balakotiah v. Union of India and others AIR 1958 SC 232; The Chairman East Pakistan Railway Board, Chittagong and another v. Abdul Majid Sardar, Ticket Collector, Pakistan Eastern Railway, Laksam PLD 1966 SC 725 and Muhammad Siddique v. Divisional Forest Officer, Okara 2014 PLC (C.S.) 253 ref.

Syed Ali Abbas and others v. Vishan Singh and others PLD 1967 SC 294; Wattan Party through President v. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others PLD 2006 SC 697 and Ambika Devi v. State of Bihar and others AIR 1988 Pat 258 rel.

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

----Art. 10-A---Every person was entitled to a fair trial and due process for determination of his civil rights.

Muhammad Javed Umar for Petitioner.

Raja Muhammad Arif, Addl. A.G. for Respondents.

Date of hearing: 13th September, 2017.

## JUDGMENT

**SHAHID WAHEED, J.---** The subject matter of challenge in this constitutional petition is the order dated 20.04.2016 passed by respondent No.1 on the second appeal of respondent No.3 whereby the order dated 11.03.2008 of respondent No.2 was set aside and consequently the allotment of plot in favour of the present petitioner was cancelled.

2. Dispute in this case relates to plot No. 58/3-Z measuring 7-Marlas situated at Area Development Scheme (ADS), Chiniot. On 13.02.1976, the plot was allotted to the present petitioner under Low Income Housing Scheme. The petitioner after making payment of first installment amounting to Rs.893/- executed sale agreement in respect of plot on 25.08.1976. Physical possession of the plot was delivered to the petitioner vide possession slip dated 24.05.1977. According to clause (vii) of the Schedule provided in the allotment order dated 13.02.1976, the petitioner was required to pay the balance price of the plot with the prescribed interest in five equal half yearly installments from the date of delivery of possession. The petitioner was also bound to construct the building within four years from the date of possession. These conditions were not fulfilled by the petitioner. This breach of terms and conditions of allotment led the respondent No.4 to issue a show-cause notice bearing No.1248 dated 9.9.1981 to the petitioner. This notice was received back un-delivered. The Head Clerk of the office of respondent No.4 prepared a note disclosing the afore-stated facts and sought order for cancellation of allotment. On this report, the respondent No.4 recorded his note dated 08.12.1981 for the issuance of cancellation order. Pursuant to said note, memorandum No.98 dated 03.02.1982 was issued to the petitioner informing him that his allotment had been cancelled; and, that if he wanted to prefer an appeal he might do so within a period of three months before the Deputy Commissioner, Jhang. Though memorandum was sent to the petitioner under registered cover but the same was also received back in the office of respondent No.4 undelivered. The petitioner was, therefore, ignorant about the cancellation of allotment of plot. He, however, being in possession of the plot raised construction thereon. It is an admitted fact that on 26.7.1999 the petitioner executed a document through which he agreed that he would have no objection if the plot, on payment of outstanding dues, is transferred in the name of one Abdul Waheed. Pursuant to said document, Abdul Waheed got possession of the plot and raised further construction. Subsequently, one Ghulam Rasool Kokab, to whom the plot was allotted on 6.7.1993, tried to dispossess Abdul Waheed from the plot. In order to protect his possession, Abdul Waheed instituted a suit before Civil Court, Chiniot and obtained injunctive order dated 3.9.1999. This suit was dismissed for non-prosecution, perhaps for the reason that allotment in respect of Ghulam Rasool Kokab was cancelled.

3. It is a matter of record that Abdul Waheed moved this Court through constitutional petition i.e. W.P.No.21668/1999 with the contention that he had filed an application before the Deputy Director, Housing and Physical Planning Department for transfer of plot but the same was not decided. Since Abdul Waheed had not attached copy of the said application along with the petition, the same was found pre mature. However, the constitutional petition was disposed of vide order dated 17.11.1999 with the observation that Abdul Waheed would be well within his right to approach the respondents for redressal of his grievance and the respondents would be duty bound to redress his grievance strictly in accordance with law. Pursuant to the said order the petitioner on 5.01.2000 moved an application before

the District Collector, Jhang for restoration of his allotment. It was maintained in the application that the plot had been sold to Abdul Waheed vide agreement dated 26.07.1999; that Abdul Waheed had constructed a house on the plot; and, that the cancellation of allotment was made without any notice, and thus, the same was void. On the other hand, Abdul Waheed also filed an application before the District Collector for issuance of allotment order in respect of the plot in his favour. Both the applications were declined by respondent No.4 vide memorandum No.17 dated 11.01.2000.

4. The petitioner felt aggrieved by memorandum No.17 dated 11.01.2000. He, therefore, preferred an appeal before the Commissioner (respondent No.2)/appellate authority. This first appeal was contested by respondent No.4. On consideration of the matter, respondent No.2 accepted the appeal vide order dated 11.03.2008. Through the said order allotment of the plot was restored subject to the condition that the petitioner would pay/deposit 10% restoration fee and other dues to the department within a period of two months. It is an admitted fact that restoration fee and other dues were paid by the petitioner within the stipulated period of time.

5. The order dated 11.03.2008 of respondent No.2 was challenged by respondent No.3 through second appeal before respondent No.1, Secretary to Government of Punjab, Housing, Urban Development and Public Health Engineering Department, Lahore. The Petitioner also filed an application before respondent No.1 for the implementation of order dated 11.03.2008 passed by respondent No.2. After hearing, respondent No.1 came to the conclusion that first appeal of the petitioner before respondent No.2 was barred by time and thus the order dated 11.03.2008 was not valid. On the basis of said conclusion the second appeal of respondent No.3 was allowed and consequently the cancellation order issued by respondent No.4 was restored. The order of respondent No.1 was assailed before this Court through a constitutional petition i.e. W.P. No.4493 of 2009, wherein it was observed that respondent No.1 while accepting the second appeal of respondent No.3 had not adverted to the reasons recorded by respondent No.2 in his order dated 11.03.2008; and, that it was the duty of respondent No.1 to advert to the reason given by respondent No.2 and then give his own reasons while differing with the order of respondent No.2 but he had failed to do so. On the basis of above stated findings W.P. No.4493 of 2009 was accepted vide order dated 14.07.2015 and the matter was remanded to respondent No.1 with a direction to decide the same afresh in the light of above findings/ observations.

6. On remand, respondent No.1 again accepted the second appeal vide order dated 20.04.2016 and set aside the order dated 11.03.2008 of respondent No.2. The petitioner is not satisfied with this order and, therefore, he has filed the instant petition with a prayer that by accepting this petition the order dated 11.03.2008 of respondent No.2 be restored.

7. It is contended on behalf of the petitioner that orders of respondent No.1 and respondent No.2 are at variance; that order dated 20.04.2016 of respondent No.1 being not in conformity with the observations recorded by this Court in order dated 14.07.2015 passed in W.P. No.4493/2009 is not valid; that the action of the respondents is discriminatory (in this regard reference is made to the case of Muhammad Latif, Fazal Din, Manzoor Ahmad and Muhammad Aslam); and, that the impugned order was passed by ignoring the different instructions/orders issued by the Government of Punjab from time to time particularly order dated 08.08.2003 and memorandum dated 15.11.1966. On the other hand, learned Addl. Advocate General, Punjab submits that since the petitioner had breached the terms and conditions of the allotment order dated 13.02.1976, he could not make a grouse that cancellation order was not valid; that the appeal of petitioner before respondent No.2 was patently barred by time which fact was not considered by respondent No.2 while accepting the appeal of the petitioner and, therefore, respondent No.1 rightly reversed the order of respondent No.2.

8. This is a case where order dated 20.4.2016 of the respondent No.1 (Secretary, Housing, Urban Development and Public Health Engineering Department, Government of the Punjab) and order dated 11.3.2008 of the respondent No.2 (District Co-ordination Officer, Jhang) qua the cancellation of allotment of plot are at variance. The legal position is that if the finding of fact reached by the second appellate authority is at variance with that of the first appellate authority, the former will ordinarily prevail. The finding of the second appellate authority will be immune from interference in constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons recorded by the first appellate authority. However, if the finding of the second appellate authority cannot be supported on the evidence on record or if it has failed to take into account a material piece of evidence on record or if it does not record a logical basis for differing from the finding of the first appellate authority or is otherwise found to be arbitrary, it will have to be set aside in constitutional petition. In the present case, the respondent No.2, on perusal of record, found that the said cancellation order was made without issuing show-cause notice to the petitioner and by ignoring order dated 08.08.2003 whereby concession was allowed to the allottees in the Housing Scheme under the control of Director General to deposit outstanding dues in respect of allotted residential plots/ quarters upto 31.12.2005. On the basis of these findings, respondent No.2 accepted the first appeal of the petitioner and set aside the cancellation order. The findings recorded by respondent No.2 in his order dated 11.03.2008 came up for consideration before respondent No.1 through second appeal which was preferred by respondent No.3. It was the duty and obligation of respondent No.1 to address himself to all the issues of law and facts and decide the matter by giving not only discreet reasoning but also by meeting with the reasoning recorded by respondent No.2 in his order dated 11.03.2008. Exactly on the same lines a direction was issued, in the earlier round of litigation, to respondent No.1 by

this Court vide order dated 14.07.2015 while disposing of W.P. No.4493/2009. This direction by virtue of Article 201 of the Constitution of the Islamic Republic of Pakistan, 1973 was binding on respondent No.1. On the contrary the respondent No.1 not only disregarded the direction of the Court but also passed the impugned order without appraising the record/evidence. It is, therefore, a case where respondent No.1 has passed the order in excess of his jurisdiction.

9. On being confronted with the above stated situation, learned Additional Advocate General by relying on the principles laid down in the cases of Balakotiah v. Union of India and others (AIR 1958 SC 232), The Chairman East Pakistan Railway Board, Chittagong and another v. Abdul Majid Sardar, Ticket Collector, Pakistan Eastern Railway, Laksam (PLD 1966 SC 725) and Muhammad Siddique v. Divisional Forest Officer, Okara (2014 PLC (C.S.) 253) suggested that by setting aside the impugned order the matter be remitted to respondent No.1 for fresh decision in accordance with law. I am not inclined to accede to this suggestion. There is a perversion of procedure apparent on the face of the record, and it is in my view idle to suggest that against such a denial of rights the proper course is to remand the matter to respondent No.1 for fresh decision. The petitioner cannot be refused relief by throwing him again on the mercy of respondent No. 1 who is responsible for such excess. My view finds corroboration from the principle settled by the Hon'ble Supreme Court of Pakistan in the case of Syed Ali Abbas and others v. Vishan Singh and others (PLD 1967 SC 294) and Wattan Party through President v. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others (PLD 2006 SC 697).

10. In the present case the plot was allotted to the petitioner under Low Income Housing Scheme vide Allotment Order dated 13.2.1976. The petitioner after making payment of first installment took possession of the plot. He was required to pay the balance price of the plot with the prescribed interest in five equal half yearly installments from the date of delivery of possession; and, also to construct the building within four years from the date of possession. Allegation is that these conditions were not complied with by the petitioner and this could be a valid basis for cancellation of allotment. However, before doing this the respondent No. 4 was required to issue notice calling upon the petitioner to show-cause as to why his allotment should not be cancelled. This was the fundamental requirement of procedural fairness and for this reason the Director General, West Pakistan Housing and Settlement Agency vide Memorandum No.3384-AURD-66/10637 dated 15.11.1966 had made it mandatory that before cancelling the allotment on account of a default of an allottee, proper show-cause notice should be issued to the allottee in future. The directions contained in said memorandum are relevant and, therefore, the same are reproduced hereunder:

> "It has been noticed that allotments/sales were cancelled in some cases by the Secretaries, District Allotment Committees on account of various defaults without given proper Show-Cause Notices to the defaulting

individual allottees/auction purchasers. In some other cases it has been noticed that a general notice was issued in the local press to a number of the defaulting allottees. In the general notice they were required to file objections against the cancellation of their allotments/sales. The cancellation of an allotment/sale without a proper notice or on the basis of a general notice is bad in law. A general notice does not fulfill the legal requirements because it is necessary that service of a notice, before a contemplated action is taken, is assured. The notice, through press is issued to an individual only when all means of service of notice are applied and failed to deliver the notice to the individual concerned or the allottees/auction purchasers refuse to accept the notice. It is, therefore, requested that before cancelling the allotment/sale on account of a default of an allottee or an auction purchaser, proper show-cause notice should be issued invariably to the allottee/auction purchaser individually in future and further action as required under rules be taken against him after its service is assured."

The respondents in their report and parawise comments have stated that complying with the above requirement of law, the respondent No.4 on 9.9.1981 vide Memo. No.1248/STJ directed the petitioner to show-cause within a fortnight as to why his allotment of plot should not be cancelled. This Memo is enclosed as Annexure-I with the report and parawise comments of respondent No.1. This was all fictional for two reasons: Firstly, a notice to be valid must satisfy at least four requirements, that is, (i) it must state the act complained of attracting adverse action; (ii) it must state the action proposed to be taken; (iii) it must state the source of power under which the action is proposed to be taken; and, (iv) it must prescribe the date, time and place of hearing and the period within which the reply may be filed [see Ambika Devi v. State of Bihar and others AIR 1988 Pat 258]. Perusal of Memo. No.1248/STJ dated 9.9.1981 (i.e. show-cause notice) unfolds that it does not contain the date, time and place of hearing. Thus, it was an inadequate notice. Secondly, the service of notice was feigned. According to Allotment Order dated 13.2.1976 the address of the petitioner was "Ghulam Muhammad Janjua son of Taj Din, Street Rajoa, Adda Chowk, Mohallah Thathi Sharqi, Chiniot, District Jhang". The respondent No. 4 was under obligation to send show-cause notice at the said address. On the contrary the notice contained incomplete address, that is, "Ghulam Mohd. Son of Taj Din, Gali Raja M/Thathi Sharqi, Chiniot". The notice, therefore, received back undelivered in the office of respondent No.4 with a remark that no person with the name of Ghulam Muhammad reside at the given address. This fact stands established from the office-note (Annexure-C) appended with the report and para-wise comments of respondents Nos.3 and 4. Notwithstanding the above omission, the respondent No.4, under these circumstances, was required to effect service of notice through publication in the local press. This was also not done. Thus, the present case is not one of inadequacy of notice, but also a case where no notice at all was given to the notice/the petitioner. In the absence of proper notice,

the cancellation order dated 8.12.1981 could not be held to be valid as being violative of natural justice.

10.(sic) The malfeasance and nonfeasance on the part of respondent No.4 did not end here. It continued till end. Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 guarantees that for the determination of his civil rights a person shall be entitled to a fair trial and due process. It is for this reason culture of authority is now a vintage. The Administrative Law has progressed and promotes the culture of reasoning. The respondent No.4 was, therefore, not only required to record reasons for the cancellation of allotment but also to supply a copy of his order to the petitioner. Again the provision of law and the fundamental right of the petitioner were violated by the respondent No.4. Annexure-'C' attached with the report and para-wise comments of respondent Nos. 3 and 4 transpires that on the office-note respondent No.4 just recorded "Issue cancellation order". This was recorded on 8.12.1981. There was neither any reason nor application of mind. This was nothing but a clear case of dereliction of duty. Perversity is still going on. The order of respondent No.4 was purportedly conveyed to the petitioner vide Memo. No.98 dated 3.2.1982. This was sent under registered cover but the address mentioned therein was incomplete and, therefore, it was received back in the office of respondent No. 4 undelivered with the remarks that "no person with the name Ghulam Muhammad reside at the given address". All these facts suggest corruption and corrupt practices of respondent No.4 and thus respondent No.2 was right while setting aside the cancellation order. The respondent No.1 was the final authority on the administrative side and thus was carrying a heavy responsibility. It was his duty to check malpractices and maladministration. The record of this case indicates that he failed to discharge his duty. He did not bother to appraise the record and meet with the findings recorded by respondent No.2 in his order dated 11.3.2008. He did not care to follow the directions of this Court which were issued vide order dated 14.7.2015 passed in W. P. No.4493 of 2009. He ignored all principles of law and passed the impugned order by misreading and non-reading of record and in a slip-shod manner. This is a grave misconduct. The order dated 20.4.2016 of respondent No.1, therefore, cannot be approved.

11. Now, I advert to the causes for cancellation of allotment. Non-payment of dues as per schedule given in the allotment order dated 13.02.1976 and non-completion of building within the stipulated time were the causes for cancellation of allotment. There is no denial to the fact that the petitioner after making payment of first installment amounting to Rs.893/- took over physical possession of the plot and thereafter did not make any payment as per schedule provided in the allotment order dated 13.02.1976. A question arises as to whether this could be made basis of cancellation of allotment. Answer to this question is in the negative for the reason that different notifications/orders [which have been appended with this petition as Annexures-U to U/18, particularly order dated 08.08.2007 (Annexure U/17)] issued by the Government of Punjab suggest that the petitioner had the time to make payment of the outstanding dues upto 31.12.2005. Similarly non-completion of building within a period of four years from the date of possession could not be made

basis for cancellation as the Government of Punjab vide letter No.SO(D-1)2-7/81 dated 25.08.1982 had granted general extension in the period of construction in the Area Development Scheme for low income housing upto 31.12.1982 without any surcharge/ penalty. Respondent No.2, therefore, rightly placed reliance upon the said notifications/orders and set aside the cancellation of the allotment. This aspect of the matter was also not appraised by respondent No.1 and thus it is a case of misreading and non-reading of evidence and also misapplication of the provisions of law.

12. There is another aspect of the matter which is worth consideration. The petitioner in ground-(k) of the memorandum of instant petition has pleaded that in identical matter restoration was granted to one Fazal Din and Muhammad Latif. In this regard, the petitioner has placed on record order dated 04.03.1990 whereby restoration was granted to the said persons. During the course of arguments the petitioner's counsel also referred the orders of respondent No.1 through which cancellation orders in the case of Muhammad Aslam and Manzoor Ahmad were set aside. I have examined the said orders and found that the case of the petitioner is at par with the referred cases. There is also no specific denial to this effect by the respondents in their parawise comments. Thus, it is a case of discrimination which is not permissible under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. Needless to mention here that discrimination is a blemish which not only eclipses the integrity of the public authority but also vitiates its action. Thus, the order passed by respondent No.1 being violative of the fundamental right guaranteed under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 is not valid. Even otherwise valuable right has accrued in favour of the petitioner as he has not only paid the entire outstanding dues along with penalty which have been received by the respondents without any protest but has also raised construction on the plot. This valuable right cannot be allowed to be trampled on mere technicalities of law.

13. In view of above, it is clear to me that this is a case where respondent No. 1, has reversed the findings of respondent No. 2 regarding the cancellation of allotment without paying any heed to the reasoning given by respondent No.2. Respondent No.1 has also wrongly discounted a very fundamental piece of evidence in the case namely non adherence to the procedure prescribed in memorandum dated 15.11.1966 qua the service of show-cause notice for cancellation of allotment and the notifications/orders issued by the Government of the Punjab from time to time, particularly the order dated 08.08.2003. Thus, this is a case wherein the findings of the first appellate authority i.e. respondent No.2 would prevail over the findings of respondent No.1.

14. This petition discloses a sordid and disturbing state of affairs. The facts and circumstances of the case take me to the question as to how grave injustice which has been perpetrated upon the petitioner can be rectified; and, administrative sclerosis leading to infringements of fundamental rights can be prevented. This Court being the protector of the fundamental rights of the citizen, has not only the power and jurisdiction but also an obligation to grant relief in exercise of its

jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to the victims whose fundamental rights under Articles 9, 10-A, 23 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973 are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers. The instant case is illustrative of such cases. Time has come to evolve new tools to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "Freedom under the Law" Lord Denning said:

> "No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do; and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence.... This is not the task for Parliament . the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country."

One of the telling ways in which the violation of fundamental rights can reasonably be prevented, is to punish its violator in the payment of monetary compensation. The right to compensation is some palliative for unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. In my view it would be a sound policy to mould the relief by granting compensation to the victims; and, to issue direction to the Competent Authority for initiation of disciplinary proceedings against delinquent officers in exercise of jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

15. In the facts of the present case the mode of redress which commends appropriate is to restore order dated 11.03.2008 of respondent No.2 by setting aside order dated 20.04.2016 of respondent No. 1 and by ordering payment of compensation of Rs.10,000/- as costs/exemplary damages and issuing direction to the Competent Authority for initiation of disciplinary proceedings against all the delinquent officers. This petition is accordingly allowed in above terms.

16. Office is directed to send a copy of this judgment to the Chief Secretary, Government of the Punjab for compliance and placing it on the dossier/personal file of the delinquent officers and for its circulation amongst the heads of all the Administrative Departments and Autonomous Bodies of the Government of Punjab for information.

ZC/G-17/L Petition allowed.

**2018 C L C Note 37**
**[Lahore (Rawalpindi Bench)]**
**Before Shahid Waheed, J**
**SULTAN KHAN---Petitioner**
**Versus**
**SADDAR-UD-DIN---Respondent**

Civil Revision No. 75 of 2010, heard on 19th May, 2017.

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

----S. 12---Suit for specific performance---Oral agreement---Trial Court dismissed the suit but Appellate Court decreed the same on the ground that defendant had failed to prove the assertions made in the written statement--- Oral agreement---Proof--- Requirements--- Validity---Plaintiff could not take advantage of any weakness of the defendant's case---Plaintiff's case must stand or fall on its own merits and not on the weakness of defendant's case---Where plaintiff sought decree on the basis of oral agreement he had to mention in the plaint the date, month, time and name of persons before whom oral agreement was concluded, complete details of terms and conditions of sale and satisfactory explanation for not reducing the terms and conditions of sale into writing---Such details should be corroborated through reliable oral as well as documentary evidence---Plaintiff, in the present case, had not complied with the said requirements---Plaint was silent with regard to necessary details of the oral agreement to sell---Such omission was fatal to the case of plaintiff---Evidence led by the plaintiff was beyond pleadings and same could not be read and relied upon---No documentary evidence was brought on record through witnesses---Documents produced by the plaintiff were not title documents---Appellate Court had reversed the findings of Trial Court without appraising evidence on the basis of weakness in the evidence led by the defendant---Trial Court had rightly dismissed the suit and judgment of Appellate Court was not valid---Impugned judgment and decree passed by the Appellate Court were set aside and those of Trial Court were restored---Revision was allowed in circumstances. [Paras. 6, 7 & 8 of the judgment]

Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others PLD 1973 SC 160; Messrs Aluminium Processing Industries International (Pvt.) Ltd. through Director and Chairman and another Karachi v. Federation of Pakistan through Chairman, Central Board of Revenue, Islamabad and 2 others 2003 PTD 1411 and Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604 rel.

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

----S. 12---Oral agreement to sell---Decree on the basis of such agreement---Requirements.

The decree on the basis of agreement to sell could be issued in favour of the plaintiff provided he would have firstly mentioned in the plaint: (i) the date, month,

time and name of persons before whom the oral agreement stood concluded; (ii) the complete details of the terms and conditions of sale; and, (iii) a satisfactory explanation for not reducing the terms and conditions of sale into writing and thereafter corroborate the same through reliable oral and as well as documentary evidence. [Para 7 of the judgment]

Mujeeb-ur-Rehman Kayani for Petitioner.

Najam-ul-Hassan Kazmi for Respondent.

Date of hearing: 19th May, 2017.

## JUDGMENT

**SHAHID WAHEED, J.---**The variant decree of the first appellate court has prompted the defendant to invoke the revisional jurisdiction of this court. This petition under section 115, C.P.C. stems from a dispute relating to house No.MCB 9/165 (Excise and Taxation No.B-IV/400), measuring 08-marlas 66 square feet situated at Mohallah Basti Allahwali, District Chakwal, which was owned by the defendant-petitioner. On 18-05-2004 the plaintiff-respondent (Saddar-ud-Din) sued the defendant through a suit for declaration with a prayer that he be declared owner in possession of the suit property on the basis of oral sale or in the alternate a decree for specific performance of the oral agreement be issued. Claim of the plaintiff was that in the year 1971, the defendant through an oral agreement had sold the suit property to him for a consideration of Rs.7,500/-; and that the defendant after having received the sale consideration amount had delivered possession of the suit property to him. The above claim was contested by the defendant through a written statement. It was maintained in the written statement that the plaintiff got possession of the suit property as tenant on a monthly rent of Rs.30/-; that the defendant had asked the plaintiff to vacate possession of the suit property on the ground of his personal need; and, that to counter the said request the plaintiff instituted the suit.

2. On pleadings, learned trial court, vide order dated 04-05-2005 settled following issues;

i. Whether the plaintiff is entitled to relief of declaration as stated in the head note of the plaint? OPP

ii. Whether the plaintiff has no cause of action to file the suit? OPD

iii. Whether the suit of the plaintiff is not properly valued for the purpose of Court fee and jurisdiction? OPD

iv. Whether the plaintiff filed this suit just to harass the defendant and defendant is entitled to special costs under section 35-A, C.P.C.? OPD

iv-A. Whether the plaintiff is entitled to specific performance of contract of the disputed house as alternative relief? OPP

v. Relief.

3. Issues Nos.1 and 4-A were the material issues. Onus to prove the said two issues was upon the plaintiff. He, therefore, as his own witness appeared before the learned trial court as PW-1 and produced Allah Yar as PW-2 and Muhammad Sharif as PW-3. The plaintiff's counsel in his statement tendered Form-B (Exh.P1), telephone bill 2001 (Exh.P2), telephone bill 2000 (Exh.P3), PT-1, 1991-95 (Exh.P4), and PT-1, 1999 (Exh.P5).

4. The plaintiff in his statement while appearing before learned trial court as PW-1 deposed that oral agreement stood concluded in the presence of Noor Muhammad and Haji Rang Ellahi; that both the said witnesses had died; that he along with defendant went to one Tariq and Sharif for arbitration where the defendant though admitted the sale of the suit property but did not extend assurance to get the sale registered in his favour. In order to get corroboration of the above statement the plaintiff produced one of the arbitrators i.e. Muhammad Sharif as PW-3 and did not produce the other one without furnishing any reason. Muhammad Sharif (PW-3) in his statement deposed that the plaintiff was his friend; and, that the plaintiff had informed him that he had purchased the suit property. Since Muhammad Sharif (PW-3) had no direct knowledge of the alleged oral sale transaction, his statement was construed as hearsay. The last witness who appeared on behalf of the plaintiff was Allah Yar (PW-2). He was mason by profession. He only participated in the construction of the suit property. He was not the witness of the alleged oral agreement to sell the suit property. The documentary evidence tendered on behalf of the plaintiff also did not establish the ownership of the plaintiff. On the basis of afore-stated evidence the learned trial court came to the conclusion that alleged oral agreement was not proved. The suit was therefore, dismissed vide judgment and decree dated 30-06-2008.

5. The plaintiff assailed the judgment and decree of the learned trial court through an appeal under section 96, C.P.C. before the learned Additional District Judge, Chakwal. On appeal the learned Additional District Judge after evaluating the evidence led by the defendant reversed the decree of the learned trial court. It was observed that the version of the defendant that the plaintiff had not been paying monthly rent since 1999 was not plausible; that solitary statement of the defendant was of no value; and, that since the defendant had failed to prove the assertions made in the written statement, it would be safe to hold that in fact there was an agreement to sell between the parties on the basis of which the plaintiff was in possession of the suit property. Wherefore, the suit was treated as one for specific performance of agreement. The learned first appellate court vide judgment and decree dated 25-11-2009 accepted the appeal while setting aside the decree of learned trial court and issued a decree for specific performance of agreement, in favour of respondent/plaintiff.

6. The sole question which falls for determination in this case is whether the decree issued by the first appellate court is valid. This is a case where judgments and decrees of the courts below are at variance and, therefore, I have examined the same from stem to stern with the assistance of learned counsel for the parties. In the

present case the plaintiff had pleaded that in the year 1971 the defendant had sold the suit property to him though an oral agreement for consideration of Rs.7,500/- and therefore, a decree for declaration of title or in the alternate a decree for specific performance of agreement was sought. Keeping in view the averments made in the plaint, learned trial court framed issue No.1 and Issue No.4-A. Onus to prove the said two issues were rightly placed upon the plaintiff. Now, it was the duty of the plaintiff to prove the said issues through confidence inspiring evidence. The plaintiff could not take advantage of any weakness of the defendant's case. It is settled principle of law that plaintiff's case must stand or fall on its own merits and not on the weaknesses of the defendant's case. It appears that this principle of law was not adhered to by the learned first appellate court. Without appraising the evidence which was led by the plaintiff to prove Issues Nos.1 and No.4-A, learned first appellate court reversed the findings of the learned trial court and issued decree in favour of the plaintiff on the basis of weaknesses in the evidence led by the defendant. Since the approach to address the issues was not proper and legal, the judgment and decree of the first appellate court cannot sustain.

7. This is a case where plaintiff sought decree on the basis of oral agreement. The decree as prayed for in the plaint could be issued in favour of the plaintiff provided he would have firstly mentioned in the plaint: (i) the date, month, time and name of persons before whom the oral agreement stood concluded; (ii) the complete details of the terms and conditions of sale; and, (iii) a satisfactory explanation for not reducing the terms and conditions of sale into writing and thereafter corroborate the same through reliable oral and as well as documentary evidence. The above requirements of law were not complied with by the plaintiff. In fact the plaint was silent about all the above cited necessary details of the oral agreement to sell. This omission was fatal. The evidence which was led by the plaintiff was beyond pleadings and, therefore, it could not be read and relied upon. The documentary evidence was also not brought on record through witnesses and therefore, the same as per principle settled in the case of "Khan Muhammad Yousaf Khan Khattak v. S.M Ayub and 2 others" (PLD 1973 SC 160), "Messrs Aluminium Processing Industries International (Pvt.) Ltd., through Director and Chairman and another Karachi v. Federation of Pakistan through Chairman, Central Board of Revenue, Islamabad and 2 others" (2003 PTD 1411) and "Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others" (PLD 2010 SC 604) could not be taken into consideration by the court. Even otherwise documents produced by the plaintiff were not title documents and, therefore, were of no significance. These aspects of the case were taken into consideration by the learned trial court and, thus, it rightly dismissed the suit of the plaintiff. Since, the learned first appellate court proceeded on incorrect premises, its judgment and decree are not valid.

8. In the sequel, this petition is accepted, the judgment and decree dated 25-11-2009 of the learned first appellate court are set aside and the judgment and decree dated 30-06-2008 of the learned trial court are restored with no order as to cost. ZC/S-75/L Revision allowed.

**PLJ 2018 Lahore 129**
**Present: SHAHID WAHEED, J.**
**Mst. GHULAM ZAINAB--Petitioner**
**versus**
**GULASTAR HUSSAIN through LRs etc.--Respondents**
C.R. No. 1217-D of 2010, heard on 24.4.2017.

**Gift--**
----Ingredients of oral gift--Transaction of gift was got recorded on the basis of power-of-attorney--Validity--Under Islamic law, a gift in order to be valid and binding upon the parties must full fill three conditions: (a) a declaration of the gift by donor (b) Acceptance of gift by the donee: (C) delivery of possession of corpus. [P. 132] A

**Onus of proof--**
----Gifted by Pardanashin Lady--Validity--Onus of proof of transaction of gift recorded in revenue record in form of mutation was essentially upon its beneficiary to establish that same was result of conscious application of mind of donor and not under influence or fraud--Petition was accepted. [P. 132] B

2002 SCMR 1291, 2010 SCMR 1370, 2008 SCMR 1384, *ref.*

*Mr. Mujeeb-ur-Rehman Kiani,* Adocate for Petitioner.
*Mr. Iftikhar Ahmad Zaki,* Advocate for Respondents No. 1 & 2.
Nemo (Ex-Parte Vide Order dated 22.2.2011) for Respondent No. 3.
Date of hearing: 24.4.2017.

**JUDGMENT**

**Shahid Waheed, J.--**The plaintiff has filed this petition to seek revision of the decree dated 05.10.2010 of the learned first Appellate Court whereby appeal of Respondents No. 1 and 2 against the decree dated 29.05.2009 of the learned Trial Court was accepted and her suit was dismissed.

2. Dispute in this case initially related to land measuring 23 *Kanals* 16 *Marlas* situated within the revenue estate of Munday, Tehsil and District Chakwal which was owned by the present petitioner (*Mst.* Ghulam Zainab) and her sister, Hameeda Begum. The said property stood transferred in the name of their nephew, Mudassar Hussain (Respondent No. 2), who is son of Gulastar Hussain (brother of the present petitioner) on the basis of oral gift. The transaction of gift was got recorded in the revenue record by Gulastar Hussain on the basis of power of attorney dated 04.04.1981 (Ex.D-7) *vide* Mutation No. 5644 dated 20.07.1998 (Ex.P-15). The petitioner alongwith her sister Hameeda Begum on 18.04.2003 instituted a suit against the respondents and sought a decree for declaration to the effect that Mutation No. 5644 dated 20.07.1998 was illegal and ineffective upon their rights. A prayer was also made that respondents be restrained from interfering in their possession over the suit land. The allegations of the plaint

were that the predecessor of Respondent No. 1, that is, Gulastar Hussain was the real brother of the petitioner; that consequent upon the death of the petitioner's father, Gulastar Hussain, brought the petitioner to Chakwal for the purpose of transfer of license of .12-bore gun; that for the said purpose the thumb impressions of the petitioner were obtained on certain blank papers; that Gulastar Hussain taking advantage of illiteracy and Parda of the petitioner fraudulently got executed general power of attorney dated 04.04.1981 in his favour; that subsequently on the basis of said power of attorney Gulastar Hussain got sanctioned gift Mutation No. 5644 dated 20.07.1998 in favour of his son i.e. Mudassar Hussain (Respondent No. 2); and, that the petitioner had not gifted the suit land in favour of Respondent No. 2 and, therefore, Mutation No. 5644 dated 20.07.1998 was illegal being result of fraud and misrepresentation.

3. The allegations of the plaint were contested by Respondents No. 1 and 2 whereas Respondent No. 3 (brother of the petitioner) filed a conceding written statement. During trial, the sister of the petitioner i.e., *Mst.* Hameeda Begum (Plaintiff No. 1) made a request that she be allowed to withdraw the suit to her extent. This request was allowed and consequently the suit to the extent of *Mst.* Hameeda Begum was dismissed as withdrawn *vide* order dated 07.10.2005. Subsequently the present petitioner filed an amended plaint seeking declaration to the effect that Mutation No. 5644 dated 20.07.1998 (Ex.P-15) to the extent of her land measuring 11 *Kanals* 18 *Marlas* was void.

4. On pleadings, issues were framed and evidence was led. After appraising evidence the learned Trial Court relying upon the case of *Muhammad Jalil and 4 others vs. Muhammad Sami and 8 others* (PLD 2007 Lahore 467) held that the brother of the petitioner, Gulastar Hussain, on the basis of general power of attorney dated 04.04.1981 (Ex.D-7) could not make a gift and transfer the suit land in favour of his real son, as it was the sole prerogative of the petitioner to decide as to whom the gift was to be made. Upon the above stated findings the claim of the petitioner was allowed *vide* judgment dated 29.05.2009 and consequently Mutation No. 5644 dated 20.07.1998 was declared illegal and void. The decree was accordingly drawn on 29.05.2009.

5. The Respondents No. 1 and 2 assailed the decree of the learned Trial Court through an appeal under Section 96, CPC before the learned Addl. District Judge, Chakwal. On appeal, the learned Addl. District Judge held that power of attorney dated 04.04.1981 (Ex.D-7) fully authorized Gulastar Hussain to make a gift of the suit land and thus Mutation No. 5644 dated 20.07.1998 (Ex.P-15) was valid.

6. This is a case of variant findings of the learned Courts below in respect of transaction whereby the suit land stood transferred in the name of Respondent No. 2 through gift which was made by Gulastar Hussain on the basis of power of attorney dated 04.4.1981 (Ex.D-7). The petitioner through this petition seeks revision of the findings of the learned first Appellate Court on the basis of principle settled in the cases of *Haji Faqir Muhammad and others vs. Pir Muhammad and another* (1997 SCMR 1811) and *Mst Naila Kausar and another vs. Sardar Muhammad Bakhsh and others* (2016 SCMR 1781). It is contended on behalf of the

petitioner: (i) that in the said cases the Hon'ble Supreme Court of Pakistan settled two principles: firstly, that an attorney cannot utilize the power conferred upon him to transfer the property to himself or to his kith and kin without special and specific consent and permission of the principal; and, secondly, that power of attorney cannot be utilized for effecting a gift by the attorney without intentions and direction of the principal to gift the property; (ii) that in the light of afore-stated principle of law Gulastar Hussain, predecessor of Respondent No. 1, on the basis of power of attorney dated 04.04.1981 (Ex.D-7) could not transfer the suit land through gift in favour of his real sent i.e. Respondent No. 2 as neither the specific consent and permission of the petitioner was obtained nor the same was proved by producing convincing evidence; and, (iii) that this aspect of the matter was not taken into consideration by the learned first Appellate Court and thus it fell into error while reversing the findings of the learned Trial Court. On being confronted with the afore-noted arguments learned counsel appearing on behalf of Respondents No. 1 and 2 by referring to the statement made by Gulastar Hussain before the learned Trial Court as DW-1 submitted that the petitioner of her own free will made gift at her house; and, that Gulastar Hussain on the basis of power of attorney dated 04.04.1981 (Ex.D-7), only got recorded the transaction of gift in the revenue record *vide* Mutation No. 5644 dated 20.07.1988 (Ex.P-15) and thus in these circumstances the principle settled in the afore-cited precedents does not attract to the present case. The arguments canvassed by respondents' counsel appeared to be convincing at first blush but after reading the contents of the written statement the same were found of no substance. Respondents No. 1 and 2 in their joint written statement did not state that the petitioner had herself made the gift at her house; and, that Gulastar Hussain was asked to get the said transaction recorded in the revenue record on the basis of alleged power of attorney dated 04.04.1981 (Ex.D-7). The statement made by Gulastar Hussain (DW-1), before the learned Trial Court was beyond the pleadings and, therefore, could not be relied upon. The afore-stated facts and circumstances lead to the conclusion that Gulastar Hussain without getting express and specific permission of the petitioner transferred the suit land in favour of his real son on the basis of power of attorney dated 04.04.1981 (Ex.D-7) and, therefore, the same could not be held valid; and, that the findings of the learned Trial Court being valid were erroneously reversed by the learned first Appellate Court.

7. There is another aspect of the matter. Under the Islamic Law, a gift, in order to be valid and binding upon the parties, must fulfill three conditions: (a) a declaration of the gift by the donor; (b) acceptance of gift by the donee; and, (c) delivery of possession of corpus. On the fulfillment of above three conditions a valid gift comes into existence. The onus of proof of transaction of gift recorded in the revenue record in the form of mutation was essentially upon its beneficiary to establish that same was result of conscious application of mind of donor and not under influence of fraud played with her. Since it was a case of transaction of oral gift, the Respondents No. 1 and 2 being beneficiary, were required to first state in the pleadings the date, time, place and persons in whose presence the gift was made

and thereafter to prove the essential ingredients of gift by producing convincing evidence. In this regard reference may be made to the cases of *Bashir Ahmad and another vs. Muhammad Rafiq* (2002 SCMR 1291) and *Khaliqdad Khan and others vs. Mst. Zeenat Khatoon and others* (2010 SCMR 1370). In the present case, the Respondents No. 1 and 2 in their written-statement had not disclosed the date, time, place and name of persons before whom the transaction of gift took place. This omission was fatal. Even otherwise the statement of Gulastar Hussain which he made before the learned Trial Court as DW-1 was also silent about the date and time on which the petitioner made a declaration of gift of the suit land in favour of her nephew and its acceptance. Same is the status of the statements of other witnesses who appeared on behalf of respondents. The failure to clearly establish the twin requirements of making and acceptance of gift was fatal to the claim of the respondents-defendants. Consequently, it could not be said that a valid gift was made by the petitioner in favour of her nephew, i.e. Respondent No. 2.

8. Another facet of the case which, was ignored by the first appellate Court is that the petitioner is a *Pardanashin* illiterate lady. The Hon'ble Supreme Court of Pakistan in the case of *Mst. Rasheeda Bibi and others vs. Mukhtar Ahmad and others* (2008 SCMR 1384) has settled the following points which should be taken into consideration by the Courts with regard to gift deed or transaction of gift made by a Pardanashin lady:--

(i) Whether the plaintiff (donor) had any friendly advice before executing the deed and by a person whom the Court considers as being genuinely interested in her welfare?

(ii) Whether the document was explained to her and whether she really had the capacity to understand its consequences?

(iii) Whether it was a mental act, that is, whether the mind accompanied the hand that executed it?

(iv) Whether the entire transaction was free from circumstances throwing any shadow of doubt or suspicion on the inception, execution and application of the deed?

In the present case, there is no evidence on the file by the respondents that the petitioner (donor) had any friendly advice before making gift; that transaction of gift was explained to her; and that transaction was result of conscious application of petitioner's mind. This aspect of the matter suggests that the Mutation No. 5644 dated 20.07.1998 was not valid; and, that the claim of the petitioner as set out in the plaint was justified.

9. Since the judgment and decree of the learned first Appellate Court are not in consonance with the principle settled by the Hon'ble Supreme Court of Pakistan, as discussed above, the same cannot be held valid. This petition is, therefore, accepted. The judgment and decree dated 05.10.2010 passed by the learned Addl. District Judge, Chakwal are hereby set aside and consequently the judgment and decree dated 29.05.2009 of the learned Trial Court are restored with no order as to costs.

(W.I.B.) C.R. Accepted

**2018 M L D 338**
**[Lahore]**
**Before Shahid Waheed, J**
**Messrs AMMAR TEXTILE (PVT.) LTD. through Chief Executive---Petitioner**
**Versus**
**KHURRAM MAQSOOD and another---Respondents**

Writ Petition No.41528 of 2017, heard on 3rd November, 2017.

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

----S. 12(2)---Constitution of Pakistan, Art. 10-A---Application under S.12(2), C.P.C.---Judgment, setting aside of---Imposition of condition---Scope---Right of fair trial---Scope---Petitioner filed an application under S. 12(2), C.P.C. assailing judgment and decree passed against him on the plea of fraud and misrepresentation---Trial Court, before deciding application under S. 12(2), C.P.C., directed petitioner to deposit Rs. 1,000,000/- in court on failure to such deposit, application was dismissed---Order passed by Trial Court was maintained by Lower Appellate Court---Validity---No provision of law existed to impose of condition to deposit certain amount for taking cognizance of application under S. 12(2), C.P.C.---Imposition of condition to deposit Rs. 1,000,000/- was not only against Islamic dispensation of justice but also violative of provisions of Art. 10-A of the Constitution which had guaranteed fair trial for determination of rights of parties---Courts below exercised their jurisdiction illegally and with material irregularity while declining application under S. 12(2) C.P.C.---Allegations raised in application under S. 12(2) C.P.C. were serious in nature and Trial Court was required to apply its mind to such allegations and could have determined the same by giving cogent reasons---Failure to determine allegations and dismissal of application on technical grounds was nothing but negation of justice and spirit of law; that was to resolve dispute between parties on merits---High Court set aside orders passed by two courts below and remanded matter to Trial Court for decision afresh---Constitutional petition was allowed under circumstances.

Syed Shahab Qutab for Petitioner.
Mian Muhammad Abbas for Respondents No.1.
Date of hearing: 3rd November, 2017.

**JUDGMENT**

**SHAHID WAHEED, J.---**The genesis of this constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is the suit which was instituted by respondent No.1 seeking a decree against the petitioner for recovery of Rs.10,261,231/-. During trial of the said suit Mirza Shabbir Hussain, Advocate by filing his power of attorney entered appearance on behalf of the

petitioner. Subsequently, Mr. Abdul Samad Khan, Advocate filed his power of attorney on behalf of the petitioner. On 07.05.2008 written statement was filed and thereafter the case had been adjourning for hearing arguments on the respondent No.1 's application under Order XXXVIII, Rules 5 and 8 read with Order XXXIX Rules 1, 2 and 151, C.P.C. Vide order dated 09.10.2009 the petitioner was proceeded against ex-parte and the said application was allowed. On the next date of hearing i.e. 21.10.2009 the Trial Court without framing issues recorded ex-parte evidence. After appraising evidence, the suit of respondent No.1 was decreed as prayed for vide judgment dated 10.11.2009. The decree sheet of even date was accordingly prepared.

2. On 16.12.2009 the respondent No.1 filed an application for the execution of decree dated 10.11.2009 through attachment of property and arrest of the officials of the petitioner-company. The Executing Court vide order dated 05.03.2010 issued non-bailable warrant of arrest of the Chief Executive of the petitioner-company, Bilal Ahmad. In compliance with said order the Chief Executive was arrested and produced before the Executing Court on 25.03.2010. On the said date Bilal Ahmad was released on bail subject to furnishing surety bonds in the sum of Rs.10.00 million. Subsequently, on 06.04.2010 the properties of the petitioner-company were ordered to be attached. Vide order dated 04.06.2010 the Executing Court appointed court auctioneer for sale of the attached property through public auction.

3. Before the date of auction, the petitioner on 06.07.2010 filed three applications: firstly, application under section 12(2), C.P.C. for setting aside judgment and decree dated 10.11.2009; secondly, application under Order XXI Rule 26, C.P.C. before the Executing Court seeking stay of auction proceedings; and, thirdly, application under Order XXI Rule 23, C.P.C. seeking, inter-alia, dismissal of the execution petition.

4. The Trial Court vide order dated 06.07.2010 issued notice on the application under section 12(2), C.P.C. and stayed the execution proceedings subject to deposit of Rs.1.00 million in the Court. Order dated 06.07.2010 reads as under:--

> "This is a petition under section 12(2), C.P.C., be registered accordingly. Let notices be issued to the respondent for 14.07.2010 through registered post A.D. and TCS.
>
> 2. Objections raised in the petition needs further consideration, therefore, subject to payment of Rs.10,00,000/- into the court, the auction proceedings are stayed, till next date of hearing. However, this order shall not affect any legal act or proceedings of any competent court."

The above cited order was not complied with and, therefore, another opportunity was granted to the petitioner to deposit sum of Rs.1.00 million vide order dated 28.10.2010, which is to the following effect:

> "Arguments on the following applications from both sides have been heard at considerable length:--

(i) APPLICATION UNDER SECTION 151, C.P.C. READ WITH ORDER XXXVIII RULE 10, C.P.C. FILED BY THE PETITIONER PERVA1Z TANVEER TUFAIL.

(ii) OBJECTION PETITION UNDER ORDER XXI RULE 23, C.P.C. FILED BY THE JUDGMENT DEBTOR.

(iii) APPLICATION UNDER SECTION 12(2), C.P.C. FOR SETTING ASIDE DECREE OBTAINED THROUGH FRAUD FILED BY THE JUDGMENT DEBTOR.

(iv) APPLICATION UNDER ORDER XXI, RULE 26 FILED BY THE JUDGMENT DEBTOR.

The court order dated 06.07.2010 has not been complied with by the judgment debtor whereby he was required to deposit an amount of Rs.01/- million into the court, therefore, the judgment debtor is required to make compliance of said order till the next date of hearing otherwise all the above miscellaneous applications shall stand dismissed. Now to come up for 06.12.2010. "

The petitioner felt aggrieved by the orders qua the deposit of Rs.1.00 million and filed petition seeking review of order dated 28.10.2010. This review petition was left undecided and the Trial Court dismissed the main case i.e. application under section 12(2), C.P.C. for non-deposit of amount vide following order dated 05.04.2011:

"Proxy counsel for judgment debtor has left the court after making his attendance. In continuation of short order dated 06.07.2010 and 28.10.2010, the judgment debtor has not deposited an amount of Rs.01 million into the court. The judgment debtor has failed to show his bona fide, therefore, all the following applications stand dismissed:-

(i) APPLICATION UNDER SECTION 151, C.P.C. READ WITH ORDER XXXVIII, RULE 10, C.P.C. FILED BY THE PETITIONER PERVAIZ TANVEER TUFAIL.

(ii) OBJECTION PETITION UNDER ORDER XXI RULE 23, C.P.C. FILED BY THE JUDGMENT DEBTOR.

(iii) APPLICATION UNDER SECTION 12(2), C.P.C. FOR SETTING ASIDE DECREE OBTAINED THROUGH FRAUD FILED BY THE JUDGMENT DEBTOR.

(iv) APPLICATION UNDER ORDER 21, RULE 26 FILED BY THE JUDGMENT DEBTOR.

The decree holder has submitted list of articles for attachment and the sale. The attachment has already been ordered. As the judgment debtor is prevaricating and trying to frustrate the court proceedings, therefore, I do not feel need to issue show cause and the attached articles are put on open auction.

2. The court auctioneer has already been appointed named Mr. Sikandar Javed, Advocate (Cell No.03006359218) vide order dated 04.06.2010. He is

directed to put the attached articles on auction under the following schedule; -

| | | |
|---|---|---|
| I | Notice to the parties and affixation of proclamation notice outside of the court | 20.04.2011 |
| II | Proclamation on the spot | 05.05.2011 |
| III | Auction of the spot | 20.05.2011 |

Now to come up for report of auction for 25.05.2011."
Again an application was filed by the petitioner seeking recalling of above stated order dated 05.04.2011. This application was declined vide order dated 28.05.2012 by invoking the provisions of section 11, C.P.C. The orders dated 28.10.2010, 05.04.2011 and 28.05.2012 were challenged through a revision petition under section 115, C.P.C. This revision petition could not evoke a favourable response and, therefore, the same was dismissed vide judgment dated 15.05.2017 by the Additional District Judge, Lahore.

5. The petitioner is aggrieved by the orders of the courts below. The petitioner's counsel press this only to the extent of orders of the courts below passed on the application under section 12(2), C.P.C. He requests that an order in the nature of writ of certiorari be issued for quashing the orders of the courts below in respect of the application under Section 12(2), C.P.C.

6. It is contended on behalf of the petitioner that maintainability of application under section 12(2), C.P.C. could not be made contingent upon the prior deposit of sum of Rs.1.00 million in the Court; that requirement to deposit sum of Rs.1.00 million amounted to place embargo on the petitioner's right to challenge the decree on the basis of fraud under section 12(2), C.P.C.; and, that the orders of the Courts below are void and, therefore, the same cannot be allowed to sustain. Responding to the above noted arguments learned counsel for respondent No.1 submits that conduct of the petitioner was contumacious and, therefore, it was not entitled to any relief; and, that the petitioner through this petition seeks to frustrate the execution of money decree, which was validly issued by the Trial Court.

7. The pivotal moot point which requires determination is whether the Trial Court could dismiss the petitioner's application under section 12(2), C.P.C. for non-deposit of Rs.1.00 million in the Court. Perusal of order dated 06.07.2010 transpires that deposit of Rs.1.00 million was not the condition precedent to entertain the application under section 12(2), C.P.C. This condition at best could be relevant for the application under Order XXI, Rule 26, C.P.C. seeking stay of auction proceedings. Admittedly, this condition was not complied with and, therefore, the Trial Court on the next date of hearing (i.e. 28.10.2010) had two options, that is, either to dismiss the application under Order XXI, Rule 26, C.P.C. or extend the time to deposit the amount of Rs.1.00 million. On the contrary the Trial Court vide

order dated 28.10.2010 not only directed the petitioner to deposit Rs.1.00 million into the Court but also administered a warning that in default its three applications would stand dismissed. It was not proper, and, therefore, gave a fillip to the petitioner to file a petition seeking review of order dated 28.10.2010. This petition even could not budge the Trial Court to notice the error. The Trial Court let the error alone and committed another irregularity. As per principle settled in the cases of "Muhammad Umer v. Muhammad Qasim and another" (1991 SCMR 1232) "Azra Manzoor Qureshi v. Faysal Bank Limited and 2 others" (2005 CLD 1417), and "Muhammad Azam v. Muhammad Abdullah through L.Rs." (2009 SCMR 326) the Trial Court was required to first decide the review petition and thereafter to proceed further in the matter. It was not done. The Trial court left the review petition undecided and dismissed the main case i.e. application under Section 12(2), C.P.C. for non-deposit of Rs.1.00 million vide order dated 05.04.2011. It was a material irregularity and for this reason the final order dated 05.04.2011 stood vitiated. Even otherwise, there is no provision of law for imposition of condition to deposit certain amount for taking cognizance of an application under section 12(2), C.P.C. In fact the imposition of condition to deposit Rs.1.00 million was not only against the Islamic dispensation of justice but also violative of the provisions of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 which guarantee fair trial for determination of rights of the parties. This aspect of the matter suggests that the courts below exercised their jurisdiction illegally and with material irregularity while passing the above stated orders and declining application under section 12(2), C.P.C.

8. Another aspect of the case is that the Trial Court while declining the application under section 12(2), C.P.C. has not recorded any reason. It is an established principle of law that a judicial order must be a speaking order manifesting by itself that the Court has made an endeavor for the resolution of the issues involved for their proper adjudication. It is essential that Judge should accord fair and proper hearing to the persons sought to be affected by his orders and give sufficiently clear and explicit reasons in support of orders made by him. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice and this rule must be observed in its proper spirit and mere pretence of compliance with it, would not satisfy the requirement of law. In the instant case the impugned orders of the Courts below with respect to application under Section 12(2), C.P.C. are bereft of any reason and, therefore, the same are not valid in the eye of law.

9. The allegations of the application under section 12(2), C.P.C. are that the petitioner never engaged a counsel but respondent No.1 through misrepresentation and fraud maneuvered the process or proceedings of the Trial Court in such a way that his fraudulent acts appeared to be natural, that is, (i) delayed service of notice; (ii) submission of memo. of appearance and then power of attorney; (iii) change of counsel: (iv) filing of fake written statement and reply to stay application (v)

seeking time and adjournments for arguments on behalf of the company; (vi) making it appear as if the petitioner had lost interest in the proceedings; and, (vii) obtaining orders for ex-parte proceeding. These allegations are serious in character and thus the Trial Court was required to apply its mind to the said allegations and determine the same by giving cogent reasons. Failure to determine the said allegations and dismissal of application on technical grounds was nothing but negation of justice and the spirit of law, that is, to resolve dispute between the parties on merits. Thus orders of the courts below being perverse are liable to be set aside.

10. In the sequel, this petition is accepted and judgment dated 28.05.2012 of the Revisional Court and impugned orders of the Trial Court qua the application under section 12(2), C.P.C. are set aside and declared to have been passed without lawful authority and of no legal effect. Consequently the petitioner's application under section 12(2), C.P.C. shall be deemed to be pending before the Trial Court which shall decide the same afresh in accordance with law. Since valuable rights of the parties are involved, the Trial Court is directed to decide the said application within a period of six months.

MH/A-105/L Petition allowed.

**2018 M L D 1044**
**[Lahore]**
**Before Shahid Waheed, J**
**WALI MUHAMMAD through L.Rs. and others---Appellants**
**Versus**
**GHULAM NABI---Respondent**

Regular Second Appeal No.221 of 2014, heard on 29th November, 2017.

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

----S. 13---Civil Procedure Code (V of 1908), S. 96---Talbs, performance of---Requirements---Discrepancy qua time of performing Talb-i-Muwathibat---Effect---Appellate Court, duty of---Scope---Pre-emptor to claim right of pre-emption was bound to prove formalities of performing talbs---Date, time and place were essential components to prove Talb-i-Muwathibat---Discrepancy in the statements of pre-emptor and his witnesses with regard to time to perform Talb-i-Muwathibat was on record which could not be ignored---Convincing, reliable and consistent statement of witnesses was mandatory requirement of law as from the date and time of performing Talb-i-Muwathibat the period for sending notice of Talb-i-Ishhad had to be calculated---Pre-emptor had not performed first Talb immediately on getting information with regard to sale of suit land---Talb-i-Ishhad was to be performed by sending a written notice under registered cover acknowledgement due attested by two truthful witnesses---Pre-emptor was required to first aver in his plaint that notice of Talb-i-Ishhad was sent under cover along with acknowledgement due request---Contents of plaint and statements of witnesses appeared on behalf of plaintiff were silent with regard to sending of said notice with acknowledgement due---Plaintiff unless permitted by the Trial Court could not have produced any evidence on the point of notice under registered cover being posted with acknowledgement due---Acknowledgement due card was tendered without getting permission of Trial Court in the statement of counsel but not through any witness---Said acknowledgement due card could not be considered in evidence in circumstances---Pre-emptor had failed to discharge his burden to prove that notice of Talb-i-Ishhad as required under S.13(3) of Punjab Pre-emption Act, 1991---Vendee had denied the receiving of any notice of Talb-i-Ishhad in the present case---Pre-emptor was bound to prove that notice of Talb-i-Ishhad was served upon the vendee---Service of notice of Talb-i-Ishhad was not personally effected upon the vendee---Pre-emptor had failed to perform Talb-i-Ishhad in accordance with law---First appeal was a right in which both questions of law and facts had to be considered---First Appellate Court was bound to deal with all the issues of law and

facts itself and decide them by rendering discreet reasoning---Appellate Court without recording its own reasons had just repeated the findings of Trial Court and dismissed the appeal---Appellate Court had failed to exercise jurisdiction while rendering impugned judgment and decree---Pre-emptor, to be entitled to the right of pre-emption, was bound to perform Talb-i-Muwathibat and Talb-i-Ishhad---Plaintiff had failed to perform talbs in accordance with law in the present case and he was not entitled to decree as prayed for---Impugned judgments and decrees passed by the Courts below were not sustainable in the eye of law---Suit filed by the pre-emptor was dismissed---Second appeal was allowed in circumstances.

Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others PLD 2007 SC 302; Ghulam Abbas and another v. Manzoor Ahmad and another 2008 SCMR 1366; Abdul Majid Mia v. Moulvi Nabiruddin Pramanik and 3 others PLD 1970 SC 465; Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others PLD 1973 SC 160; Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604; E.A. Evans v. Muhammad Ashraf PLD 1964 SC 536; Abdul Qayyum v. Muhammad Rafique 2001 SCMR 1651; Basharat Ali Khan v. Muhammad Akbar 2017 SCMR 309; Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Bashir Ahmad v. Ghulam Rasool 2011 SCMR 762; Allah Ditta through his L.Rs. and others v. Muhammad Anar 2013 SCMR 866; Khan Afsar v. Afsar Khan and others 2015 SCMR 311 and Munawar Hussain and others v. Afaq Ahmad 2013 SCMR 721 rel.

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

----S. 96---Appeal---Scope---Appeal under S. 96, C.P.C. was a substantive right conferred by the statute.

Saif Ullah Maan for Appellants.

Mian Shah Abbas Iqbal for Respondent.

Date of hearing: 29th November, 2017.

## JUDGMENT

**SHAHID WAHEED, J.---**The defendant has brought this second appeal to challenge the affirmative decree dated 21.07.2014 passed in a suit for possession through pre-emption by the Additional District Judge, Sheikhupura, on the grounds contemplated in: (i) section 100(1)(a), C.P.C. that decision is contrary to law; and (ii) section 100(1)(c), C.P.C. that a substantial error or defect in the procedure provided by the Code of Civil Procedure has produced error or defect in the decision of the case upon merit.

2. Dispute in this case related to land measuring 11-kanals 12 marlas situated within the revenue estate Buttar Tehsil and District Sheikhupura, which was sold to the predecessors of the appellants, that is, Wali Muhammad for a consideration of

Rs.300,000/- vide mutation No.2015 dated 28.02.2006 (Ex.P4). This land was owned by Liaqat Ali, who was brother of the respondent-plaintiff, Ghulam Nabi. The case of the respondent-plaintiff was that although sale of the suit land was made surreptitiously yet he got knowledge of the same on 18.04.2006 at 8.00 a.m. through Muhammad Siddique (PW-1) and Maqbool Ahmad (PW-4) at the Baithak of his house; that after getting knowledge a declaration to exercise right of pre-emption was made by him on the ground of superior right; and, that Talb was repeated through a notice whereby request was made to the vendee to transfer the suit land in his favour. The averments made in the plaint were traversed by the vendee, Wali Muhammad, through a written statement. It was maintained in the written statement that plaintiff-respondent had neither made requisite Talbs in accordance with law nor was entitled to exercise right of pre-emption as he had participated in the sale of suit land.

3. The divergent stances canvassed in the pleadings were reduced into issues by the Trial Court vide order dated 18.10.2006. The instant appeal is only concerned with issue No.1 viz "whether the plaintiff has fulfilled requirements of Talbs?" The onus to prove the said issue was placed upon the plaintiff-respondent. The respondent-plaintiff as his own witness appeared before the Trial Court as PW-6. He in his statement admitted that vendor, Liaqat Ali, was his real brother and they were living without any conflict in a joint house situated in a village. He also deposed that he got knowledge of the sale of the suit land on 18.04.2006 at 8.00 a.m. through Maqbool Ahmad and Muhammad Siddique; that on getting information a declaration to exercise right of pre-emption was made; that on 25.04.2006 the whole state of affairs was disclosed to Maqbool Ahmad clerk, who prepared the notice which was attested by Maqbool Ahmad and Muhammad Siddique and was dispatched from Post Office Kutchehry under registered cover. The first witness, who appeared on behalf of the plaintiff, was Muhammad Siddique (PW-1). This witness in his examination-in-chief did not disclose time at which he informed the plaintiff-respondent about the sale of the suit land. However, during course of cross-examination he stated that he went to Ghulam Nabi at 10.00 a.m. The statement of this witness regarding the date of making Talb-i-Muawathbit was consistent with the averments made in the plaint. As regard notice of Talb-i-Ishhad he stated that same was drafted by Maqbool Ahmad clerk which was signed by him and was dispatched through post office. The other witness who appeared on behalf of the plaintiff-respondent was Maqbool Ahmad (PW-4). He in his examination stated that on 18.04.2006 the plaintiff-respondent was informed about the sale of the suit land; that on getting information Ghulam Nabi on the ground of his superior right made declaration to exercise his right of pre-emption; that on 25.04.2006 Maqbool Ahmad clerk on our statements prepared a notice which was signed by him and

dispatched to the vendee, Wali Muhammad. The respondent-plaintiff also produced Mirza Manzoor Ahmad, Postman, (PW-2). This witness in his statement stated that he was postman of the revenue estate Buttar; that he delivered the registered post No.189 to one girl at the house of Wali Muhammad; and, that he also obtained signatures of that girl on the acknowledgement card. He, however, did not produce the record as same had been destroyed. The pre-emptor also produced Riaz Ameen (PW-3). He was postal clerk in the Kutchehry Post Office, Sheikhupura. He in his statement stated that postal receipt No.189 dated 25.04.2006 (Ex.P1) was issued from his office. The last witness who appeared on behalf of the plaintiff-respondent was Maqbool Ahmad clerk (PW-5). He in his statement stated that notice of Talb-i-Ishhad (Ex.P2) was drafted by him which was read over to the plaintiff-respondent and witnesses; that notice was signed by the witnesses; and, that notice was sent under registered cover (Ex.P1) to the defendant. The counsel for the plaintiff-respondent in his statement tendered acknowledgement card (Ex.P3), copy of mutation No.2015 (Ex.P4), copy of Jamabandi for the year 1997-98 (Ex.P5) and a copy of Khasra Girdwari (Ex.P6). The evidence of the plaintiff-respondent stood closed vide order dated 29.09.2010.

4. After recording plaintiff-respondent's evidence the defendant, Wali Muhammad, died. According to order dated 09.02.2010 the date of death of the defendant was 26.12.2009. In the wake of death of defendant, his legal heirs, that is, present appellants were impleaded as defendants in the suit. The amended plaint impleading present appellants was filed. The present appellants, however, did not file amended written statement but relied upon the earlier written statement filed by their predecessor. On the side of the appellants only Shafaaqat Ali (appellant No.2) appeared before the Trial Court as DW-1. This witness in his examination-in-chief stated that respondent-plaintiff was aware of the sale of the suit land as he was the person through whom the sale was finalized in favour of his deceased father-vendee, Wali Muhammad; and, that the respondent-plaintiff had neither made any Talb nor sent any notice to his father. He, however, during course of cross-examination admitted that Ghulam Nabi got knowledge of the sale of the suit land on 18.04.2006.

5. On consideration of the matter, the Trial Court came to conclusion that although there was a very minor and trivial discrepancy as regard time, yet respondent-plaintiff and his witnesses had been consistent qua the date and place of making Talb-i-Muwathibat and thus it stood proved. As regard Talb-i-Ishhad it was held that the same was proved by examining attesting witnesses of the notice of Talb-i-Ishhad (Ex.P2). On the basis of afore-stated findings the Trial Court issued decree in favour of the pre-emptor-plaintiff, that is, respondent through judgment dated 08.09.2011.

6. The defendant, feeling aggrieved, appealed against the decree of the Trial Court. It was duty of the Court of first appeal to deal with all issues, as first appeal was a valuable right in which both questions of law and facts were to be considered and judgment in the first appeal was to address itself to all the issues of law and facts and decide them by giving discreet reasoning. Law is well settled that an appeal under section 96, C.P.C. is a substantive right conferred by the Statue and it is continuation of the proceedings, which comes entirely upon the first Appellate Court carrying with it a right of re-hearing of law and facts as well as reviewing pleadings and evidences afresh. In the present case, the Additional District Judge, while deciding issue No.1, after recapitulating the statements of the witnesses cited some case law and recorded, "I fully endorse the findings of the trial court that there is very minor and trivial discrepancy as regard time of the Talb-i-Muwathibat in the cross-examination of Muhammad Siddique who mentioned that we went to plaintiff at 10.00 a.m." As regard Talb-i-Ishhad the first Appellate Court returned its findings by holding "same has been proved by the plaintiff by producing marginal witnesses of the notice of Talb-i-Ishhad and in that notice Talb-i-Muwathibat has been reiterated." The Additional District Judge without recording his own reasons had just repeated the findings of the Trial Court and dismissed the appeal vide judgment and decree dated 21.07.2014. This was nothing but dereliction of duty and complete failure to exercise jurisdiction rendering the judgment and decree dated 21.07.2014 perverse and arbitrary apart from grossly illegal. Ordinarily in these circumstances the case is remanded to the first Appellate Court to give its findings after proper appreciation of evidence. However, I am not inclined to adopt this course of action so as to save parties from the agony of further litigation.

7. First objection of the appellants is that since the respondent had not proved the making of Talb-i-Muwathibat, he was not entitled to the decree as prayed for in the plaint. Elaborating this objection the appellants' counsel submits that in order to be entitled to the right of pre-emption the pre-emptor-plaintiff should have proved through convincing evidence the date, time and place of making Talb-i-Muwathibat; and, that the statement of the plaintiff qua the time of making Talb-i-Muwathibat did not tally with the statement of PWs and thus it could not be held that the plaintiff-respondent had proved the making of Talb-i-Muwathibat. Responding to this objection respondent's counsel submits that the plaintiff-respondent in paragraph 2 of the plaint stated that he had got knowledge of the sale of the suit land on 18.04.2006 at 8.00 a.m. This averment stood corroborated from the statement which was made by the respondent while appearing before the Trial Court as PW-6; and, that the time stated by Muhammad Siddique (PW-1) in his cross-examination, that is, 10.00 a.m though did not match with the time stated by plaintiff-respondent, yet it could be ignored being trivial in nature. He concluded that since statements of witnesses are consistent with regard to date and place of making Talb-i-Muwathabit, findings of the Trial Court warrant no interference.

8. The arguments canvassed at Bar are to be addressed according to the provisions of Section 13 of the Punjab Pre-emption Act, 1991 which envisage that for claiming right of pre-emption strict proof for observance of formalities of making of Talbs would be essential. The date, time and place are essential components to prove valid making of Talb-i-Muwathibat. In the present case difference of opinion between the learned counsel for the parties is with regard to time of making Talb-i-Muwathibat. Thus, in order to resolve this difference, it is expedient to examine contents of the plaint and statements of the witnesses. The plaintiff in paragraph 2 of the plaint stated that he had got knowledge of the sale of the suit land at 8.00 a.m. This time was reiterated by the pre-emptor in his statement before the Trial Court while appearing as PW-6. The plaintiff-respondent was required to prove this fact through evidence. He, therefore, produced Muhammad Siddique, one of the informers, before the Trial Court as PW-1. This witness in his examination-in-chief did not state the time at which the plaintiff made Talb-i-Muwathibat. However, during course of cross-examination he stated that he went to the plaintiff at 10.00 a.m. This time did not match with the time stated in the plaint or by the plaintiff in his statement. The other witness was Maqbool Ahmad (PW-3). The statement of this witness is silent about time at which the plaintiff got knowledge and made Talb-i-Muwathibat. Thus, his statement was inconsequential to prove time. Here a question arises whether the discrepancy with regard to time stated by the plaintiff and his witness Muhammad Siddique (PW-1) was ignorable being trivial in nature. Answer to this question is in the negative for the reason that law insists on utmost promptitude in the making of first Talb i.e. Talb-i-Muwathibat. To prove factor of time convincing, reliable and consistent statements of the witnesses is mandatory requirement of law, as from the date and time of making Talb-i-Muwathibat, the period for sending notice of Talb-i-Ishhad is calculated. This is exactly what the Hon'ble Supreme Court of Pakistan has held in the case of Mian Pir Muhammad and another v. Faqir Muhammad through LRs and others (PLD 2007 SC 302). In this precedent case the Full Bench of the Hon'ble Supreme Court of Pakistan while examining importance of date and time of making Talb-i-Muwathibat has held that great emphasis and importance is to be given to this word in making Talb-i-Muwathibat and it is necessary that as soon as the pre-emptor acquired knowledge of the sale of pre-empted property he should make immediate demand for his desire and intention to assert his right of pre-emption without the slightest loss of time. According to the dispensation which has been reproduced hereinabove after performing Talb-i-Muwathibat, in terms of section 13(2) of the Act, the pre-emptor has another legal obligation to perform i.e. making of Talb-i-Ishhad as soon as possible after making Talb-i-Muwathibat but not later than two weeks from the date of knowledge of performing Talb-i-Muwathibat, therefore, the question can conveniently be answered by holding that to give full effect to the provisions of subsections (2) and (3) of section 13 of the Act, it would be mandatory to mention in the plaint date, place and time of performance of Talb-i-Muwathibat because from such date, the time provided by the statute i.e. 14 days under sub-section (3) of section 13 of the Act shall be calculated. Supposing that there is no mention of the

date, place and time of Talb-i-Muwathibat then it would be very difficult to give effect fully to subsection (3) of section 13 of the Act, and there is every possibility that instead of allowing the letter of law to remain in force fully the pre-emptor may attempt to get a latitude by claiming any date of performance of Talb-i-Muwathibat in his statement in Court and then on the basis of the same would try to justify the delay if any, occurring in the performance of Talb-i-Ishhad. It is now a well-settled law that performance of both these Talbs successfully is sine qua non for getting a decree in a pre-emption suit. It may be argued that as the law has not specified about the timing then how it would be necessary to declare that the mentioning of the time is also necessary. In this behalf, it is to be noted that connotation of Talb-i-Muwathibat in its real perspective reveals that it is a demand which is known as jumping demand and is to be performed immediately on coming to know of sale then to determine whether it has been made immediately, mentioning of the time would be strictly in consonance with the provisions of section 13 of the Act. This Court in the case of Rana Muhammad Tufail v. Munir Ahmed and another (PLD 2001 SC 13), declined to grant leave to appeal maintaining the judgment of the learned High Court as there was four hours delay in making the Talb-i-Muwathibat from the time of receiving the knowledge of the sale. In the case of Mst. Sundri Bai v. Ghulam Hussain (1983 CC 2441) High Court of Sindh, held the delay of 1-1/2 hour in making Talb-i-Muwathibat to be fatal to the scheme of Shufa when the pre-emptor was residing on the first floor while the purchaser/respondent was residing on the ground floor of the same building. In another case of Mst.Kharia Bibi v. Mst. Zakia Begum and 2 others (C.A.1618 of 2003) this view was endorsed". On the basis of principle settled in the case of Mian Pir Muhammad's case the discrepancy between statements of the plaintiff (PW-6) and Muhammad Siddique (PW-1) qua the time of making Talb-i-Muwathibat was not trivial and, thus, could not be ignored. In fact, it was a material discrepancy which created doubt in respect of making Talb-i-Muwathibat and benefit thereof would go to the vendee. The conclusion, therefore, is that respondent-plaintiff had not made first Talb, that is , Talb-i-Muwathibat immediately on getting information about the sale of suit land. Thus, objection raised by the appellants is valid and findings of the Courts below with regard to making of Talb-i-Muwathibat are hereby reversed.

9. The second objection of the appellants is that the respondent had also not made Talb-i-Ishhad in accordance with law. The grouse of the appellants is that since notice of Talb-i-Ishhad (Ex.P2) was not personally served upon the vendee, that is, Wali Muhammad, and, thus, merely on the basis of statement of the attesting witnesses of Ex.P2 it could not be held that second Talb was made by the respondent-plaintiff in accordance with law. Controverting this objection, respondent's counsel submits that notice of Talb-i-Ishhad (Ex.P2) was attested by two witnesses, i.e. Muhammad Siddique (PW-1) and Maqbool Ahmad (PW-3) and the same was sent to the vendee under registered cover acknowledgment due; that the said facts stand proved from the statements of witnesses; and, that on the basis of principle settled by the Hon'ble Supreme Court of Pakistan in the case of Ghulam

Abbas and another v. Manzoor Ahmad and another (2008 SCMR 1366), Courts below rightly returned their findings that making of Talb-i-Ishhad was proved. The law governing this objection is contained in subsection (3) of Section 13 of the Punjab Pre-emption Act, 1991 which envisages that where a pre-emptor has made Talb-i-Muwathibat, he shall as soon thereafter as possible but not later than two weeks from the date of knowledge make Talb-i-Ishhad by sending a notice in writing attested by two truthful witnesses, under registered cover acknowledgment due, to the vendee, confirming his intention to exercise right of pre-emption. It means that Talb-i-Ishhad shall be made by (a) written notice; (b) attested by two truthful witnesses; (c) sent under registered cover; and (d) acknowledgment due. These four formalities are mandatory where the facility of post office is available. Admittedly in the present case, facility of post office was available to the pre-emptor (respondent) and, therefore, onus was on him to prove that while making Talb-i-Ishhad said formalities were strictly observed. In order to discharge the burden of proving Talb-i-Ishhad, the pre-emptor -respondent was required to first aver in his plaint that notice (Ex.P2) was sent under registered cover along with acknowledgment due request. In the present case, not only contents of the plaint but also statements of all the witnesses, who appeared on behalf of the pre-emptor-respondent, are silent with respect to sending of notice (Ex.P2) with acknowledgment due and, therefore, unless permitted by the Trial Court, the pre-emptor-respondent could not have produced any evidence on the point of notice under registered cover being posted with acknowledgment due. Though the acknowledgment due card (Ex.P3) was tendered without getting permission of the Trial Court but as per principle settled by the Hon'ble Supreme Court of Pakistan in the cases of Abdul Majid Mia v. Moulvi Nabiruddin Pramanik and 3 others (PLD 1970 SC 465), Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others (PLD 1973 SC 160) and Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others (PLD 2010 SC 604) it could not be taken into consideration as the same was not brought on record through any witness but in the statement of counsel. Consequently, keeping in view the pleadings and evidence on record it can safely be held that the respondent-pre-emptor had not been able to discharge his burden to prove that notice of Talb-i-Ishhad was issued in accordance with requirement of Section 13 (3) of the Punjab Pre-emption Act, 1991. Such default as per principle settled by the Hon'ble Supreme Court of Pakistan in the cases of E.A. Evans v. Muhammad Ashraf (PLD 1964 SC 536), Abdul Qayyum v. Muhammad Rafique (2001 SCMR 1651) and Basharat Ali Khan v. Muhammad Akbar (2017 SCMR 309) was fatal.

10. There is another aspect of the matter which lends credence to the objection that second demand, Talb-i-Ishhad, was not made in accordance with law. According to subsection (3) of Section 13 of the Punjab Pre-emption Act, 1991 the pre-emptor is required to send notice of the Talb-i-Ishhad to the vendee confirming his intension to exercise right of pre-emption. The expression "sending a notice" occurring in subsection (3) of Section 13 of the Punjab Pre-emption Act, have been under

consideration of the Hon'ble Supreme Court of Pakistan. The first judgment on the subject was rendered in the case of Ghulam Abbas and another v. Manzoor Ahmad and another (2008 SCMR 1366). This judgment was made on 24.12.2003. In this case three Members Bench of the Hon'ble Supreme Court of Pakistan held that when a notice of Talb-i-Ishhad was sent through registered post acknowledgement due at the correct address of the vendee then by virtue of Section 26 of the General Clauses Act it would be presumed that it had been delivered to the vendee. The second judgment in the series is Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105). This judgment was delivered on 23.02.2007. In this case three Members Bench of the Hon'ble Supreme Court of Pakistan took a different view and interpreted expression "sending a notice" as serving a notice and while doing so it was held that it was imperative for the plaintiff, in order to succeed in a suit for pre-emption, to produce evidence, including postman to prove that in fact notice was personally served upon the vendee or that he refused to accept the notice, which was sent at his correct address. The principle settled in the case of Abbas Ali Shah (supra) was affirmed and reiterated in the case of Bashir Ahmad v. Ghulam Rasool (2011 SCMR 762) and Allah Ditta through his LRs and others v. Muhammad Anar (2013 SCMR 866). Finally, the three Members Bench of the Hon'ble Supreme Court in the case of Khan Afsar v. Afsar Khan and others (2015 SCMR 311) again examined the provisions of Section 26 of the General Clauses Act, 1956 and requirement of making of Talb-i-Ishhad. After examining provisions of law and different precedents, the Hon'ble Supreme Court of Pakistan held that general law as contained in Section 26 of the General Clauses Act, 1956 would not be applicable in the case of making of Talb-i-Ishhad. In the light of above, it now stands settled that expression "sending a notice" has been used in section 13(3) of the Punjab Pre-emption Act, 1991 in a wider sense to convey the idea of "serving a notice" upon vendee. In the case on hands the appellants had denied the receiving of any notice of Talb-i-Ishhad, thus, a heavy burden was upon pre-emptor-respondent to prove that notice of Talb-i-Ishhad (Ex.P2) was served upon the vendee. In order to discharge this burden, the respondent produced Manzoor Ahmad, Postman, (PW-2). This witness in his examination-in-chief stated that registry No.189 was delivered to one girl at the house of Wali Muhammad, vendee. Even name of that girl was not disclosed by the said witness. The statement of PW-2 gives rise to a question as to whether the delivery of notice of Talb-i-Ishhad to a girl, whose name and relation with the vendee was unknown, would be valid. Answer to this question may be given by referring to the case of Munawar Hussain and others v. Afaq Ahmad (2013 SCMR 721). In that case vendees were two brothers and both notices of Talb-i-Ishhad were sent upon one vendee. It was pleaded therein that service upon co-vendee would be sufficient to make Talb-i-Ishhad. This plea was repelled, and it was held that service of notice on co-vendee was not backed by any provisions of law and, therefore, it was not tenable. Admittedly, in the present case, service of notice of Talb-i-Ishhad (Ex.P2) was not personally effected upon the vendee, Wali Muhammad and, thus, taking light from the case of Munwar Hussain (supra), it is held that it was not service in the eye of law. In these circumstances the only

conclusion which may be drawn is that the respondent had failed to make Talb-i-Ishhad in accordance with law.

11. Needless to observe here that in order to be entitled to the right of pre-emption a pre-emptor should make Talb-i-Muwathibat and Talb-i-Ishhad. They are condition precedent to exercise right of pre-emption. The respondent-pre-emptor, in the present case, had not made Talbs in accordance with law and, therefore, he was not entitled to decree as prayed for in the plaint. This aspect of the matter was not considered by the Courts below and, therefore, their decisions being contrary to law are not sustainable in the eye of law. This second appeal is, therefore, allowed. Decrees of the Courts below are set aside and consequently suit of the respondent is dismissed with no order as to costs.

ZC/W-1/L Appeal allowed.

**2018 M L D 1449**
**[Lahore]**
**Before Shahid Waheed, J**
**GHULAM MUHAMMAD---Petitioner**
**Versus**
**ASHIQ HUSSAIN and 13 others---Respondents**

Writ Petition No.206544 of 2018, decided on 30th April, 2018.

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

----O. XXXIX, Rr. 1 & 2---Specific Relief Act (I of 1877), S. 12---Colonization of Government Lands (Punjab) Act (V of 1912), S. 19---Allotment of colony land---Oral agreement to sell by the allottee---Suit for specific performance---Temporary injunction, grant of---Scope---Contention of plaintiff was that he was in possession of the suit land---Application for grant of temporary injunction was dismissed by the courts below---Validity---Convincing and reliable evidence was required to be produced by the plaintiff to establish the alleged oral sale---Prior to recording evidence it could not be held that plaintiff had established prima facie case in his favour---Temporary injunction could not be granted as a matter of course in such cases where evidence was yet to be produced to establish prima facie case---Plaintiff had failed to make out a prima facie case and there was no need to attend other two consideration i.e. balance of convenience and irreparable loss---Monetary value was attached to the suit land and there was no question of irreparable loss---No illegality or jurisdictional defect had been pointed out in the exercise of discretion by the courts below---Constitutional petition was dismissed in circumstances.

Mirza Nazim Baig v. Government of the Punjab through Chief Secretary and others 2008 SCMR 291; Syed Hussain Naqvi and others v. Mst. Begum Zakara Chatha through L.Rs. and others 2015 SCMR 1081; Fazal Din v. Mst. Robeena Aurgangzeb and 2 others 1983 CLC 1280; Chairman, Municipal Committee, Taxila v. Mohammad Jan and 4 others 1987 CLC 2416 and Aijaz Hussain Bhatti and another v. Haji Bagh Ali and 9 others 1985 CLC 261 ref.
Malik Noor Muhammad Awan for Petitioner.

**ORDER**

**SHAHID WAHEED, J.---**Prayer in this petition is that an order in the nature of writ of certiorari be issued for quashing the orders of the Courts below, whereby

application of the plaintiff under Order XXXIX, Rules 1 and 2, C.P.C. for grant of temporary injunction was dismissed.

2. This constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is of the plaintiff and arises from his suit through which he sought a decree for specific performance of oral agreement to sell dated 11.07.2004. Alon gwith plaint an application under Order XXXIX Rules 1 and 2, C.P.C. was also filed for grant of temporary injunction restraining the defendants from interfering with his possession. The averments made in the plaint as well as in the application for grant of temporary injunction were traversed by the defendants Nos.1 to 5, 11 and 12 whereas the other defendants submitted a joint consenting written reply. On consideration of the matter, the Trial Court dismissed the application for grant of temporary injunction vide order dated 08.03.2017 on the ground that the plaintiff had failed to establish a prima-facie case in his favour. The plaintiff thereupon preferred an appeal before the Addl. District Judge, Khushab. On appeal, the plea of the plaintiff was re-appraised but the same was not found sufficient for the grant of temporary injunction. The Appellate Court relying upon the case of "Mirza Nazim Baig v. Government of the Punjab through Chief Secretary and others" 2008 SCMR 291 came to the conclusion that the defendants being lessee of the state land were not entitled to transfer any right or interest in state land leased out to them except with permission of the competent authority, that is, Collector; and that since the defendants had not obtained any permission of the Collector, alleged oral agreement to sell by virtue of provisions of Section 19 of the Colonization of Government Lands (Punjab) Act, 1912 was void. On the basis of said conclusion the relief for the grant of temporary injunction was declined and resultantly, the appeal was dismissed vide judgment dated 11.04.2018. So, this petition.

3. The grouse of the plaintiff is that he had established a case of temporary injunction in his favour but this fact was not appreciated properly; that his possession over the suit land is not disputed; that the defendants being allottee/tenant of the colony land by way of an agreement to sell, handed over possession of the suit land to him and undertook to execute sale deed in his favour on grant of proprietary rights; and that as per principle settled in the case of "Syed Hussain Naqvi and others v. Mst. Begum Zakara Chatha through L.Rs. and others"(2015 SCMR 1081) such contingent /prior agreement to sell did not necessitate obtaining prior permission to transfer the right in the suit land in term of Section 19 of the Colonization of Government Lands (Punjab) Act, 1912.

4. Although the ground which prevailed upon the Courts below to decline temporary injunction was not valid yet the arguments canvassed at the Bar have not persuaded me to grant the prayer made in this petition. The dispute in this case related to the land measuring 104-Kanlas 7-Marlas which according to record of rights for the years 2003-2004 comprising Khatta No.31-Min and Khatooni No.32-Min was situated within Chak No.6-MB Tehsil Quaidabad District Khushab. This is a colony land and was allotted to the defendants under Abaad Kaari Scheme. The case of the plaintiff is that on 11.07.2004, the defendants in the presence of witnesses sold the suit land to him for consideration of Rs.1,500,000/-; that upon payment of the whole sale consideration amount, the possession of the suit land was delivered to him and since then he is enjoying possession over the suit land; and, that it was agreed that the defendants would transfer the suit land in his favour after getting proprietary rights from the Collector. On the other hand, defendants Nos.1 to 5 and 11 in their joint written statement have denied the claim of the plaintiff. The defence of the said defendants is that they never agreed to sell the suit land to the plaintiff; and, that the possession of the suit land was never delivered to the plaintiff. The defendants Nos.7 to 10 however, filed a joint consenting written statement before the Trial Court. The Province of Punjab through Collector, that is, defendant No.12 also submitted a contesting written statement. The plea of defendant No.12 is that the alleged oral agreement to sell dated 11.07.2004 is not enforceable by law and, therefore, the same cannot be got performed through process of the Court. The rival stances of the parties to the suit suggest that convincing and reliable evidence is required to be produced by the plaintiff so as to establish the alleged oral sale; and the reasons which led him to wait for more than fourteen years to knock at the door of the Court for protection of his alleged right. Prior to recording of evidence, it cannot be held at this stage that the plaintiff has established prima-facie case in his favour. It is now well established principle that temporary injunction cannot be allowed as a matter of course in those cases where even to establish prima-facie case evidence is yet to be produced. In this regard reference may be made to the cases of Fazal Din v. Mst. Robeena Aurgangzeb and 2 others (1983 CLC 1280) and Chairman, Municipal Committee, Taxila v. Mohammad Jan and 4 others (1987 CLC 2416)

5. The argument that since the possession of the plaintiff is not disputed and thus the balance of convenience lean in his favour to get protection of his possession over the suit land as otherwise he would suffer irreparable loss sans merits. In the present case, the plaintiff has failed to make out a prima-facie case and, thus, as per

principle settled in the case of Aijaz Hussain Bhatti and another v. Haji Bagh Ali and 9 others (1985 CLC 261), there is no need to attend to other two considerations, that is, balance of convenience and irreparable loss which really belong to one and the same category. Even otherwise the monetary value is attached to the suit land and, therefore, question of irreparable loss does not arise.

6. Since exercise of discretion by the Courts below does not suffer from any illegality or procedural irregularity or jurisdictional defect, interference with the orders, under challen, is not called for. This petition is, therefore, dismissed.

ZC/G-6/L Petition dismissed.

**P L D 2018 Lahore 803**
**Before Shahid Waheed, J**
**TAHIRA BIBI---Petitioner**
**Versus**
**MUHAMMAD KHAN and others---Respondents**

Civil Revision No.955 of 2015, heard on 17th April, 2018.

**(a) Islamic law---**

----Gift---Ingredients---Inheritance---Transaction of gift---Proof---Procedure---Allegations of fraud and misrepresentation---Burden of Proof---Non-appearance of donee as witness---Effect-Mutation, proof of-Requirements---Plaintiff (daughter of deceased) was deprived from inheritance through gift mutation---Contention of plaintiff was that transaction of gift was based on fraud and misrepresentation---Suit was dismissed concurrently---Validity---When a person attacked a transaction as sham, bogus, fraudulent and fictitious then he must prove the same---Initial burden to prove the negative fact would stand discharged the moment a person substantiated his allegations by making a statement on oath and onus would be shifted to the other side to prove that the transaction in question was bona fide and legal---Plaintiff, as her own witness, appeared before the Trial Court and reiterated the allegations of fraud and misrepresentation on oath---Defendant was required to prove not only the validity of disputed mutation but also the bona fide and legality of transaction of gift incorporated therein---Courts below misdirected the plaintiff by misplacing the burden of proof and recorded impugned findings---Misplacing burden of proof would vitiate judgment passed by the Courts below---Trial Court illegally and erroneously failed to cast the burden on the defendant and recorded impugned findings which were perverse---Beneficiary of gift mutation was bound not only to prove the disputed mutations but also the factum of gift---Defendant neither in his written statement stated the date, time, place and name of witnesses before whom declaration and acceptance of gift was made nor any of his witnesses made such statement---Failure to establish the requirements of gift i.e. proposal and acceptance was fatal to the claim of defendant---Acceptance of gift was personal act of donee who was required to prove the same through his statement---Attorney could not substitute the donee under the law---Donee, in the present case, did not appear before the Trial Court to make statement and only his attorney appeared in the witness-box---Statement of attorney was of no avail to prove the transaction of gift---Gift incorporated in the impugned mutation had not been proved in circumstances---Neither presumption of correctness nor truth to the contents of mutation was attached under the law---Once existence of mutation was questioned by a party in the suit then the person claiming benefit thereunder was bound to prove the same---Patwari Halqa who entered the mutation and Revenue Officer who attested the same should be produced in the witness box to prove valid attestation of mutation---Defendant neither produced Patwari Halqa nor Revenue Officer who

sanctioned the impugned mutations---Donee had failed to prove the valid sanctioning of impugned mutations in circumstances---Donee was not legal heir of donor nor in ordinary circumstances was entitled to get the suit property---Donor was not bound to furnish reasons for making a gift but no gift in the ordinary course of human conduct was made without reason and justification unless donor was divested of power of reasons and unless he/she was a person of unsound mind---Impugned mutations had been attested to deprive the plaintiff of her right of inheritance---Defendant had failed to justify the disinheritance of plaintiff through disputed gift mutations---Fraud would vitiate the most solemn transaction---Any transaction based on fraud would be void---Limitation did not run against void transaction nor efflux of time extinguished the right of inheritance---Impugned judgments and decrees passed by the Courts below were set aside---Impugned mutations were declared illegal, void ab initio and ineffective upon the rights of plaintiff---Plaintiff would be entitled to her legal share as per Sunni school from the inheritance of her deceased father---Revision was allowed in circumstances.
M. Krishnaswami Naidu v. Secretary of State represented by Collector of Tanjore and others AIR (30) 1943 Madras 15; Inayat Ali Shah v. Anwar Hussain 1995 CLC 1906; Muhammad Aslam v. Muhammad Tufail and 2 others 1995 CLC 1061; Mst. Raj Bibi and others v. Province of Punjab through District Collector, Okara and 5 others 2001 SCMR1591; Mst. Kalsoom Bibi and another v. Muhammad Arif and others 2005 SCMR 135; Aurangzeb through L.Rs. and others v. Muhammad Jafar and another 2007 SCMR 236; Rehmatullah and others v. Saleh Khan and others 2007 SCMR 729; Muhammad Iqbal and another v. Mukhtar Ahmad through L.Rs. 2008 SCMR 855; Muhammad Ejaz and 2 others v. Mst. Khalida Awan and another 2010 SCMR 342; Allah Ditta and others v. Manak alias Muhammad Siddique and others 2017 SCMR 402; Mrs. Khalida Azhar v. Viqar Rustam Bakhshi and others 2018 SCMR 30; Shah Nawaz and another v. Nawab Khan PLD 1976 SC 767; Mst. Gumbad and others v. Member Board of Revenue and others 1996 SCMR 1755; Muhammad Ejaz and 2 others v. Mst. Khalida Awan and another 2010 SCMR 342; Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688; Sher Baz Khan and others v. Mst. Malkani Sahibzadi Tiwana and others PLD 2003 SC 849; Barkat Ali through L.Rs. and others v. Muhammad Ismail through L.Rs. and others 2002 SCMR 1938; Fareed and others v. Muhammad Tufail and another 2018 SCMR 139; Mst. Raj Bibi and others v. Province of Punjab through District Collector, Okara and 5 others 2001 SCMR 1591 and Peer Bakhsh through L.Rs. and others v. Mst. Khanzadi and others 2016 SCMR 1417 rel.

**(b) Islamic law---**

----Gift---Ingredients---Ingredients of gift were the declaration of gift by the donor, acceptance of gift by donee and delivery of possession of corpus.

**(c) Qanun-e-Shahadat (10 of 1984)---**
----Art. 2 (d)---'Fact'---Meaning and scope

Rationale of Judicial Evidence (Vol. 6, 1838 43; William Tait p.45; Edgination v. Fitzmaurice (1885) 29 Ch. D 459; Emperor v. Ramanuja Ayyangav AIR 1935 Mad. 528; Sabhapathi v. Huntley AIR 1938 PC 91; Saiyid Rashid Ahmed v. Mst. Anisa Khatoon AIR 1932 PC 25; Akbarally v. Mahomedally AIR 1932 Bom. 356; Mst. Iqbal Begum v. Mst. Syed Begum AIR 1933 Lah. 80; Mst. Sardar Bibi v. Muhammad Bakhsh and others PLD 1954 Lah. 480; Pathana v. Mst. Wasai and another PLD 1965 SC 134; Hussain v. Mansoor Ali and 5 others PLD 1977 Kar. 320; Zohran Mai v. Mst. Siftan and others 1983 CLC 2559; Amir Ali v.Gul Shaher and 10 others PLD 1985 Kar. 365; Mst. Jantan through Mazhar Hussain v. Mst. Manzooran Bibi and others 2005 YLR 233; Mst. Ghulam Ayesha alias Ilyas Begum and otehrs v. Sardar Sher Khan and others 2006 SCJ 313; Pathana and others v. Allah Ditta 2008 YLR 589; Ghulam Shabbir and others v. Mst. Bakhat Khatoon and others 2009 SCMR 644; Muhammad Bashir and others v. Mst. Latifa Bibi through L.Rs. 2010 SCMR 1915 and Mst. Latif Bibi and 8 others v. Muhammad Bashir and 10 others 2006 CLC 1076 rel.

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

----Art. 117---Burden of proof---Scope.
Article 117 of the Qanun-e-Shahadat, 1984 defines "burden of proof" which clearly lays down that whosoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Qanun-e-Shahadat, 1984 has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged; the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until the Court arrives at such conclusion, it cannot proceed on the basis of weakness of the other party. In view of this legal position of the Qanun-e-Shahadat, 1984, it is clear that there can be no dispute that a person who attacks a transaction as sham, bogus, fraudulent and fictitious must prove the same. Initial burden to prove the said negative fact would stand discharged the moment a person substantiates his allegations prima facie by making a statement on oath and the onus would be shifted to the other side to prove that the transaction in question was bona fide and legal.
Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604; Mst. Kulsoom Bibi and another v. Muhammad Arif and others 2005 SCMR 135 and Joseph Constantine Steamship Line Ltd. v. Imperial Smelthing Corporation Ltd. (1941) 2 All ER 165 at 179 rel.

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

----S. 42---Mutation---Value---Presumption of correctness or truth was not attached to the contents of mutation.

**(f) Fraud---**

----Fraud would vitiate the most solemn transaction.

**(g) Fraud---**

----Transaction based on fraud would be void.

**(h) Inheritance---**

----Right of---Limitation---Void transaction----Limitation did not run against void transaction nor efflux of time would extinguish the right of inheritance.
Naveed Shehryar Sheikh and Ms. Fatima Malik for Petitioner.
Muhammad Zaman Mangat for Respondent No.1.
Muhammad Nawaz Bosal for Respondents Nos.2 and 3.
Date of hearing: 17th April, 2018.

**JUDGMENT**

**SHAHID WAHEED, J.--**This application in revision is of the plaintiff and arises from a dispute relating to land measuring 27-Kanals 4-Marlas, which was owned by Ghulam Qadir, who was her real father and step brother of defendant No.1, Muhammad Khan. Vide gift mutation No.3847 dated 16.06.1999 (Exh.P-3) and gift mutation No.3760 dated 17.02.1998 (Exh.P-4), land measuring 15-Kanals, 4-Marlas and 12-Kanals respectively stood transferred in the name of Mst. Fatima Bibi, who was mother of Ghulam Qadir. Subsequently vide mutation No.3846 dated 16.06.1999 (Exh.P-1) and mutation No.3850 dated 26.08.1999 (Exh.P-2), the land mentioned in mutations Nos.3760 and 3847 were transferred in the name of defendant No.1, Muhammad Khan, by way of oral gifts. On 12.04.2008 the plaintiff challenged the above transactions of gift through a declaratory suit on the ground of fraud and misrepresentation with the assertion that her deceased father, Ghulam Qadir being follower of Shia faith had never made any gift in favour of his mother Mst. Fatima Bibi. Subsequently, the defendant No.1 on 15.10.2008 instituted a suit under Section 9 of the Specific Relief Act, 1877, against the plaintiff and 4 others seeking a decree for possession. It was alleged in the plaint that the plaintiff along with four others had illegally dispossessed him (defendant No.1) from the suit land. During trial of the suits Muhammad Munir and Nazir filed application under Order 1 Rule 10, C.P.C. for their impleadment as defendants. Since they were cousins (Chachazad) of Ghulam Qadir, their application was allowed and they were impleaded as defendants Nos.2 and 3 in plaintiff's suit. The defendants Nos.2 and 3 also contested the allegations made in the plaint. They in their written statement maintained that Ghulam Qadir belonged to Sunni school of thought; and, that the plaintiff was entitled to inherit only share of the property of her deceased father, Ghulam Qadir.

2. Both the said two suits were consolidated. On pleadings, the Trial Court vide order dated 04.06.2009 framed consolidated issues. Parties to the suits led evidence in support of their respective claims before the Trial Court. After appraising evidence, the Trial Court dismissed both the suits through consolidated judgment dated 23.02.2012 and resultantly two decree sheets were accordingly prepared. The plaintiff and defendant No.1 through separate appeals challenged the said decrees of the Trial Court. Both the appeals met the same fate and were dismissed through two separate decrees which were issued vide consolidated judgment dated 11.03.2015. The plaintiff now seeks revision of the decrees of the Courts below which were issued in her suit. It is made clear that the decrees issued in the suit of defendant No.1 are not the subject matter of this revision application and, therefore, issues relating to it would not be discussed.

3. In the present case, the prime fact in issue was as to what was the belief of the deceased, Ghulam Qadir, that is to say, whether in the matter of religious faith, he adhered to Shia faith or Sunni discipline. At this juncture it would be apposite to state here that the fact in issue means any fact from which either by itself or in connection with other facts the existence, non-existence, nature or existence of any right, liability or disability, asserted or denied in any suit or proceedings necessarily follows. The word "fact" has been defined in Article 2(d) of the Qanun-e-Shahadat, 1984 and includes:--

(i) Anything, set of things, or relation or things, capable of being perceived by the senses; and

(ii) Any mental condition of which any person is conscious.

According to J. Bentham, Rationale of Judicial Evidence (Vol.6, 1838-43, Edinburgh: William Tait. P.45), physical facts are such as either have their seat in some inanimate being or if in one that is animate, then not by virtue of the qualities which constitute it such; while psychological facts are those which have their seat in an animate being by virtue of the qualities by which it is constituted animate. The definition under Article 2(d) supra, therefore, refers to two kinds of facts: firstly, physical fact, that is anything, set of things, or relation of things capable of being perceived by the senses; and, secondly, psychological fact which includes any mental condition of which a person is conscious. It was held in the case of Edginaton v. Fitzmaurice (1885) 29 Ch. D 459 that a person's state of mind was as much a matter of fact as his state of digestion. This principle was followed in the cases of Emperor v. Ramanuja Ayyangav (AIR 1935 Mad 528) and Sabhapathi v. Huntley (AIR 1938 PC 91). Belief is the state of mind in which a person thinks something to be the case with or without there being empirical evidence to prove that something is the case with factual certainity. The religious faith of a person being related to state of mind, therefore, falls within the category of psychological fact. Article 27 of the Qanun-e-Shahadat, 1984 expressly deals with the relevancy of facts showing the existence of any state of mind and Explanation-1 appended thereto provides as under:

> "A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exist, not generally but in reference to the particular matter in question."

In this perspective the Trial Court settled two issues. The first was issue No.1 (whether plaintiff Tahira Parveen is owner in possession of the suit property as sole heir of her Shia father, Ghulam Qadir, as averred in the plaint? OPP), whereas the second was issue No.13-A (whether father of plaintiff Mst. Tahira Parveen was belonging to Shia school of thought? OPP). Upon the decision of said two issues would depend as to what law would govern the succession to the estate of the deceased, Ghulam Qadir.

4. The first witness PW-1 who appeared before the Trial Court to prove that the deceased Ghulam Qadir was not Sunni but Shia was plaintiff herself. She was the real daughter of deceased Ghulam Qadir. She in her examination-in-chief stated that her father belonged to the Shia sect. During the course of cross-examination she admitted that funeral prayer of her father was offered by a Sunni Molvi. She, however, voluntarily stated that in her village funeral prayers of Sunni and Shia were offered by the same Molvi; that her Nikah was solemnized by a Sunni Molvi; that she also professed Shia faith; and, that Nikah of defendant was also solemnized by a Sunni Molvi. The plaintiff was also cross-examined by the counsel of defendants Nos.2 and 3. During this cross-examination the plaintiff also stated that her father belonged to Shia sect whereas mother was of Sunni faith; that her grand-father (Dada) and grand-mother (Dadi) were Shias; that no mosque of Shia sect was available in their village Mousa Seeray and, therefore, Sunni and Shia offered prayers together in the same mosque; that there were four or five mosques in their village; that there was no Imambargah in their village; that sometimes her father offered Juma prayer at Mauza Dhaal and sometimes at home; that her father used to observe Iftar timing according to Mauza Dhaal; and, that she did not remember the name and sect of the Molvi who offered the funeral prayer of her father. The second witness who appeared on behalf of the plaintiff was Umer Hayat (PW-2). This witness in his examination-in-chief stated that Ghulam Qadir belonged to Shia faith. During cross-examination he stated that funeral prayer of Ghulam Qadir was offered by a Sunni Molvi. This witness was also cross-examined by the counsel of defendants Nos.2 and 3. In this cross-examination, PW-2 stated that plaintiff was his neice; that plaintiff's grand-father (Dada) and grand-mother (Dadi) were of Shia faith; that plaintiff's father used to offer Eid prayer under the Imamat (leadership) of Sunni Molvi; that plaintiff's funeral prayer was offered by a Sunni Molvi namely Noor-ul-Haq; that plaintiff's Nikah was also solemnized by a Sunni Molvi; that before 1986 plaintiff's father was Sunni but later on he professed Shia faith; that he did not know in whose presence plaintiff's father professed Shia faith. He, however, voluntarily deposed that he used to arrange Majlis at the house of his brother, namely, Muhammad Khan.

5. On the other hand the nephew (Bhanja) and attorney of defendant No.1, namely, Iftikhar appeared before the Trial Court as DW-1. He in his examination-in-chief stated that father of the plaintiff was Sunni. During cross-examination, he deposed that defendant No.1 (Muhammad Khan) and his mother were Sunni by faith. This witness further stated that he and his wife were followers of Shia faith. The defendant No.1 in support of his claim also produced Sher Muhammad (DW-2), who in his statement stated that Ghulam Qadir was Sunni. Another witness who appeared on behalf of defendant No.1 was Saee Muhammad (DW-3). He was husband of the sister of defendant No.1. This witness in his statement stated that Ghulam Qadir was Sunni.

6. Defendant No.2, Muhammad Munir, as his own witness appeared before the Trial Court as DW-4. He was cousin (Chachazad) of the deceased Ghulam Qadir. He in his examination-in-chief stated that Ghulam Qadir was Sunni by faith; that Ghulam Qadir used to offer prayer according to Sunni creed; that Ghulam Qadir died professing Sunni faith; and, that his funeral prayer was offered by Sunni Molvi Noor-ul-Haq. During cross-examination he stated that mutation regarding inheritance of Ghulam Qadir was sanctioned as per Shia sect; that appeal against the said mutation was preferred before DDO (Revenue) by the defendant which was allowed; that decision of the DDO (Revenue) was reversed by the EDO (Revenue); that mother of defendant No.1 was Sunni; that Majlis had been arranging at the house of defendant No.1; that there were five or six houses of Shia community in Mauza Serray; that there was no Molvi or Imambargah of Shia sect in Mauza Serray; that all persons belonging to Shia faith of Mauza Serray used to offer Eid prayer in Mauza Dhaal. The defendant No.2 produced Syed Mureed Hussain (DW-5). He was Khateeb of Masjid Hussainia of Mouza Dhaal. This witness in his statement deposed that the distance between Seeray and Mauza Dhall was two miles and that Ghulam Qadir was Sunni. During cross-examination he stated that he knew all the persons belonging to Shia faith of Moauza Seeray. The last witness was Muhammad Rafiq (DW-6). He was lumberdar of Mouza Seeray and stated before the Trial Court that Ghulam Qadir was Sunni by faith.

7. Now a question arises as to what would be the principle of law to evaluate the above stated evidence led by the parties of the suit for determination of faith of deceased Ghulam Qadir. In order to find out answer to this question, it is essential to survey the relevant case law. The first case which may be referred is "Saiyid Rashid Ahmad v. Mst. Anisa Khatoon" (AIR 1932 PC 25). In that case no suggestion had been made in the pleadings or in the arguments that parties were not Sunni Muhammadan governed by the ordinary Hanafi Law. The Court had to decide the question of Muhammadan Law relating to Talak and it was held that as there was no such suggestion mentioned in the record, the Hanafi Law should be applied.
The second case is "Akbarally v. Mahomedally" (AIR 1932 Bom 356). In that case Tyabji, J. observed: "it is not easy however to conceive of a case so devoid of all

other circumstances from which the religion of the parties can be inferred, that this presumption from numbers should effectually come into operation."

In the case of "Mst. Iqbal Begum v. Mst. Syed Begum" (AIR 1933 Lahore 80), the plaintiff who was the sister of the last holder alleged that the deceased was a Sunni but the defendants who were the daughters of the last holder denied that fact. The onus of proving that the deceased was a Shia was held to be on the defendants. The above stated principles were reiterated by a Division Bench of this Court in case of "Mst. Sardar Bibi v. Muhammad Bakhsh and others" (PLD 1954 Lahore 480) and the Hon'ble Supreme Court of Pakistan in the case of "Pathana v. Mst. Wasai and another" (PLD 1965 SC 134).

In the case of "Hussain v. Mansoor Ali and 5 others" (PLD 1977 Karachi 320) the dispute was with regard to the administration of estate of late Mohatrama Fatima Jinnah, the sister of the founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah. Inter alia, the question for consideration was whether late Mohatrama Fatima Jinnah practised Sunni/Hanafi faith during her life time and remained a Sunni until the time of her death. One of the arguments was that funeral prayer at the time of death of Quaid-e-Azam as well as that of the deceased was held according to the Sunni manner and was led by Sunni Pesh Imam and, therefore, it be declared that Mohatrama Fatima Jinnah died professing Sunni faith. This argument was repelled and the Court observed that the fact that funeral prayers were performed according to the manner of her particular sect was not by itself sufficient for decision as to the religious belief held by the deceased himself or herself, for obviously the matter of funeral ceremony would be in the hands of those who were incharge of the same and it was conceivable in fact it had been so held that such persons might arrange such ceremonies not strictly according to the religious faith of the deceased but for their own reasons in some other manner.

This Court in the case of "Zohran Mai v. Mst. Siftan and others" (1983 CLC 2559) has held that question of sect of a person cannot be determined: (i) by opinion of parties but can be inferred from facts creating presumption one way or other; and, (ii) merely from sect to which his relatives belonged.

In the case of "Amir Ali v. Gul Shaker and 10 others" (PLD 1985 Karachi 365), the Division Bench of Sindh High Court has held that it is not necessary that a Mussalman must either be a Sunni, or, a Shia and it may well be that he is free from all sectarian feelings, sentiments and faith; and, that if it is not established that deceased was a Sunni or Shia then his estate has to be distributed in accordance with pure Muslim Law, as is stated in Quran in Sura Nisa.

This Court in the case of "Mst. Jantan through Mazhar Hussain v. Mst. Manzooran Bibi and others" (2005 YLR 233) held that donation receipts could only prove monetary contributions to an organization, but could not be proof of donor's faith, which would require independent, clear and indisputable evidence for its proof or disproof.

The Hon'ble Supreme Court of Pakistan in the case of Mst. Ghulam Ayesha alias Ilyas Begum and others v. Sardar Sher Khan and others" (2006 SCJ 313) has held

that flying of Alam of Hazrat Abbas on house of deceased would be proof of fact that deceased was of Shia faith.
In the case of Pathana and others v. Allah Ditta (2008 YLR 589) the presumption that the deceased was Sunni was not at all displaced either by the respondent or by the petitioner and, therefore, it was held that deceased was a Sunni.
`The full Bench of Hon'ble Supreme Court of Pakistan in the case of "Ghulam Shabbir and others v. Mst. Bakhat Khatoon and others" (2009 SCMR 644) has held that the initial presumption in Pakistan is that a Muslim is a Sunni until the contrary is proved; and, that the burden to prove that the deceased was Shia is on the person alleging him to be not Sunni but Shia.
Finally, the Hon'ble Supreme Court of Pakistan in the case of Muhammad Bashir and others v. Mst. Latifa Bibi through L.Rs (2010 SCMR 1915) while reversing the judgment rendered by this Court reported as "Mst. Latif Bibi and 8 others v. Muhammad Bashir and 10 others" (2006 CLC 1076) has held that no principle of universal application is available to determine the faith of a person and determination whereof depends on the surrounding circumstances, the way of life, the paternal faith and faith of other kith and kins.

8. Having carefully examined the case-law on the question in issue, I am of the view that although the psychological fact, that is, faith of a person is incapable of direct proof and no principle of universal application is available to determine it yet diagnosis whereof may be made through: (i) direct disclosures by word of mouth by the deceased; (ii) circumstantial evidence of the conduct of the deceased; and (iii) opinion of witnesses. In the present case onus was upon the plaintiff to displace the presumption that deceased Ghulam Qadir was not Sunni but Shia. The plaintiff appeared before the Trial Court as her own witness as PW-1 and produced her distant relative, Umer Hayat, PW-2. The statements of these two witnesses were deficient to prove that Ghulam Qadir was Shia. Mere their statement that Ghulam Qadir and his parents professed Shia faith was not sufficient particularly when PW-2 in his cross-examination admitted that till 1986 Ghulam Qadir was Sunni by faith and later on he professed Shia creed. The plaintiff was required to produce the person(s) before whom Ghulam Qadir denounced Sunni faith. This was not done. None of the witnesses particularly deposed as to the mode or manner of performance by Ghulam Qadir of his alleged Shia faith, prayers, rites, its practices, ceremonies and mandates. The witnesses also failed to disclose their source, basis and reason that the deceased Ghulam Qadir was a Shia. Similarly, no witness was produced to show that the deceased ever attended Zuljinah/Tazia/Taboot/Alam or the Muharram processions. The documentary evidence, that is, certificates (Mark-A to Mark-C) issued by different private Shia institutions were of no avail for two reasons: firstly, the scribes of these two certificates were not produced; and secondly, these private documents were tendered in the statement of the counsel, which itself is not permissible as per principle settled in the case of "Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others" (PLD 2010 SC 604). The conclusion, therefore, is that inference drawn by

the Courts below fairly arose on that evidence and was indeed, in all probability, is in accord with the facts. No fault could, therefore, be found with the appreciation of the evidence by the Courts below in revisional jurisdiction of this Court. Consequently the findings of the Courts below under issues Nos.1 and 13-A that deceased Ghulam Qadir died professing Sunni/Hanafi creed are maintained and upheld.

9. Now, I address the other fact in issue. This is the case in which transactions of gift incorporated in mutations Nos.3760, 3847, 3846 and 3850 were questioned by the plaintiff on the ground of fraud and misrepresentation. The Trial Court, therefore, framed issue No.2 i.e. whether mutations of Hibba No.3760 (17.02.1998), 3847 (16.06.1999), 3846 (16.06.1999) and 3850 (26.08.1999) are against law and facts, null and void on rights of plaintiff Tahira Parveen? OPP; and, issue No.3 i.e. whether plaintiff Tahira Parveen is entitled to the decree for declaration along with consequential relief for perpetual injunction as prayed for? OPP. The onus to prove the said issues was placed upon the plaintiff. The Courts below decided these issues on the basis of provisions of law contained in Order VI, Rule 4, C.P.C. which contemplates that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with date and items if necessary) shall be stated in the pleading. Applying the above said provisions of law, the issue No.2 was decided against the plaintiff on the ground that the plaint of the plaintiff was lacking particulars of fraud. I am afraid the Courts below while returning findings on this issue not only mis-read and non-read the contents of plaint but were also misdirected in law. The contents of plaint of the plaintiff were required to be appraised on the basis of two fundamental facts of the case, that is, firstly, that the plaintiff is real daughter of the deceased Ghulam Qadir whereas defendant No.1 is step brother of Ghulam Qadir; and, secondly, that initially, the suit land stood transferred through oral gift by way of two mutations i.e. mutation No.3760 dated 17.02.1998 and mutation No.3847 dated 16.06.1999 in favour of Fatima Bibi, who was mother of Ghulam Qadir and subsequently the said land stood transferred in favour of defendant No.1 by way of mutation No.3846 dated 16.06.1999 and 3850 dated 26.08.1999. The allegations of the plaintiff were that defendant No.1 was a cunning and sneak person; that neither there was any offer and acceptance of gift nor there was any occasion to make any gift in favour of Fatima Bibi; that her deceased father neither appeared before any revenue officer nor he thumb marked any document in this regard; that possession of the land was also not delivered to defendant No.1; and, that the defendant No.1 through fraud and in collusion with the revenue staff got transferred the suit land in his favour by way of a fake oral gift so as to deprive her of her right of inheritance. Aforestated allegations pointing fraud and misrepresentation in the sanctioning of disputed mutations as per principle settled in the case of "Mst. Kulsoom Bibi and another v. Muhammad Arif

and others" (2005 SCMR 135) were sufficient to meet the requirements of Order VI, Rule 4, C.P.C.

10. The other ground which prevailed upon the Courts below to decide issues Nos.2 and 3 against the plaintiff was that she had failed to prove the allegation of fraud and misrepresentation. Again the approach of the Courts below to evaluate the evidence available on record was incorrect. The general rule is incumbit probation qui dicit, non qui negat i.e. the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons [See Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. (1941) 2 All ER 165 at 179)]. Article 117 of the Qanun-e-Shahadat, 1984 defines "burden of proof" which clearly lays down that whosoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Qanun-e-Shahadat, 1984 has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged; the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until the Court arrives at such conclusion, it cannot proceed on the basis of weakness of the other party. In view of this legal position of the Qanun-e-Shahadat, 1984, it is clear that there can be no dispute that a person who attacks a transaction as sham, bogus, fraudulent and fictitious must prove the same. Initial burden to prove the said negative fact would stand discharged the moment a person substantiates his allegations prima facie by making a statement on oath and the onus would be shifted to the other side to prove that the transaction in question was bona fide and legal. In this regard reference may be made to the cases of "M. Krishnaswami Naidu v. Secretary of State represented by Collector of Tanjore and others" (AIR (30) 1943 Madras 15) "Inayat Ali Shah v. Anwar Hussain" (1995 CLC 1906), "Muhammad Aslam v. Muhammd Tufail and 2 others" (1995 CLC 1061). In the case on hands, the plaintiff as her own witness appeared before the Trial Court and reiterated the allegation of fraud and misrepresentation on oath and, thus as per above stated principle of law the defendant No.1 was required to prove not only the validity of the disputed mutations but also to prove the bona fide and legality of transactions of gift incorporated therein. The facts of the case and principles of law applicable thereto were not properly appreciated and the Courts below misdirected themselves by misplacing the burden of proof and recording in the impugned judgment that the plaintiff had failed to prove issue No.2. Since the Courts below misplaced burden of proof, they clearly vitiated their own judgments. It is well established principle of the Qanun-e-Shahadat that misplacing burden of proof may vitiate judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while

appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter where the Courts below illegally and erroneously failed not to cast the burden on defendant No.1 by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse.

11. It was the case of defendant No.1 that firstly his step brother Ghulam Qadir during his life time gifted the suit land to his mother Fatima Bibi vide mutation No.3847 dated 16.06.1999 (Exh.P-3) and mutation No.3760 dated 17.02.1998 (Exh.P-4); and, that subsequently Fatima Bibi transferred the said land through oral gift in his favour vide mutation No.3846 dated 16.06.1999 (Exh.P1) and mutation No.3850 dated 26.08.1999 (Exh.P-2). According to principle settled in the cases of "Mst. Raj Bibi and others v. Province of Punjab through District Collector , Okara and 5 others" (2001 SCMR 1591), Mst. Kalsoom Bibi and another v Muhammad Arif and others (2005 SCMR 135) "Aurangzeb through L.Rs and others v. Muhammad Jafar and another" (2007 SCMR 236) and "Rehmatullah and others v. Saleh Khan and others" (2007 SCMR 729), "Aurangzeb through L.Rs and others v. Muhammad Jafar and another" (2007 SCMR 236), "Muhammad Iqbal and another v. Mukhtar Ahmad through L.Rs" (2008 SCMR 855) and "Muhammad Ejaz and 2 others v. Mst. Khalida Awan and another" (2010 SCMR 342)."Allah Ditta and others v. Manak alias Muhammad Siddique and others" (2017 SCMR 402) and "Mrs. Khalida Azhar v. Viqar Rustam Bakhshi and others" (2018 SCMR 30), the beneficiary of the transaction, that is, defendant No.1 was bound not only to prove the disputed mutations but also to prove the actual factum of gift by falling back on three ingredients, that is, (i) declaration of gift by the donor; (ii) acceptance of gift by the donee; and, (iii) delivery of possession of corpus. In this perspective, I have examined the evidence available on record. The defendant No.1 neither in his written statement stated the date, time, place and name of witnesses before whom the declaration and acceptance of gift was made nor any of the witness who appeared on behalf of the defendants made any statement that proposal and acceptance of gift was made in his presence. Failure to establish the twin requirement of gift i.e. proposal and acceptance of gift was fatal to the claim of defendant No.1. This aspect of the matter was not considered by either of the Courts below and thus, their findings on issues Nos.2 and 3 cannot be approved.

12. There is another aspect of the matter which has prompted me to interfere with the findings of the Courts below. The acceptance of gift was a personal act and, therefore, it was required to be proved by the donee through his own statement and attorney cannot substitute the donee under the law. In the present case defendant No.1 i.e. Muhammad Khan was donee of the transaction of gift as incorporated in mutation No.3846 dated 16.06.1999 (Exh.P-1) and mutation No.3850 dated 26.08.1999 (Exh.P2) and thus he was required to appear before the Trial Court as his own witness to make statement with regard to date, time, place and name of

witnesses before whom he made the declaration to accept the offer of gift. Instead of appearing as his own witness, the defendant No.1 produced his attorney Iftikhar as DW-1. His statement as per principle settled in the cases of "Shah Nawaz and another v. Nawab Khan" (PLD 1976 Supreme Court 767) "Mst. Gumbad and others v. Member, Board of Revenue and others" (1996 SCMR 1755) "Muhammad Ejaz and 2 others v. Mst. Khalida Awan and another" (2010 SCMR 342) was of no avail to prove the transaction of gift and thus the gift incorporated in the impugned mutations stood unproved.

13. It is settled principle of law that neither presumption of correctness nor that of truth to the contents of mutation is attached under the law. Once the existence of a transaction itself has been questioned by a party in suit, it was legal obligation of the person claiming benefit thereunder to prove the same. Most important entities in connection with the attestation of mutation were the Patwari Halqa who had to enter the mutation and the Revenue Officer who was to attest the same. The defendant No.1, thus, as per principle settled in the cases of "Muhammad Akram and another v. Altaf Ahmad" (PLD 2003 Supreme Court 688) "Sher Baz Khan and others v. Mst. Malkani Sahibzadi Tiwana and others" (PLD 2003 Supreme Court 849) was required to produce the said two persons in the witness box to prove the valid attestation of the mutations in question. The defendant No.1 neither produced the Patwari Halqa nor Revenue Officer who sanctioned the impugned mutations and thus the inference which may be drawn is that defendants had failed to prove the valid sanctioning of the impugned mutations.

14. The fraud and collusion alleged by the plaintiff may also be unearth from the intention and motive of defendant No.1. It is to be noted that defendant No.1 was not the legal heir of deceased Ghulam Qadir nor in the ordinary circumstances was entitled to get the suit property. Though it is not necessary for a donor to furnish reasons for making a gift yet no gift in the ordinary course of human conduct be made without reason or justification unless the donor is divested of power of reasons and logic and unless he/she is a person of unsound mind. The Hon'ble Supreme Court of Pakistan in the case of "Barkat Ali through L.Rs and others v Muhammad Ismail through L.Rs and others" (2002 SCMR 1938) has held that in the wake of frivolous gifts generally made to deprive the females in the family from the course of inheritance prevalent at present times, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to the rightful claimant and no course of inheritance is bye passed. In the instant case, no reason has been furnished for making gift in the impugned mutations. The attorney of defendant No.1, that is, Iftikhar, however, while appearing before the Trial Court as DW-1 stated that Ghulam Qadir had transferred the suit land in favour of Fatima Bibi for God's sake ( ). It means that love and affection of mother was not the consideration of gift but instead the intention behind the transaction was to please God Almighty. If that was the intention of Ghulam Qadir, he could not ignore his real daughter (plaintiff) and deprive her of her share

of inheritance, ordained by the Allah Almighty. Even otherwise the fraud and collusion stood established from the date itself i.e. 16.06.1999 on which date the alleged gift mutations Nos.3847 and 3846 were sanctioned. The defendant No.1 had neither led any evidence to establish the fact that Ghulam Qadir in his life time was aware about the transaction of gift nor explained the reasons as to why Ghulam Qadir had not made gift directly to him; and, that why the land was firstly transferred in the name of Fatima Bibi and from her, it was gifted to him on the same date. All these facts show nothing but fraud on the part of defendant No.1, so as to deprive the plaintiff of her right of inheritance. Since the defendant No.1 had failed to justify the disinheritence of the plaintiff, the disputed gift mutations as per principle settled in the case of "Fareed and others v. Muhammad Tufail and another" (2018 SCMR 139) cannot be held valid. In view of above, findings of the Courts below in respect of issues Nos.2 and 3 are reversed and the said issues are decided in favour of the plaintiff.

15. Lastly, I would address the question of limitation which was the subject matter of issue No.7. It is well settled principle of law that fraud vitiates even the most solemn transaction, as such any transaction based on fraud would be void and notwithstanding the bar of limitation the matter can be considered on merit so as not to allow fraud to perpetuate. In this regard reference may be made to the case of Mst. Raj Bibi and others v Province of Punjab through District Collector, Okara and 5 others (2001 SCMR 1591). In another recent judgment handed down by the Hon'ble Supreme Court of Pakistan in the case of "Peer Bakhsh through LRs and others v. Mst. Khanzadi and others" (2016 SCMR 1417) it has been held that limitation does not run against the void transaction nor efflux of time extinguishes the right of inheritance. In view of above settled principles of law, the objection of defendant No.1 qua limitation is repelled.

16. The other issues i.e. issues Nos.5, 6, 8, 9 and 10 were neither pressed before the first Appellate Court nor during the course of arguments before this Court and, therefore, there is no need to dilate upon them.

17. The upshot of the above discussion is that this application in revision by setting aside the judgments and decrees of the Courts below is accepted and consequently it is declared that the mutation No.3847 dated 16.06.1998, mutation No.3760 dated 17.02.1998, mutation No.3846 dated 16.06.1999 and mutation No.3850 dated 26.08.1999 are illegal, void ab initio and ineffective upon the rights of the plaintiff; and, that the plaintiff is entitled to get her share as per Sunni school of thought from the inheritance of the deceased Ghulam Qadir. Injunction as prayed for in the plaint is also granted and thus defendant No.1 is restrained to interfere in the possession of the plaintiff and also to further alienate or transfer the suit land to any other person on the basis of above said mutations. Decree in above terms be issued. No order as to costs.
ZC/T-11/L Revision allowed.

**2018 Y L R 2295**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD (deceased) and another---Petitioners**
**Versus**
**Mst. BIKHI (deceased) and 3 others---Respondents**

Civil Revision No.1635 of 2010, heard on 29th May, 2018.

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

----S. 42---Suit for declaration---General power-of-attorney---Transfer of property by attorney in favour of his kith and kin---Requirements---Attorney transferred suit property in favour of his son---Contention of plaintiff was that impugned power-of-attorney and mutation were illegal, void and ineffective upon his rights---Suit was decreed concurrently---Validity---Attorney could not utilize the power conferred upon him to transfer the property to himself or to his kith and kin without special consent and permission of the principal---General power-of-attorney did not contain any special and specific power conferring right upon attorney to transfer the suit property to his son---Transaction of sale as incorporated in the impugned mutation could not be held valid---Revision was dismissed in circumstances.
Muhammad Younas v. Atta Muhammad and 2 others 1999 SCMR 2574 distinguished.

Fida Muhammad v. Pir Muhammad Khan (deceased) through Legal heirs and others PLD 1985 SC 341; Muhammad Taj v. Arshad Mehmood and 3 others 2009 SCMR 114 and Mst. Naila Kausar and another v. Sardar Muhammad Bakhsh and others 2016 SCMR 1781 rel.

Sh. Naveed Shehryar and Ms. Kashwar Naheed for Petitioners.
Malik Rab Nawaz for Respondent Nos.3 and 4.
Nemo for Respondent No.2.
Date of hearing: 29th May, 2018.

**JUDGMENT**

**SHAHID WAHEED, J.---**Unsuccessful defendants have brought this petition under Section 115, C.P.C. to seek revision of the concurrent findings returned by the Courts below through which the declaratory suit of the plaintiff, Muhammad Ismail, predecessor of the present respondents was allowed.

2. Dispute in this case related to swath of land measuring 106-Kanals 19-Marlas situated at Chak No.134-J.B., Tehsil Chiniot which was owned by Muhammad Ismail. On 22.12.1988 general power of attorney was executed in favour of Muhammad (brother of Muhammad Ismail) to administer and manage the affairs of the said land. On the basis of general power of attorney, the land stood transferred vide sale mutation No.631 dated 24.09.1994 in the name of Ahmad Yar (petitioner No.2) who was son of Muhammad. Subsequently, on 08.09.1996 Muhammad Ismail instituted a suit against the present petitioners and sought decree for declaration to the effect that general power of attorney dated 22.12.1988 and mutation No.631 dated 24.09.1994 were illegal, void and ineffective upon his rights. It was alleged in the plaint that present petitioners through fraud and misrepresentation obtained thumb impression of the plaintiffs on a plain paper on the pretext to procure loan from the Agricultural Bank for the purchase of tractor: and, that the petitioner No.1, who was real brother of Muhammad Ismail, after getting identity card of the plaintiff fraudulently got executed general power of attorney dated 22.12.1988 and on its basis transferred the land in favour of petitioner No.2. During trial Muhammad Ismail died and resultantly his legal heirs were impleaded in the suit. The present petitioners contested the suit by filing joint written statement, wherein it was maintained that Muhammad himself transferred the property in the name of his son (petitioner No.2, Ahmad Yar) after receiving consideration amount before the Tehsildar.

3. The rival stances of the parties led the Trial Court to frame issues. After recording evidence the Trial Court came to the conclusion that the petitioners-defendants had failed to prove the due execution of general power of attorney dated 22.12.1988 and mutation No.631 dated 24.09.1994. On the basis of said conclusion decree was issued in favour of plaintiffs-respondents vide judgment dated 08.07.2008. The petitioners appealed against decree of the Trial Court. On appeal, the evidence available on record was reappraised and findings of the Trial Court were found free from any infirmity. The conclusion of the first Appellate Court was that since the general power of attorney dated 22.12.1988 had not conferred any specific power upon the Attorney to transfer the property to any of his fiduciary relation, sale mutation No.631 dated 24.09.1994 was illegal. The appeal was, therefore, dismissed vide judgment and decree dated 06.02.2010. So, this petition.

4. The petitioners have challenged the findings of the Courts below on the grounds that no limitation had been placed on the Attorney (petitioner No.1, Muhammad) to

transfer the suit land in favour of his son, that is, Ahmad Yar (petitioner No.2), therefore, it could not be held that power of attorney had been misused or mutation No.631 dated 24.09.1994 was not valid. In support of this argument reliance has been placed to the case of "Muhammad Younas v. Muhammad and 2 others" (1999 SCMR 2574). The above stated argument sans merit. The precedent cited by the petitioners' counsel is inapt as in that case the Attorney had not transferred the property in his own name or in the name of his kith and kin. The admitted facts of the present case are that the Attorney namely Muhammad (petitioner No.1) was the real brother of Muhammad Ismail (Principal-plaintiff) whereas Ahmad Yar (Transferee-petitioner No.2) was the real son of the Attorney. Question which falls for determination in this case is whether the Attorney on the basis of general power of attorney dated 22.12.1988, in the given facts and circumstances of the case, could transfer the suit property to his real son, Ahmad Yar ("petitioner No.2). The law governing this question has been settled by the Hon'ble Supreme Court of Pakistan. First judgment on the above said question was rendered in the case of "Fida Muhammad v. Pir Muhammad Khan (deceased) through Legal Heirs and others" (PLD 1985 Supreme Court 341) wherein it was held that if the agent dealt on his own account with the property under agency, e.g. if he purchased it himself or for his own benefit, he in his own interest should obtain the consent of the principal in that behalf after acquainting him with all material circumstances on the subject. failing which the principal was at liberty to repudiate the transaction. The second judgment was passed in the case of "Muhammad Taj Arshad Mehmood and 3 others" (2009 SCMR 114) in which it was settled that whenever general attorney transferred property of his principal in his own name or in the name of his close fiduciary relations, the attorney had to take special permission from the principal. Lastly in the case of "Mst. Naila Kausar and another v. Sardar Muhammad Bakhsh and others" (2016 SCMR 1781) the Hon'ble Supreme Court of Pakistan has held that attorney can not utilize the powers conferred upon him to transfer the property to himself or to his kith and kin without special and specific consent and permission of the principal. In the present case neither the general power of attorney dated

22.12.1988 contained any special and specific power conferring right upon Attorney (Muhammad-petitioner No. 1) to transfer the suit property to his real son namely Ahmad Yar (petitioner No.2) nor any of the witnesses who appeared before the Trial Court deposed that permission of the Principal Muhammad Ismail was obtained prior to transfer of suit land in favour of Ahmad Yar. In these attending circumstances, the transaction of sale as incorporated in the mutation No. 631 dated 24.09.1994 could not be held valid. Exactly the same conclusion was drawn by the Courts below and thus interference therewith is not called for in exercise of revisional jurisdiction of this Court.

5. This petition being devoid of any merit is dismissed with no order as to costs.
ZC/M-106/L Revision dismissed.

**2018 M L D 2054**
**[Lahore (Bahawalpur Bench)]**
**Before Shahid Waheed, J**
**NAZIR AHMAD BHATTI and others---Appellants**
**Versus**
**M. YOUNAS and others---Respondents**

Civil Revision No.19 of 2012, decided on 7th February, 2013.

**Court Fees Act (VII of 1870)---**

----Ss. 10, 6 & 28---Civil Procedure Code (V of 1908), O. VII, R. 11---Court-fee, determination of---Rejection of plaint on ground of insufficient court-fee---Scope---Plaint or memo. of appeal could not be rejected or dismissed on account of being deficiently stamped unless amount of court fee payable on the same was first determined with exactitude and an opportunity was allowed to the party to pay the deficit amount---Court, on examination of a plaint, if the court found that relief claimed was undervalued, then it was to require the plaintiff to correct valuation within a time fixed by the court, and if plaintiff failed to comply, then the plaint should be rejected under O. VII, R. 11, C.P.C.---Matter of court fee if required investigation, then the court was to record evidence of the parties bearing on such point of court-fee and if it was found the court-fee was insufficient, then court should stay further proceedings in the suit and require plaintiff to make good the deficiency ---Where a court recorded findings on all issues and while dismissing suit on merits also required that court-fee should be paid by plaintiff, in such a case, the said procedure would not be justified.

Mst. Perveen v. Jamsheda Begum and others PLD 1983 SC 227; Mst. Ghulam Sakina and 4 others v. Nishat and 2 others 1992 CLC 87; Walaiti Ram v. Gopi Ram and others (AIR 1935 Lahore 75; Sis Ram v. Sohan Lal and others AIR 1938 Lahore 311; Secretary of State AIR 1933 Madras 321; Kedar Nath Goenka v. Chandra Mauleshwar Parsad Singh AIR 1932 Patna 228; Sri Sri Maharbirji v. Saraswati Devi AIR 1960 Patna 527; Amir Ali v. Gul Muhammad PLD 1968 Pesh. 106; Muhammad Ramzan and 3 others v. Irshad Khanum PLD 1982 BJ 38; Muhammad Yasin v. Muhammad Amin and 4 others 2002 YLR 3339 and Muhammd Nasrullah v. Muhammad Ayaz Khan and another PLD 1975 Lah. 886 rel.

Muhammad Suleman for Petitioners.
Naveed Khalil Ch., A.A.G. for Respondents Nos.138 and 139.
Remaining respondents proceeded against ex parte.
Date of hearing: 7th February, 2013.

## JUDGMENT

**SHAHID WAHEED, J.---**The plaintiffs-petitioners brought a suit for declaration of title, injunction and recovery of possession over the suit land against the respondents valuing the claim for purpose of payment of court fee at Rs.10,000/-. The respondents Nos.l, 12, 13, 38, 50 to 64 and 86 contested the suit by filing separate written statements whereas other respondents were proceeded against ex parte. The respondents raised numerous pleas on the merits and also pleaded that the plaint was not sufficiently stamped. Learned Trial Court instead of trying a preliminary issue as to the proper Court fee payable, framed 10 issues, the 7th of which related to sufficiency of court fee. The learned Trial Court then proceeded to try the case on all the issues and on 8.1.2011 dismissed the suit on merits. In the judgment he recorded a finding on the 7th issue that the court fee of Rs.15000/- was payable on the market value of the suit land and not Rs.10,000/- as stated in the plaint. A decree sheet was prepared dismissing the suit wherein it was recorded that the petitioner would affix Court fee of Rs.15000/- on the plaint within one month otherwise the same would be recovered as arrears of land revenue. Feeling aggrieved, the petitioners preferred an appeal before the learned Additional District Judge and thereby called in question the findings recorded by the learned trial Court on each issue including issue No.7. The learned Additional District Judge, Rahimyar Khan dismissed the appeal vide judgment and decree dated 30.9.2011 for non-payment of court fee of Rs.15000/- as determined by the learned Trial Court. Hence, this petition.

2. Learned counsel for the petitioners in support of instant petition has contended that the learned first Appellate Court, without affirming the findings of the learned Trial Court in respect of issue No.7, that is, court fee and without giving opportunity to make good the deficiency of court fee could not dismiss the appeal for want of Court fee or non-compliance of judgment passed by the learned Trial Court. He has further contended that the learned Trial Court while dismissing the suit could not direct the petitioners/plaintiffs to affix court fee of Rs.15000/- and, therefore, order to this effect was void.

3. Notices were issued to the respondents Nos. 1 to 137 but despite service they did not appear before this Court and resultantly they were proceeded against ex parte vide order dated 18.4.2012. However, on behalf of respondent No.138 (Province of Punjab through District Collector) and 139 (Assistant Collector) learned Assistant Advocate General entered appearance and opposed this petition. He contended that the petitioners were required to comply with judgment and decree dated 8.1.2011 passed by the learned Trial Court and affix Court fee of Rs.15000/- on the plaint. Non-compliance of order passed by the learned Trial Court was contumacious act on the part of the petitioners and, therefore, learned Additional District Judge had rightly dismissed the appeal for want of court fee.

4. I have heard the learned counsel for the petitioners as well as learned Assistant Advocate General and also perused the record.

5. The petitioners in paragraph 17 of the plaint assessed value of the suit for purposes of court fee and jurisdiction at Rs.10,000/-. The respondents in their written statement denied the assertions recorded in paragraph 17 of the plaint and also raised preliminary objection that the plaint was liable to be rejected for insufficient court fee. In view of divergent pleadings of the parties the learned Trial Court reduced the controversy into issues and one of the issue was issue No.7 i.e. "whether the plaintiffs suit is under-valued for the purpose of Court fee and jurisdiction, if so, then what is correct value for both the purposes? OPD". The learned Trial Court decided this issue against the petitioners/ plaintiffs. After recording findings on each issue, learned Trial Court while dismissing the suit vide judgment and decree dated 8.1.2011 directed the petitioners to affix court fee of Rs.15000/- on the plaint within one month otherwise the same would be recovered as arrears of land revenue. Before proceeding further it would be apposite to state here-that the order to the extent of affixation of court fee, for the reasons recorded in succeeding paragraph, was not proper. The petitioners through an appeal assailed the findings of the Trial Court qua court fee recorded in judgment and decree dated 8.1.2011 before the learned first Appellate Court. The first Appellate Court without affirming the findings of the learned Trial Court and giving opportunity to the petitioner for making up the deficiency in court fee could not dismiss the appeal for want of court fee as it is settled principle of law that the plaint or memo. of appeal cannot be rejected or dismissed on account of being deficiently stamped unless correct amount of court fee payable on them is first determined with exactitude and an opportunity is allowed to the party for paying deficit court fee. In this regard-reference may be made to the case of "Mst. Perveen v. Jamsheda Begum and others" (PLD 1983 SC 227) and "Mst. Ghulam Sakina and 4 others v. Nishat and 2 others" (1992 CLC 87).

6. I am constrained to observe here that direction to affix Court fee on the plaint as issued by the learned Trial Court while dismissing suit was not proper. If on examining the plaint, the Court finds that the relief claimed is under-valued, it should require the plaintiff to correct the valuation within a time to be fixed by it and if he fails to do so, the plaint should be rejected under Order VII, Rule 11, C.P.C. If the matter requires investigation, the Court should record the evidence of the parties bearing on the point and if it finds that the court fee paid is insufficient it should stay further proceedings in the suit and require the plaintiff to make good the deficiency within a specified time, and on his failure to do so, it should dismiss the suit under section 10 of the Court Fee Act. Hence, where the Court records findings on all the issues and while dismissing the suit on merits requires that the deficit court fee should be paid by plaintiff, the procedure is not justified. In this regard reliance may be placed on the case of Walaiti Ram v. Gopi Ram and others (AIR

1935 Lahore 75). The above said case was relied upon in the case "Sis Ram v. Sohan Lal and others" (AIR 1938 Lahore 311) wherein it was held that:

> "where plaintiff having been mislead by the wrong procedure adopted by the learned Trial Court files appeal with the same court fee with which he had stamped his plaint, the Appellate Court should exercise its discretion in his favour and extend time to allow him to make up deficiency".

The reference of "Secretary of State" (AIR 1933 Madras 321) and the case of "Kedar Nath Goenka v. Chandra Mauleshwar Parsad Singh" (AIR 1932 Patna 228) are also to the same effect. In the case of Kedar Nath it was held that:

> "after the judgment has been pronounced and it has been signed and sealed no power is left in the Court to alter it or add to it or substract any thing from it; and the judgment having been pronounced a decree must be prepared in accordance with it. Section 28, Court Fees Act, does not empower the Court to call upon the parties to pay the deficit Court fee after the judgment has been announced".

The above view was followed in "Sri Sri Maharbirji v. Saraswati Devi" (AIR 1960 Patna 527) and "Amir Ali v. Gui Muhammad" (PLD 1968 Peshawar 106). The aforesaid judgments were considered in the case of "Muhammad Ramzan and 3 others v. Irshad Khanum" (PLD 1982 BJ 38) and it was held that:

> "Court has power to determine the correct amount of Court fee payable in a suit and such determination should be resorted to at the initial stage in order to avoid anomalies. Otherwise, also a plaint or any other document without proper Court-fee stamp is not of any validity unless and until it is properly stamped".

Similarly, a learned Division Bench of this Court in the case of Muhammad Yasin v. Muhammad Amin and 4 others (2002 YLR 3339) while making reference to the case of Muhammd Nasrullah v. Muhammad Ayaz Khan and another (PLD 1975 Lah. 886) observed that:

> "a direction issued for payment of court fee by a Court while dismissing a suit is without jurisdiction for the simple reason that on passing of the final judgment in the suit, the Court could not continue the process of adjudication in the procedural matters of the suit thereof".

The learned Additional District Judge while dismissing the appeal for want of court fee-did not take into consideration the above said facts and law and, therefore, exercised jurisdiction vested in him with material irregularity.

7. In view of above, this petition is accepted and the judgment and decree dated 30.09.2011 passed by the learned Additional District Judge, Rahimyar Khan is set aside. The case is remanded to the learned Additional District Judge, Rahimyar Khan, who shall decide the matter afresh and in accordance with law. The parties are directed to appear before the learned Additional District Judge, Rahimyar Khan on 28.2.2013. Parties shall bear their own cost.

KMZ/N-19/L Petition allowed.

**2018 M L D 2070**
**Before Shahid Waheed and Ali Akbar Qureshi, JJ**
**Malik ALLAH YAR---Appellant**
**Versus**
**Mst. NAZRAN KHATOON and others---Respondents**

R.F.A. No.443 of 2014, decided on 9th February, 2015.

**(a) Court Fees Act (VII of 1870)---**

----Ss. 6 & 28---Civil Procedure Code (V of 1908), O. VII R. 11---Court fee, determination of---Deficiency in court-fee---Rejection of plaint on ground of deficiency in court-fee---Scope---Plaint or any other document without proper court-fee stamp was not of any validity unless and until the same was properly stamped---Where plaint was written upon insufficiently stamped paper, the court was duty bound to first determine the exact amount of court-fee payable, and secondly, to afford plaintiff opportunity to make good for its deficiency and thirdly to take further steps in a suit after getting requisite stamp paper of the court-fee---Court to reject plaint under O.VII, R.11, C.P.C. for non-payment of court-fee, was to first positively and specifically determine amount of deficit court-fee and secondly allow reasonable time to plaintiff to make-up for the same.
Mst. Parveen v. Mst. Jamsheda Begum and another PLD 1983 SC 227; Siddique Khan and 2 others v. Abdul Shakur Khan and another PLD 1984 SC 289; Sardar Ahmad Yar Jang v. Sardar Noor Ahmad Khan PLD 1994 SC 688; Zulfiqar Ali and others v. Mst. Sajida Begum 1995 SCMR 911 and Faiz Ahmad v. Ghulam Ali 2000 AC 739 rel.

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

----O. VII, Rr. 3 & 11---Rejection of plaint for non-compliance of O.VII, R.3, C.P.C.---Scope---Where time was granted to party at his / her own instance to produce evidence or cause attendance of witnesses or perform any other act necessary to further progress of suit; then in such a case court could not apply O.VII, R.3, C.P.C. to reject a plaint under O. VII, R. 11, C.P.C.

Enatulla Basunia v Jiban Mohan Roy 1914 ILR 41 Cal 956 = 23 IC 769; Jethmal and others v. Mst. Sakina AIR 1961 Raj. 59; Juggi Lal Kamla Pat v. Ram Janki Gupta and another AIR 1962 All 407 and Maulvi Abdul Aziz Khan v. Mst. Shah Begum and 2 others PLD 1971 SC 434 rel.
Malik Abdul Rasheed for Appellant.
Malik Javed Iqbal Ojila for Respondents.
Date of hearing: 9th February, 2015.

**JUDGMENT**

**SHAHID WAHEED, J.---**The plaintiff has filed this appeal under section 96, C.P.C. to challenge the order and decree dated 28.10.2014 passed by the learned Civil Judge, Ist Class, Multan, whereby his suit was dismissed under Order XVII, Rule 3, C.P.C. and, the plaint was rejected under Order VII, Rule 11, C.P.C.

2. The plaintiff sued to recover possession of the suit property from the respondent No. 1, Mst. Nazran Khatoon (hereinafter called the defendant No. 1) through specific performance of agreement to sell dated 10.3.2014. It was maintained in the plaint that the defendant No.1 had agreed to sell the suit property to the plaintiff for a consideration of Rs.7,650,000/-; and, that Rs.650,000/- was paid to the defendant No.1 as earnest money in the presence of witnesses and the remaining amount of Rs.7,000,000/- was agreed to be payable on 5.9.2014. The learned Trial Court after hearing preliminary arguments vide order dated 10.9.2014 directed: (i) to issue summons to the defendant No.1 for 24.9.2014;?? (ii) defendant No.1 to maintain status quo regarding the suit property; (iii) the plaintiff to deposit the remaining consideration amount of Rs. 7,000,000/- till the next date; and (iv) the plaintiff to affix required court-fee. On 24.9.2014 the defendant No.1 through her counsel entered appearance before the learned Trial Court and got recorded her statement to the effect that she had no objection on being decreed the suit subject to payment of remaining consideration amount of Rs.7,000,000/-. In view of statement made by the defendant No.1, the learned Trial Court vide order dated 24.9.2014 granted last opportunity to the plaintiff to deposit remaining consideration amount of Rs.7,000,000/-; and, to make good the deficiency in the court-fee before the next date of hearing i.e. 10.10.2014. The appellant did not comply with the aforesaid order. Again vide order dated 10.10.2014, the learned Trial Court subject to cost of Rs.2000/- granted opportunity to the plaintiff to deposit the remaining sale amount; and, to make good the deficiency in court-fee and case was adjourned to 24.10.2014. On the said date the plaintiff filed an application under Order I, Rule 10, C.P.C. for impleading Mst. Rabia Bibi, respondent No.2 (hereinafter called defendant No.2) as defendant in the suit. The defendant No.1 on the same date got recorded her statement that she had no objection on the impleadment of respondent No.2 as defendant in the suit. The said application was accordingly allowed and vide order dated 24.10.2014 the plaintiff was directed to file amended plaint; to deposit remaining consideration amount of Rs.7,000,000/-; to make up the deficiency of court-fee; and, to pay the cost of Rs.2000/-. The case was postponed to 27.10.2014. The plaintiff again defaulted in complying with the order dated 24.10.2014. However, on 27.10.2014 the defendant No.2 also got recorded her statement that she had no objection on decreeing the suit. After recording statement of defendant No.2, the learned Trial Court vide order dated 27.10.2014 reiterated the afore stated directions to the plaintiff and set down the case for hearing on 28.10.2014. The plaintiff remained non-compliant and resultantly the learned Trial Court vide order dated 28.10.2014 dismissed the suit under Order XVII, Rule 3, C.P.C. and rejected the plaint under Order VII, Rule 11, C.P.C. Hence, this appeal.

3. The appellant's-plaintiff's counsel contends that the learned Trial Court has rejected the plaint under Order VII, Rule 11, C.P.C. for deficiency in court-fee; and, dismissed the suit under Order XVII, Rule 3, C.P.C. for non-filing of amended plaint, non-deposit of balance consideration amount of Rs.7,000,000/- and, non-payment of cost. He urges that neither the plaint could be rejected nor suit could be dismissed through a composite order; and, that the impugned order shows that the learned Trial Court has acted in the exercise of its jurisdiction illegally or with material irregularity and thus the same is not sustainable in the eye of law. On the other hand, learned counsel for the respondents-defendants has vehemently opposed this appeal and supported the order and decree of the learned Trial Court.

4. In this case the plaint of the suit for possession of the suit property through specific performance of agreement to sell dated 10.3.2014 was written upon paper insufficiently stamped. This defect was noticed by the learned Trial Court in its first order dated 10.9.2014 and, therefore, the plaintiff was required to supply the requisite stamp paper. Simultaneously, through the said order the plaintiff was also directed to deposit the remaining consideration amount of Rs.7,000,000/-. Question arises as to whether the learned Trial Court without getting the requisite stamp-paper of court-fee could order the plaintiff to deposit the above said amount. Answer to this question is in the negative. Section 6 of the Court Fee Act, 1870 provides that no document of any of the kinds specified as chargeable in the First or Second Schedule to this Act shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document the prescribed court-fee has been paid. The provisions of section 28 of the Act ibid are to the effect that no document which ought to bear a stamp under the Court Fees Act shall be of any validity, unless and until it is properly stamped. The cumulative effect of the aforesaid provisions of the Court Fees Act is that a plaint or any other document without proper court-fee stamp is not of any validity unless and until it is properly stamped. Thus, it is the duty of the Court, in a case where plaint is written upon paper insufficiently stamped, first, to determine the exact amount of court-fee payable on lis; secondly, to afford the plaintiff opportunity to make good its deficiency; and, thirdly, to take further steps in the suit after getting the requisite stamp paper of court-fee. In the present case the steps were not taken as per above stated procedure and, therefore, the learned counsel for the plaintiff is right in his saying that the learned Trial Court while passing the impugned order and decree did not exercise the jurisdiction vested in it legally.

5. The other moot point in this case is as to whether in the given facts and circumstances of the case the plaint could be rejected under Order VII, Rule 11, C.P.C. It is settled principle of law that in order to entail rejection of plaint under the said rule two conditions must be satisfied: firstly, the court should have positively and specifically determined the amount of deficit court-fee which the plaintiff was required to pay on the plaint; and, secondly, a reasonable time must be allowed to the plaintiff to make up deficiency in the amount of court-fee. [See Mst.

Parveen v. Mst. Jamsheda Begum and another (PLD 1983 SC 227), Siddique Khan and 2 others v. Abdul Shakur Khan and another (PLD 1984 SC 289), Sardar Ahmad Yar Jang v. Sardar Noor Ahmad Khan (PLD 1994 SC 688), Zulfiqar Ali and others v. Mst. Sajida Begum (1995 SCMR 911) and Faiz Ahmad v. Ghulam Ali (2000 AC 739)]. In the instant case the learned Trial Court without determining the amount of deficit court-fee vide orders dated 10.9.2014, 24.9.2014, 10.10.2014 and 24.10.2014 directed the plaintiff to make good the deficiency in the court-fee. The said orders, being silent about the amount of court-fee which the plaintiff was required to pay on the plaint, as per above stated principle of law, were not valid. However, the learned Trial Court realized this omission and vide order dated 27.10.2014 directed the plaintiff to deposit court-fee of Rs.15,000/- before the next date of hearing i.e. 28.10.2014. This order was also not valid as no reasonable time was allowed to the plaintiff to make up deficiency in the amount of court-fee. Thus, in these attending circumstances, the learned Trial Court could not resort to the provisions of Order VII, Rule 11, C.P.C. for rejection of plaint.

6. The other fact which prevailed upon the learned Trial Court to dismiss the suit of the plaintiff under Order XVII, Rule 3, C.P.C. was the default in respect of payment of remaining consideration amount of Rs.7,000,000/-; and, to file amended plaint. We are afraid the learned Trial Court could not invoke the provisions of Order XVII, Rule 3, C.P.C. as they apply to a case where time is granted to a party at his instance, to produce evidence, or to cause attendance of witness or to perform any other act necessary to the further progress of the suit and do not apply unless default is committed by such party in doing the act for which time was granted. In the present case the plaintiff was granted time on several occasions to deposit the remaining amount of sale consideration; and, to file amended plaint. However, said time was not granted at his instance but by the learned Trial Court of its own motion, thus, the provisions of Order XVII, Rule 3, C.P.C. as per principle laid down in the cases of Enatulla Basunia v Jiban Mohan Roy (1914 ILR 41 Cal 956 = 23 IC 769), Jethmal and others v. Mst. Sakina (AIR 1961 Raj. 59 ), Juggi Lal Kamla Pat v. Ram Janki Gupta and another (AIR 1962 All 407) and Maulvi Abdul Aziz Khan v. Mst. Shah Begum and 2 others (PLD 1971 SC 434) were not attracted to the facts of the present case. In view of above, order passed by the learned Trial Court under Order XVII, Rule 3, C.P.C. is not valid.

7. In the sequel we **accept** this appeal; set aside the order and decree dated 28.10.2014 passed by the learned Trial Court; and, remit the case to the learned Trial Court for adjudication afresh in accordance with law. The acceptance of this appeal is subject to the condition that the appellant shall supply the stamp paper of court-fee of Rs. 15000/- to the learned Trial Court within a period of 20 days from today. There will, however, be no order as to costs. The parties are directed to appear before the learned Civil Judge Ist Class, Multan, on 24.2.2014.

KMZ/A-62/L Case remanded.

**2019 C L C 71**
**[Lahore]**
**Before Shahid Waheed, J**
**MEHMOOD UL HASSAN----Petitioner**
**Versus**
**ADDITIONAL DISTRICT JUDGE and others----Respondents**

W.P. No. 2682 of 2017, decided on 22nd November, 2018.

**(a) Family Courts Act (XXXV of 1964)---**

----S. 14---Adjudication of appeal under S. 14 of the Family Courts Act, 1964---Obligations of the first appellate court---Scope---Suit for dissolution of marriage and recovery of dowry and maintenance allowance was decreed and first appeal thereagainst by the petitioner/husband was dismissed---Contention of petitioner/husband inter alia was that the order of the first appellate court was bereft of any reason and was made without appraisement of evidence and without an independent mind---Validity---Appeal under S. 14 of the Family Courts Act, 1964 was a substantive right and was in continuation of proceedings which came entirely upon the first appellate court carrying with it the right of rehearing law and facts as well as reviewing pleadings and evidence afresh---First appellate court was duty bound to deal with all issues as first appeal was a valuable right in which both questions of law and facts were to be considered---Impugned judgment of first appellate court was made without recording any reasons in support thereof and no ascertainment of facts upon appreciation of evidence was made---High Court observed that impugned order could not be regarded as proper and was not an honest discharge of the duty of the first appellate court --- Impugned order was set aside and matter remanded to appellate court for decision afresh in accordance with law---Constitutional petition was allowed, accordingly.

**(b) Administration of Justice----**

----Judicial obligations, discharge of---Observance of the principles of natural justice---Scope----Essential for a Judge to give fair and proper hearing to the person sought to be affected by his/her order and give sufficiently clear and explicit reasons in support of order made by him/her---Rule requiring independent reasons to be given in support of an order is like the principles of audi alteram partem, basic principles of natural justice which must be observed in its proper spirit and mere pretense of compliance with the same would not satisfy the requirements of law.

Muhammad Shafiq Anjum for Petitioner.

Shamim Ahmad for Respondents.

Date of hearing: 22nd November, 2018.

## JUDGMENT

**SHAHID WAHEED, J.----**This constitutional petition is of the defendant and arises from a suit instituted by respondent No.3 seeking a decree for dissolution of marriage, recovery of dowry article and maintenance allowance. The allegations made in the plaint were traversed by the present petitioner. On pleadings, issues were framed and evidence was led. On consideration of the matter, the Trial Court through judgment dated 26.11.2015 issued a decree in favour of respondent No.3 and held her entitled of maintenance allowance @ Rs.10,000/- per month for Iddat period only. Respondent No.3 was further held entitled to recover dowry articles as per list Ex-P3 except gold ornaments. The petitioner thereupon preferred an appeal under Section 14 of the Family Courts Act, 1964 before the Addl. District Judge, Lahore. This appeal was dismissed through judgment and decree dated 01.12.2016. Penultimate paragraph of the appellate judgment dated 01.12.2016 is to the following effect:-

> "6. It is evident from the perusal of the record of learned Family Court/Trial Court has not passed the impugned judgment and decree against the financial status of the appellant and the same has been passed after keeping in view the expenses/life necessities of minor in terms of food, cloth etc. In this scenario, the undersigned court is of the view that the learned Family Court/Trial Court has passed the impugned judgment and decree which is well reasoned, justified and do not warrant interference by the undersigned court. So undersigned court is reluctant to disagree with the findings of learned Trial Court."

2. Grouse of the petitioner is that the findings returned by the first appellate Court in the above cited paragraph are not only contrary to record but also bereft of any reason. Elaborating the above complaint, the petitioner's counsel submits that in the case on hands neither there was any minor nor question of maintenance allowance of the minor was involved but the first appellate Court upheld the findings of the Trial Court with the observation that the same were in consonance with the expenses/life necessities of minor in terms of food, cloth etc.; and, that this fact alone is sufficient to draw a conclusion that the first appellate Court neither appraised the evidence available on record nor applied its independent mind to the findings returned by the Trial Court.

3. After hearing the above noted arguments, I asked learned counsel for respondent No.3, as to how the judgment and decree of the first appellate Court can be approved. Responding to this question, he submitted that though the first appellate Court had not returned findings in accordance with law yet this Court by ignoring the judgment of first appellate Court could examine the validity of decree issued by the Trial Court so as to save the parties from further litigation.

4. Arguments canvassed at the Bar give rise to a question as to whether the first appellate Court has decided the petitioner's appeal questioning the decree dated 26.11.2015 of the Family Court in a lawful manner. The law governing the said question is well settled that appeal under Section 14 of the Family Courts Act, 1964 is a substantive right conferred by the statute and it is continuation of the proceedings, which comes entirely upon the first Appellate Court, carrying with it a right of rehearing of law and facts as well as reviewing the pleadings and evidences afresh. It is the duty of the Court of first appeal to deal with all the issues, as first appeal is a valuable right in which both the questions of law and facts are to be considered and the judgment in the first appeal is to address itself to all the issues of law and fact and decide it by giving discrete reasoning. In the present case the Addl. District Judge, Lahore has not validly decided the legality or otherwise of the findings and judgment of the Family Court. The judgment of the first appellate Court consists of seven paragraphs. First paragraph is introductory. In the second paragraph the arguments of the petitioner/appellant were recorded whereas third paragraph contained arguments canvassed on behalf of respondent No.3. Fourth paragraph is one liner wherein it was stated that "arguments heard and record perused". In the fifth paragraph the first appellate Court narrated the facts of the case culminating up to findings of the Trial Court. Sixth paragraph, reproduced hereinabove, is that paragraph in which the first appellate Court returned its findings whereas the seventh paragraph contains the order of the first appellate Court. That is all. It is unfortunate that the Additional District Judge neither: (i) made a bid for proper appraisement of merits of the case put forwarded by the parties nor examined the evidence available on record; (ii) returned findings on any issue framed by the Trial Court nor recorded any cogent reason for maintaining the decree of the Trial Court. Even the observations, as rightly pointed out by the petitioner's counsel, for maintaining the decree of the Trial Court were extraneous to the record. This is nothing but dereliction of duty and complete failure to exercise jurisdiction.

5. It is essential that a judge should accord fair and proper hearing to the person sought to be affected by his/her order and give sufficiently clear and explicit reasons in support of order made by him/her. The rule requiring independent reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice and this rule must be observed in its proper spirit and mere pretense of compliance with it would not satisfy the requirement of law. In the case on hands the first appellate Court passed the impugned judgment without recording any reason in support thereof. The contribution made by the Addl. District Judge to ascertainment of facts upon appreciation of the evidence is zilch. A judgment of this kind delivered by the first appellate Court cannot be regarded as proper and is of doubtful validity. It does not represent an honest discharge of its duty by the appellate Court.

6. In view of above, I cannot accede to the request of learned counsel for respondent No.3 that I should re-appraise the evidence and come to my own

conclusion in exercise of constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. It is for the first Appellate Court to give its findings after a proper appreciation of the evidence. Thus, without going into other questions raised by the parties, this constitutional petition is hereby allowed on the basis of above stated question of law. The impugned judgment and decree dated 01.12.2016 of the Addl. District Judge, Lahore are hereby set aside and declared to have been passed without lawful authority and of no legal effect and consequently the matter is remanded to the Additional District Judge, Lahore for a fresh decision in accordance with law within a period of two months. Parties are directed to appear before the Additional District Judge, Lahore on 06.12.2018.

7. Before parting with this judgment I also direct the Additional Registrar (Judicial) of this Court to transmit copy of this file along with this judgment to the Director General, Directorate of District Judiciary, Lahore High Court, Lahore for its placement before the concerned Hon'ble Inspection Judge for his kind perusal and appropriate action.

KMZ/M-181/L Order accordingly.

**2019 C L D 23**
**[Lahore]**
**Before Shahid Waheed, J**
**JESS SMITH AND SONS COTTON LLC---Plaintiff**
**Versus**
**D.S. INDUSTRIES---Defendant**

Civil Original No. 628 of 2014, decided on 12th January, 2018.

**Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---**

----Ss. 6, 3, 4, Sched., Arts. III & IV--- Arbitration agreement---Enforcement of foreign arbitral award---Refusal of court to recognize and enforce a foreign arbitration award---Adjudication to determine as to whether arbitration agreement existed between the parties in a proceeding where foreign arbitration award was sought to be enforced---Scope---Refusal of a court to recognize a foreign arbitral award under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 usually involved investigation into disputed questions but it was not in every case that the court would be under obligation to frame issues, record evidence of the parties and follow the procedure prescribed for decision in a suit---Such matters had been left to the satisfaction of the Court under Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, which had to regulate its proceedings keeping in view nature of the allegations in pleadings, and court may adopt such mode for disposal as was in consonance with principles of justice and what the circumstances of the case required; and therefore it was within competence of the court to frame formal issues and record evidence in a particular case---Questions as to whether exchange of e-mails and letters available on record constituted arbitration contract/agreement and whether arbitration was conducted according to applicable rules could be questions which cannot be decided without framing issues and adducing evidence.

Qazi Iftikhar Ahmad and Ms. Gohar Batool for Plaintiff.
Waleed Khalid, Furqan Naveed and Muhammad Ali Khan for Defendant.
Imran Aziz Khan, DAG as amicus curiae.

**ORDER**

**SHAHID WAHEED, J**.---A preliminary question which falls for determination in this suit under section 6 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 for recognition and enforcement of the foreign award dated 16th December, 2011 made by the

International Cotton Association Limited is whether the controversy involved therein should be resolved after framing issues and recording evidence.

2. The case of the plaintiff is that the contractual relationship between the plaintiff and the defendant was governed by the terms and conditions of the contract which came into existence through exchange of letters/e-mails. According to the plaintiff, the contract was governed in its entirety by the rules and regulations of the International Cotton Association Limited under English law and jurisdiction which inter alia contained an arbitration clause for settlement of any dispute under the contract by arbitration of the International Cotton Association Limited. It has been maintained in the plaint that through a sale contract dated 2nd February, 2011, the defendant agreed to purchase from the plaintiff 140 metric tons (approximately 604 bales of cotton) of 2010/2011 American Raw Cotton SJV-ACALA-RECAP3 at the price of 188.00 US cents per pound, the shipment thereof was to be made by the end of May-2011 and letter of credit was to be opened prior to shipment; that the plaintiff had been willing and ready to perform its parts of the said contract but the defendant committed default which led the plaintiff to move an application before the International Cotton Association Limited for commencement of arbitration proceedings; and, that the International Cotton Association Limited after complying with the requirements of the rules and regulations made an ex parte award dated 16th December, 2011.

3. The defendant, apart from raising certain preliminary objections to the maintainability of the suit in the written statement filed by it, has submitted that there was no legally executed and subsisting arbitration agreement between the parties for referring any dispute to the International Cotton Association Limited. The defendant has also pleaded that in the absence of agreement, the defendant was not under obligation to take delivery of any cotton from the plaintiff; that the defendant was never informed of any application being made to the International Cotton Association Limited for commencement of arbitration; that the defendant did not receive any notice regarding the said arbitration; and that no actual shipment of cotton was made to the defendant for which compensation was being sought. On the basis of above said assertions, the defendant has made a prayer that the suit be dismissed as ex parte award is illegal, unlawful and unenforceable in terms of laws of Pakistan.

4. Heard. According to the provisions of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, this court cannot assume jurisdiction unless the party applying for recognition and enforcement of a foreign award supplies the following two documents:-

(a) the duly authenticated original award or a duly certified copy thereof; and,

(b) the original agreement for arbitration or a duly certified copy thereof.

5. The plaintiff has placed on record the certified copy of the award. As regards agreement for arbitration the plaintiff has placed on record the letters/e-mails which were exchanged between the plaintiff and M/s Pakistan AXA International; and, the defendant and the Pakistan AXA International. There is no direct exchange of letters/ e-mails between the plaintiff and the defendant. Before proceeding further it would be apposite to state here that the plaintiff in paragraph No.6 of the plaint has stated that Pakistan AXA International was its dealer. The plaintiff, however, has not placed on record any document/evidence to show how the said dealer was engaged and what was its authority and role in the sale and purchase of cotton. The plaintiff has also not stated any reason for not impleading the said dealer as a party in the present proceedings. On the other hand, the defendant has denied the existence of any contractual relationship with the plaintiff. This denial raises a threshold question, that is, whether this Court has jurisdiction to take cognizance of the instant application for recognition and enforcement of a foreign award. The said question along with other questions which have been raised in the pleadings are required to be determined by following the procedure as nearly as may be provided by the Code of Civil Procedure, 1908.

6. The conjoint reading of Article IV and Article V of the Schedule to the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011 (that is, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards), suggests that the Court may refuse recognition and enforcement of the foreign award on the following points:

(i) If the application for the recognition and enforcement of foreign award is not accompanied by: (a) the duly authenticated original award or duly certified copy thereof; and, (b) the original Arbitration Agreement or a duly certified copy thereof.

(ii) Article V uses the expression "may" in the context of refusing enforcement instead of the mandatory "shall" or "must". In other words the legislature has left it to the discretion of the court to refuse enforcement of a foreign award, depending upon the facts and circumstances of a particular case.

(iii) The scope of inquiry before the Court before whom the application for enforcement of the foreign award is pending is circumscribed by the condition for refusal set out in clauses (a) to (e) of Article V. It is not open to a party seeking to resist a foreign award to assail the award on merits or because a mistake of fact or law has been committed by the Arbitral Tribunal.

(iv) The legislative intent regarding enforcement of a foreign award is writ large, in that, the conditions for refusing enforcement are to be narrowly construed, and, as far as possible the court may exercise its discretion in favour of enforcement of the award as is clear from the use of the words "recognition and enforcement of the award may be refused, .only if that party furnishes to the competent authority prove that ".

7. The above noted points usually involve investigation into the disputed questions but it is not in every case that the Court would be under obligation to frame issues, record evidence of the parties and follow the procedure prescribed for decision of the suit. In my view, the matter has been left to the satisfaction of the Court which has to regulate its proceedings and keeping in view the nature of the allegations in the pleadings, may adopt such mode for its disposal, as in consonance with justice, the circumstances of the case may require. It is thus within the competence of this Court to frame formal issues and record evidence if the facts of a particular case so demand. So far as the case on hands is concerned, inter alia, the questions whether the e-mails/letters available on record constitute contract containing arbitration; whether Pakistan AXA International was duly authorized to act as an agent of the plaintiff; and, whether the arbitration proceedings were conducted in accordance with the rules of the International Cotton Association Limited, in my view, are the questions which cannot be decided without framing issues and allowing the parties to adduce evidence in support of their respective claims.

8. In view of above, office is directed to fix this case on 12.01.2018 for framing of issues.
KMZ/J-6/L Order accordingly.

**P L D 2019 Lahore 76**
**Before Shahid Waheed and M. Sohail Iqbal Bhatti, JJ**
**ABDUL JABBAR SHAHID and others---Appellants**
**Versus**
**NATIONAL BANK OF PAKISTAN and others---Respondents**

F.A.O. No.311 of 1995, decided on 15th April, 2015.

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

----O. XXI, Rr. 66, 67, 68 & O. V, Rr. 17 & 20---Execution of decrees and orders---Public auction of immoveable property to satisfy a decree/order---Compliance of mandatory provisions relating to such auction(s)---Obligations and duties of Executing Court---Principles and scope---Executing Court was duty bound to satisfy itself that all conditions of service of notice upon judgment-debtor(s) were complied with and such court was entrusted with duty determine valuable rights of the parties with proper application of the law---Efforts of process-server under O.V C.P.C. was to be stated in the report of the process -server, who was to take pains to find whereabouts of judgment-debtors and visit locations where they were likely to be present and make enquiries about their whereabouts---Executing Court was obliged to examine the bailiff or process-server and to satisfy itself that conditions of O.V, R. 17 C.P.C. had been fulfilled---Without due service of notice under O. XXI, R. 66 C.P.C., Executing Court could not proceed further in the sale of attached property through public auction and non-compliance of mandatory conditions was a material irregularity which vitiated the public auction---Executing Court could not delegate powers to Court Auctioneer to draw terms and conditions of the sale nor the Court Auctioneer on his own, could issue proclamation of sale, and publication of notice of sale by a Court Auctioneer was an unauthorized act and would void auction of a property---Omission of reserve price in proclamation of sale was a fatal error which could make whole auction proceedings invalid---Whilst provisions of O.XXI, R.67 C.P.C. were not mandatory in nature, however substantial compliance with the same was essential---Proclamation of sale was to state whether time frame of sale / auction of property prescribed in O.XXI, R.68 C.P.C. was complied with and omission of dates on the proclamation of sale of such property was non-compliance of the O.XXI, R.68 C.P.C.---Powers vested in Executing Court to confirm sale were judicial and not ministerial and absence of objection to an auction report or auction process did not absolve the Executing Court from responsibility to examine the same; and confirmation of sale may be disallowed by the Executing Court if the same was a nullity in law, prima facie illegal, or suffered from such invalidity which was self-evident or apparent on face of record; or for any other reason
it was not fit to be confirmed.

Messrs Lanvin Traders, Karachi v Presiding Officer Banking Court-II Karachi and others 2013 SCMR 1419; Messrs Nice "N" Easy Fashion (Pvt.) Ltd and others v Allied Bank of Pakistan and another 2014 CLD 1404; National Bank of Pakistan and 117 others v Saf Textile Mills Ltd and another PLD 2014 SC 283; Vannisami Thevar and another v Periayaswami Thevar and another AIR 1917 Mad. 176, Sm. Bhabasundari Dassi v. Gopeswar Auddy and others AIR 1941 Calcutta 159; Al Hassan Feeds through Syed Abbas Hassan Shah and another v United Bank Ltd and 6 others PLD 2004 SC 144; Muhammad Ikhaq Memon v Zakaria Ghani and others PLD 2005 SC 819 and Mst. Anwar Sultan through L.Rs v Bank Al-falah Ltd and others 2014 SCMR 1222 ref.'

Parasurama Odavar Appadurai Chetty and other's case AIR 1970 Mad. 271; Tota v Badri Pershad AIR 1930 Lah. 192; Tripura Modern Bank Ltd v. Bansen and Co AIR 1952 Cal. 781; Syed Iqbal Hussain v Mst. Sarwari Begum PLD 1967 Lah. 1138; Siraj Din v Mst. Iqbal Begum PLD 1968 Lah.639; Abdul Salam v. Mrs. Tahira Zaidi 1984 CLC 2855; Syed Muhammad Anwar Advocate v. Sheikh Abdul Haq 1985 SCMR 1228; Mst. Salima Khatoon v. M. Anzar Hussain 1989 CLC 691; Syed Mazhar Ali Shah v. Shah Muhammad 1990 MLD 1070; Muhammad Amin v Karachi Building Control Authority 1992 CLC 691, Mst. Zubeda Begum v M/s. Long Life Builders 1995 CLC 1290; Zulfiqar v. Muhammad Jan 2002 CLC 932; Messrs Mahmood Brothers through Mahmood Ahmed and another v. National Bank of Pakistan through Manager and another 2004 CLD 771; Muhammad Asghar and others v. Qamar Din PLD 2005 Lah. 240; Balwant Rai Kumar v. Smt. Amriti Kaur AIR 1961 Punjab 495; Brig (Retd) Mazhar ul Haq and another v. M/s. Muslim Commercial Bank Limited, Islamabad and another PLD 1993 Lah. 706; Mst. Zainab Bibi v. Allied Bank of Pakistan Limited and others 2003 YLR 3274; Appu alias Subramania Patter v. O. Achuta Menon and others AIR 1926 Madras 755; Muhammad Hassan v Messrs Muslim Commercial Bank Ltd. through Branch Manager and 3 others 2003 CLD 1693; Ghulam Abbas v. Zohra Bibi and another PLD 1972 SC 337; Yakin ud Din Khan Hazari Gir and others AIR 1929 Lah. 441; Liaqat Ali v. Bashiran Bibi and 9 others 2005 CLC 11 and Muhammad Attique v. Jami Limited and others PLD 2010 SC 993 rel.

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

----O. XXI, Rr. 66, 67 & 68---Limitation Act (IX of 1908), Arts. 166 & 181---Execution of decree---Public auction---Objection petition/ application to set aside auction---Limitation---Computation of period of limitation---For an objection application merely for setting aside sale where auction itself had not been questioned to be void and without jurisdiction; then limitation for such objection petition/application would be one month as prescribed by Art.166 of the Limitation Act, 1908---If the sale was questioned on the basis of being null and void and of no legal effect, then Art. 166 of the Limitation Act, 1908 would

have no application---Application contending that auction was not conducted in accordance with provisions of Rr.66, 67 & 68 of O. XXI, C.P.C. would be governed by Art.181 of the Limitation which prescribed a limitation period of 3 years.
Mst. Manzoor Jahan Begum and others v. Haji Hussain Bakhsh PLD 1966 SC 375 and Muhammad Attique v. Jami Limited and others PLD 2010 SC 993 rel.

**(c) Administration of justice---**

----Non-disposal of pending miscellaneous application while deciding main case---Effect---Non-disposal of pending miscellaneous application while deciding the main case vitiated the final order.

Rehmat Ali Kohar v. Mst. Saardaran Bibi and 15 others PLD 1986 Lah. 283; Muhammad Umar v. Muhammad Oasim and another 1991 SCMR 1232; Pak Carpet Industries Ltd v. Government of Sindh and 2 others 1993 CLC 334; Khair Deen v. Rehm Deen and 4 others 1996 CLC 1731 and Azra Manzoor Qureshi v. Faysal Bank Limited and 2 others 2005 CLD 1417 rel.
Imtiaz Rashid Siddique and Tahir Atique Piracha for Appellants.
Abid Hussain for Respondent No.1.
Asim Hafeez for Respondents Nos. 2 to 4.
Ali Zafar Syed and Zahid Nawaz Cheema for Respondent No.5.
Date of hearing: 15th April, 2015.

**JUDGMENT**

**SHAHID WAHEED, J.--**This judgment will govern FAO. No.311 of 1995, FAO.No.312 of 1995 and FAO No.290 of 1995 as common questions of law and facts are involved therein.

2. Challenge in all said three appeals is to the order dated 8.11.1995 whereby the then learned Banking Tribunal rejected the objections to the sale filed by the decree holder and judgment debtors Nos.1 and 2 and confirmed the sale of the property No.23-E Main Market, Gulberg-II, Lahore, measuring 1-kanal 6-marlas 25 square feet in favour of the Auction Purchaser, Malik Muhammad Ashraf-respondent No.5.

3. All said three appeals have arisen in the background that on 19.4.1994 the National Bank of Pakistan filed a suit for recovery of Rs.11,309,003 against M/s. Camslid Equipment and Mohsin Rafique (appellants in FAO. No.290 of 1995 and judgment debtors Nos.1 and 2), Abdul Jabbar Shahad, Razia Sultan and Abdul Shakoor (appellants in FAO. No.311 of 1995 and judgment debtors Nos.5 to 7) and some other persons. The suit was decreed by the then learned Banking Tribunal (since defunct) vide judgment and decree dated 19.4.1994.

The decree-holder bank on 31.5.1994 filed an application for execution of the said decree along with an inventory of the property to be attached. Learned Banking Tribunal on 4.7.1994 issued notices under Order XXI, Rule 52 C.P.C to the judgment debtors for the attachment of the properties mentioned in the inventory (Fard Taleeqa). One of the properties which was attached by the learned Banking Tribunal was property No.23-E Main Market, Gulberg-II Lahore, measuring 1-kanal 6- marla 25 square feet. The said property was ordered to be sold by public auction in execution of the decree dated 19.4.1994. Thus, on 1.9.1994 notices under Order XXI Rule 66 C.P.C were issued to the judgment debtors for their attendance before the learned Banking Tribunal on 7.9.1994 so that they might participate in the proceedings for finalizing the terms and conditions of sale. On 7.9.1994 the judgment-debtors were not in attendance. However, the case was adjourned to 13.9.1994 as the learned Chairman of the Banking Tribunal was on leave. The learned Banking Tribunal on the next date of hearing in the absence of the judgment-debtors approved the terms of sale vide order dated 13.9.1994. Through the said order Mr. Zahid Hamid, Advocate, was appointed as Court Auctioneer to conduct the sale of the attached property by public auction in accordance with law after observing necessary formalities. The Court Auctioneer fixed 30.11.1994 as the date to conduct sale of the attached property by public auction. In the meantime Abdul Jabbar Shahid, etc (appellants in FAO. No.311 of 1995 and judgment debtors Nos.5 to 7) moved this Court through W.P.No.14110 of 1994. The said petition came up for hearing before the learned Full Bench of this Court on 28.11.1994 and in C.M. No.2 of 1994 following order was passed:

> "The decree impugned in the writ petition is for an amount of Rs.1,13,09,003/- Abdul Jabbar Shahid petitioner No.1, who is present in person, when questioned, admitted that an amount of Rs.99,00000/- (Ninety-nine laces only) was obtained as loan originally. He says that petitioners are ready to deposit the said entire amount within six months from today in three instalments. He says that first instalment of an amount of Rs.33,00,000/- (Rupees thirty three lacs only) shall be deposited within three months from today, the second instalment within 1-1/2 months thereafter, and the last instalment within further 1-1/2 months after the payment of the said second instalment. In view of this undertaking, the execution of the decree against property bearing No. SXXA-23-E, Main Market, Gulberg-II, Lahore, of the petitioners, shall remain stayed, subject to the petitioners depositing an amount of Rs.33,00,000/- (Rupees thirty there lacs only) within three months from today and another instalment of an amount of Rs.33,00,000/- (Rupees thirty three lacs only) within 1-1/2 months thereafter and the last instalment of Rs.33,00,000/- (Rupees thirty three lacs only) within 1-1/2 months after the expiry of the period for payment of the second instalment. The auction of the said property of the petitioners, which is

scheduled to be held on 30.11.1994, shall be withheld. In case the petitioners fail to deposit any of the instalments, the entire decretal amount shall become recoverable and execution may proceed. "

4. On 29.11.1994 the decree holder bank filed an application before learned Banking Tribunal for permission to take part in auction proceedings and bid for the attached property on the ground that it was adjoining to its branch. This application was accordingly allowed vide order dated 29.11.1994. However, the auction proceedings for sale of the attached property could not take place on 30.11.1994 due to restraining order dated 28.11.1994 passed by this Court in W.P. No.14110 of 1994. This fact finds support from the auction report dated 12.12.1994 of the Court Auctioneer.

5. Subsequently, the decree holder bank informed learned Banking Tribunal that not a single installment had been deposited by the judgment debtors within the period fixed by this Court in W.P.No.14110 of 1994 vide order dated 28.11.1994 and, therefore, made a request for continuation of the execution proceedings. This request was allowed and Robkar was issued to the Court Auctioneer to go ahead with the auction of the attached property in accordance with the fresh schedule to be fixed by him. The Court Auctioneer accordingly fixed 28.6.1995 as the date to conduct proceedings for sale of the attached property. On the date of auction, i.e. 28.6.1995 Mohsin Rafique (appellant No.2 in FAO. No.290 of 1995 and judgment debtor No.2) filed a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, i.e. W.P. No.8082 of 1995 before this Court for the stay of auction proceedings. The said petition was disposed of vide following order dated 28.6.1995.

Mr. Azmat Saeed, Advocate

" Learned counsel for the petitioner says that petitioner undertakes to deposit the entire decretal amount of Rs.1,13,2,000/- up to 1.10.1995.

The property of the petitioner is scheduled to be auctioned today. The auction of the said property shall take place but the same shall not be confirmed before 1.10.1995. In case the petitioner deposits the entire decretal amount as undertaken by him on or before 1.10.1995 the auction shall not be confirmed and in case he fails to deposit the said amount or any part thereof before the said date the auction may be confirmed.

Disposed of. "

Sd/- (MUNIR A. SHEIKH)

JUDGE

6. In compliance with order dated 28.6.1995 passed by this Court in W.P. No.8082 of 1995 the auction of the attached property took place. The Court Auctioneer on 6.7.1995 submitted auction report No.2 wherein it was disclosed that the auction proceedings were closed with the declaration that Malik

Muhammad Ashraf was the highest bidder with a bid of Rs.6,100,000/-. The Court Auctioneer in his report also made the following observations:

> "That the valuation of the property carried out by the decree-holder bank in 1991 was Rs.1.15 crore. It appears that the intending bidders were put off, by the likely delay in acceptance/confirmation of the highest bid as a result of the order of the High Court dated 28.6.1995 mentioned in the letter of Mr. Azmat Saeed, Advocate. The property can be auctioned for higher amount in case the judgment debtor/petitioner does not deposit the decretal amount by the date mentioned in High Court's order viz 1.10.l995."

7. The decree holder bank on 31.7.1995 filed objections in respect of auction held on 28.6.1995. Subsequently, on 4.10.1995 the decree holder bank and judgment debtors filed a joint application under section 151, C.P.C before the learned Banking Tribunal with a request to adjourn the execution proceedings sine die on the ground that the judgment debtors had agreed to undertake to pay 30% of the decretal amount within 30 days; and, that the balance amount of 70% within a period of 60 days thereafter. The said application came up for hearing before the learned Banking Tribunal on 10.10.1995. On the said date the auction purchaser also filed an application seeking permission to deposit 25% of the sale proceed amounting to Rs.6,100,000/- in the Tribunal. The auction purchaser, however, objected to the above said joint application and sought time to file reply thereto. This request was allowed vide order dated 10.10.1995 and the auction purchaser was directed to deposit Rs.15,25,000/- in the Tribunal. Later on, judgment debtor Nos. 1 and 2 (i.e appellants of FAO No.290 of 1995) also filed an application under section 151, C.P.C for rejection of bid. Along with said application the judgment debtors Nos.1 and 2 also filed an application under section 5 of the Limitation Act, 1908. Finally, the objections to the sale of the attached property filed by the decree holder bank and judgment debtors were rejected by the learned Banking Tribunal, Lahore, vide order dated 8.11.1995 and sale in favour of the auction purchaser was confirmed.

8. The appellants, feeling anguished by the order dated 8.11.1995, filed the above stated three appeals i.e. FAO. No.290 of 1995, FAO. No.311 of 1995 and FAO. No.312 of 1995 before this Court.

9. During pendency of above said three appeals before this Court, the Court Auctioneer filed two applications before the learned Banking Tribunal, Lahore. First application was for possession of the suit property; and, second application was for issuance of sale certificate. On 16.11.1995 the judgment debtors Nos.1 and 2 moved two applications, one under section 12 (2) read with section 151 C.P.C wherein fraud was alleged in the sale of attached property; and, another application under Order XLI, rule 5 C.P.C. The learned Chairman of the

Banking Tribunal (Rana Aish Bahadur Khan) thought it proper not to hear the case for personal reasons and on 21.11.1995 he adjourned the case to 4.12.1995 and wrote a letter to the Ministry of Law and Justice, Government of Pakistan for transfer of the case. In pursuance of said request the case was transferred to the learned Banking Tribunal-IV, Lahore, vide notification dated 30.11.1995. The learned Chairman, Banking Tribunal-IV, Lahore, (Mr. Mohammad Aslam Nagi) vide order dated 8.2.1996 accepted the application of the auction purchaser for issuance of court sale certificate and rejected the other applications of the judgment-debtors.

10. On 10.2.2005 the said three appeals i.e. FAO. No.290 of 1995, FAO. No.311 of 1995 and FAO. No.312 of 1995 came up for hearing before this Court. All three appeals were disposed of in following terms:

(i) the impugned order dated 8.11.95 is set aside.

(ii) a sum of Rs.93, 64, 406/- (as tabulated above), out of the total amount of Rs.1, 23, 70, 000/- which stands deposited with the Deputy Registrar of this Court in the shape of pay orders/cheques, shall be paid to the decree holder bank through its general attorney/duly authorized person of the Bank by the Deputy Registrar (Judl) of this Court, after observing all the legal formalities.

(iii) a sum of Rs.30,00,000/- shall be paid to auction purchaser, namely Malik Muhammad Ashraf by the Deputy Registrar (Judl.) of this Court, after due identification and after observing all the legal formalities.

(iv) the decree dated 19.4.1994 stands satisfied.

(v) No order as to costs."

11. The auction purchaser assailed the above said judgment dated 10.2.2005, which was announced on 28.7.2005, before the Hon'ble Supreme Court in Civil Appeals Nos.1102 to 1104 of 2005. The said appeals were allowed with the consent of the parties vide order dated 11.3.2014 and judgment dated 28.7.2005 of this Court was set aside and resultantly the case was remanded to this Court for a decision on merit within a period of four months.

12. It is contended on behalf of the decree holder bank and judgment debtors that the auction proceedings for sale of the attached property were not conducted in accordance with law; that proclamation of sale of the attached property was not in conformity with the mandatory provisions of law as it did not contain the requisite information qua the attached property; that the reserve price was not mentioned in the proclamation of sale of the attached property and due to this fact the property was sold at throw away price; that the attached property was

got mortgaged in favour of the decree holder bank in 1991 and at that point of time the attached property was valued at Rs.11.05 million and despite this fact the sale of the property was confirmed at Rs.6,100,000/-; that the property is situated in the Main Market, Gulberg-II, Lahore, which is one the most expensive commercial area in the city of Lahore and its worth now is more than 200.00 million; that the decree holder bank and judgment debtors were unanimous that the price for which the property was disposed of was extremely low and, therefore, auction could not be confirmed; learned Banking Tribunal erred in law by not giving consideration to the factum that only one bidder took part in the auction and none else came forward to bid and this was sufficient to establish fraud played in the auction proceedings; and, that the impugned order suffers from misapplication of provisions of law. In support of above said contentions reliance is placed on the cases of Messrs Lanvin Traders, Karachi v Presiding Officer Banking Court-II Karachi and others (2013 SCMR 1419), Messrs Nice "N" Easy Fashion (Pvt) Ltd and others v Allied Bank of Pakistan and another (2014 CLD 1404) and National Bank of Pakistan and 117 others v Saf Textile Mills Ltd and another (PLD 2014 SC 283).

13. On the other hand, learned counsel for auction purchaser has vehemently opposed the afore-stated contentions. He submitted that there was no allegation of fraud or misrepresentation against the auction purchaser and the Court Auctioneer; that auction proceedings were conducted strictly in accordance with law and there was no irregularity therein and, thus, the sale was rightly confirmed; and, that the objection petitions filed by the judgment debtors were time barred. In support of his contentions reliance is placed on the cases of Vannisami Thevar and another v Periayaswami Thevar and another (AIR 1917 Madras 176), Sm. Bhabasundari Dassi v. Gopeswar Auddy and others (AIR 1941 Calcutta 159), Al Hassan Feeds through Syed Abbas Hassan Shah and another v United Bank Ltd and 6 others (PLD 2004 SC 144), Muhammad Ikhaq Memon v. Zakaria Ghani and others (PLD 2005 SC 819) and Mst. Anwar Sultan through L.Rs v. Bank Al-falah Ltd and others (2014 SCMR 1222).

14. The arguments canvassed by the learned counsel for the parties give rise to three questions. Firstly as to whether the proceedings for sale of the attached property through public auction were conducted in accordance with law; secondly, as to whether the objections filed by the decree holder bank and judgment debtors were within time; and thirdly, as to whether the sale could be confirmed by the learned Banking Tribunal.

15. The fate of all these appeals hinges upon the findings of the first question as to whether the proceedings for sale of the attached property through public auction were conducted in accordance with law. In order to find out the answer to this question, it is essential to examine each step of the proceedings of the sale of attached property through public auction. According to Order XXI, Rule

66 C.P.C where any property is ordered to be sold by public auction in execution of a decree, the court shall cause a proclamation of the intended sale to be made in the language of such court; and, such proclamation shall be drawn up after notice to the decree holder and judgment debtor. It means the first step in the sale of attached property by public auction is a proclamation of sale which is to be drawn up after notice to the decree holder and judgment debtor. The learned executing Court being conscious of this mandatory provision of law vide order dated 10.7.1994 issued notices under Order XXI, Rule 66 C.P.C to the judgment debtors for their attendance on 7.9.1994. The said notices as per provisions of Order XLVIII, Rule 2 C.P.C. were required to be served in the manner provided by Order V C.P.C (See Parasurama Odavar Appadurai Chetty and others (AIR 1970 Madras 271). The notices under Order XXI, Rule 66 C.P.C along with terms of sale were served on the judgment debtors by affixation and this fact is evident from the report of the bailiff/

جناب عالی

مودبانہ گزارش ہے کہ میں نے عدالت سے جاری شدہ نوٹس 21/66 وشرائط نیلام وصول کیا اور ہمراہ نمائیدہ بنک ڈگریدار موقع پر آیا ہوں موقع پر مدیون موجود نہ تھا موقع پر نوٹس 21/66 وشرائط نیلام کی ایک ایک کاپی چسپاں کردی گئی، لہذا رپورٹ عرض ہے۔

(دستخط) نسیم احمد
نمائندہ بنک نیشنل بنک آف پاکستان
بادامی باغ، لاہور۔

(دستخط بحروف انگریزی)
عبدالغفار بیلف، بینکنگ ٹریبونل لاہور
4-9-994

process server which is to the following effect:

It was the duty of the Banking Tribunal or the Executing Court to satisfy itself that all conditions of service of notice were complied with. It goes without saying that a Court or Tribunal entrusted with the duty to determine valuable rights of the parties is required to act with proper application of mind to the matter. It is unfortunate that the Banking Tribunal in this respect had acted in the exercise of its jurisdiction illegally or with material irregularity. The above cited report unfolds that the service of notices under Order XXI, Rule 66 C.P.C were not properly served for the reasons that: (i) the bailiff or process server in his report had not stated that it was not possible to effect personal service of the notices upon the judgment debtors under Rules 10, 12 and 16 of Order V C.P.C; (ii) the process server was requried to use all due and reasonable diligence to find out the judgment debtors. He should have taken pains to find out the judgment debtors by going again and again where the judgment debtors were

likely to be present and to make enquiry about their whereabouts and follow them. All the efforts so made by the process server should have been stated in the report. On the contrary the report of the process server is silent about his efforts; (iii) the report is silent about the time and identity of the property; (iv) the report was not supported by an affidavit and thus it was incumbent upon the Executing Court to examine the bailiff or process server and to satisfy itself that the conditions of Order V Rule 17 had been fulfilled. The afore-stated requirements with regard to service by affixation have been interpreted in the cases of Tota v. Badri Pershad (AIR 1930 Lahore 192), Tripura Modern Bank Ltd v. Bansen and Co (AIR 1952 Calcutta 781), Syed Iqbal Hussain v. Mst. Sarwari Begum (PLD 1967 Lahore 1138), Siraj Din v Mst. Iqbal Begum (PLD 1968 Lahore 639), Abdul Salam v. Mrs. Tahira Zaidi (1984 CLC 2855), Syed Muhammad Anwar Advocate v. Sheikh Abdul Haq (1985 SCMR 1228), Mst. Salima Khatoon v. M. Anzar Hussain (1989 CLC 691), Syed Mazhar Ali Shah v. Shah Muhammad (1990 MLD 1070), Muhammad Amin v. Karachi Building Control Authority (1992 CLC 691), Mst. Zubeda Begum v. M/s. Long Life Builders (1995 CLC 1290), Zulfiqar v Muhammad Jan (2002 CLC 932), Messrs Mahmood Brothers through Mahmood Ahmed and another v. National Bank of Pakistan through Manager and another (2004 CLD 771); Muhammad Asghar and others v. Qamar Din (PLD 2005 Lahore 240). In the light of above it would be construed that notices under Order XXI, Rule 66 C.P.C were not properly served upon the judgment debtors. Thus without due service of notice under Order XXI, Rule 66 C.P.C. the learned Executing Court/Banking Tribunal could not proceed further in the sale of attached property through public auction. This aspect of the matter was not considered by the learned Banking Tribunal and it illegally approved the terms of sale. This was a material irregularity which vitiates the sale for the simple reason that where mandatory conditions for exercise of jurisdiction are not fulfilled by following requisite procedure, the subsequent proceedings become illegal. In this regard reference may be made to the cases of Balwant Rai Kumar v Smt. Amriti Kaur (AIR 1961 Punjab 495), Brig (Retd) Mazhar ul Haq and another v. M/s. Muslim Commercial Bank Limited, Islamabad and another (PLD 1993 Lahore 706) and Mst. Zainab Bibi v. Allied Bank of Pakistan Limited and others (2003 YLR 3274).

16. There was another irregularity in the sale of the attached property through public auction. According to Order XXI Rule 66 C.P.C and principle laid down in the cases of Appu alias Subramania Patter v. O. Achuta Menon and others (AIR 1926 Madras 755) and Muhammad Hassan v. Messrs Muslim Commercial Bank Ltd. Through Branch Manager and 3 others (2003 CLD 1693) a proclamation of sale was to be drawn up by the Executing Court itself after hearing the parties. In the case on hands this requirement of law was not complied with. This fact is evident from different orders of the learned Banking Tribunal, Lahore. The learned Banking Tribunal on 10.7.1994 passed an order for issuance of notices under Order XXI, Rule 66 C.P.C. In compliance with the

said order, on 1.9.1994 notices under Order XXI, Rule 66 C.P.C were issued to the judgment debtors for their attendance before the learned Banking Tribunal so that they might participate in the proceedings for approval of following terms

شرائط نیلام حسب ذیل ہیں:۔

۱ :۔ تفصیلات جائیداد جو کہ شیڈول میں دکھائی گئی ہیں بمطابق اطلاع درست ہیں۔

۲ :۔ عدالت کا مقرر کردہ نیلام کنندہ اپنی مرضی سے بولی بڑھائے گا۔ کوئی بھی تنازعہ بابت بولی اگر اٹھایا گیا تو نیلام دوبارہ کیا جاسکتا ہے۔

۳ :۔ سب سے زیادہ بولی دینے والے شخص کو کامیاب قرار دیا جائے گا۔ بشرطیکہ عدالت اس کی توثیق کرے، عدالت کو پورا اختیار حاصل ہے کہ وہ کوئی بھی بولی منظور یا نا منظور کرے اور بیشک نا منظور کرنے کی وجوہات ظاہر نہ کرے۔

۴ :۔ نیلام کنندہ کو نیلامی ملتوی کرنے کا اختیار حاصل ہے۔

۵ :۔ منقولہ جائیداد کی صورت میں جملہ زر بولی بوقت نیلام ہی نیلام کنندہ کو ادا کیا جائے گی، بصورت عدم ادائیگی جائیداد دوبارہ نیلام کردی جائے گی۔

۶ :۔ غیر منقولہ جائیداد کا کامیاب بولی دہندہ زر نیلام کا ۲۵ فی صد حصہ فوری طور پر بوقت نیلام ہی نیلام کنندہ کو ادا کرے گا۔ بصورت دیگر جائیداد دوبارہ نیلام کردی جائے گی۔

۷ :۔ بقیہ زر نیلام ۱۵ دن کے اندر بولی دہندہ عدالت ہذا میں جمع کرائے گا عدم ادئیگی کی صورت میں

and conditions of the sale of attached property:

عدالت کو اختیار حاصل ہوگا کہ وہ ۲۵ فی صد جمع شدہ رقم میں سے اخراجات نیلام وضع کرے اور جائیداد دوبارہ نیلام کردے۔ اگر جائیداد سابقہ بولی سے کم رقم پر نیلام ہوگا تو یہ فرق اس رقم سے پورا کیا جائے گا۔

شیڈول جائیداد قرق شدہ مورخہ 7-9-94 برائے نیلام۔

The above said conditions were approved by the learned Banking Tribunal vide order dated 13.9.1994 which reads as under:

"Present: Counsel for the decree holder.

Notice under Order XXI, rule 66 C.P.C. along with the terms of sale has been served on the judgment debtors concerned by "Chaspangi" as they were not available to accept service but none of them has turned up with any objections. The terms of sale are, therefore, approved.

Consequently, Mr. Zahid Hamid Advocate, is appointed as the court auctioneer to conduct the sale of the attached property by public auction

in accordance with law after observing necessary formalities. A sum of Rs.5000/- to be deposited by the decree holder within 10 days shall initially be paid to the court auctioneer by way of expenses of sale.

For auction report now to come up on 7.11.94.

Sd/-

Chairman'

(underlining is for emphasis)

Consequent upon the above said order the auction was to be held on 30.11.1994 but the same could not take place due to restraining order dated 28.11.1994 passed by this Court in W.P.No.14110 of 1994 and, thus, the auction was postponed. Subsequently, the decree holder bank requested the learned Banking Tribunal/Executing Court to take further steps in the auction of the attached property as judgment debtors had not complied with order dated 28.11.1994 passed in W.P.No.14110 of 1994. This request was acceded to vide order dated 26.4.1995 which reads as under:

Present: Mr. Muhammad Iqbal Manager of the concerned branch of the decree holder bank.

He says that not a single instalment was deposited by the judgment debtors within period fixed by the Honourable High Court by order dated 28.11.94. The objection petitions have already been withdrawn, hence the execution proceedings are to continue. The court auctioneer be issued robkar to go ahead with the auction of the attached property now in accordance with fresh schedule to be fixed by him.

For auction report to come up on 26.6.95

Sd/-

Chairman'

(underlining is for emphasis)

The above cited order shows that the learned Banking Tribunal just issued Robkar to the Court Auctioneer for taking further steps for auction of the attached property in accordance with fresh schedule to be fixed by him. Subsequent proceedings of the learned Banking Tribunal reveals that the Court Auctioneer never presented the schedule for auction or proposed proclamation of the sale before the learned Banking Tribunal for approval. The Court Auctioneer on his own prepared the schedule and proclamation of sale and conducted the sale of the attached property at public auction. This was a material irregularity and shows dereliction of duty on the part of the learned Banking Tribunal. The learned Banking Tribunal or Executing Court could neither delegate powers to Court Auctioneer to draw terms and conditions of sale nor Court Auctioneer, on his own, could issue proclamation of sale. Thus, publication of notice of sale by Court Auctioneer was an unauthorized act and of no legal consequence and resultantly the sale would be treated as void.

17. It is now well settled that the proclamation of sale should contain the following facts:

(a) the time and place of sale;

(b) description of property to be sold;

(c) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the government;

(d) any incumbrance to which the property liable;

(e) the amount for the recovery of which the sale is ordered;

(f) the Court's own estimate of the value of the property; and

(g) reserve price.

In the case on hands, proclamation of sale prepared by the Court Auctioneer did not contain the reserve price. The "reserve price" is a safety valve to check malpractice in the sale of attached property through public auction. In fact this a measure through which an effort is made to get best price of the property in public auction and thereby to safeguard the interest of the judgment-debtors. Thus, omission of reserve price in the proclamation of sale was fatal which made the whole proceedings of sale invalid. In this regard guidance may be had from the following extract of the recent judgment rendered by the Hon'ble Supreme Court in the case National Bank of Pakistan and 117 others v. Saf Textile Mills Ltd and another (PLD 2014 SC 283) :

" It is well settled law that even and the absence thereof may be fatal. In this behalf, it may be advantageous to refer to the majority judgment in the case reported as Messers Lanvin Trader, Karachi v Presiding Officer, Banking Court No.2 Karachi and others (2013 SCMR 1419), the relevant observations thereof are reproduced hereunder:--

"Agreed that the expression "reserve price" does not find mention in the relevant rule but the words used in the rule pointedly hint thereto. A sale, in its absence, is apt to give walkover to maneuvers to fix any price of their choice. A sale thus effected is no sale in the eye of law especially when the number of bidders is meager, which, indeed is close to nill. A superstructure of sale built on such a shaky infrastructure cannot sustain itself. Neither the buttress of limitation nor the ministerial nature of the rule can prevent it from a fall."

18. According to Order XXI, Rule 67 C.P.C every proclamation is required to be made and published, as nearly as may be in the following manner:

i. the order of sale shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode;
ii) a copy of the proclamation shall be affixed on a conspicuous part of the property;
iii) the proclamation of sale shall be affixed on conspicuous part of the Court-house; and
iv) where the property is land paying revenue to the government the proclamation of sale shall be affixed at a conspicuous part in the office of the Collector of the District in which the land is situate.

Although the provisions of rule 67 of Order XXI are not mandatory in nature yet substantial compliance with them is essential (See Ghulam Abbas v Zohra Bibi and another (PLD 1972 SC 337). In order to ascertain as to whether the substantial compliance of the said rule was made we have no material except the auction report dated 6.7.1995 of the Court Auctioneer. Para 1 of the said reports is relevant and the same reads as under:

"That in compliance with this Honourable Tribunal's order the undersigned, as Court-Auctioneer, fixed 28.6.1995 as the (second) date of auction of the mortgaged property. Once again extensive publicity was carried out through publication of posters which were affixed outside this Honourable Tribunal's premises as well as in an around the mortgaged property and other places frequented by likely buyers. A copy of the poster published and distributed 30 days before the scheduled date of auction, is attached as Annexure-A."

The bald assertions of the said paragraph do not establish substantial compliance of the provisions of Order XXI rule 67 C.P.C. This is also a material irregularity which eclipses the validity of sale of attached property through public auction.

19. The Court Auctioneer in the above cited paragraph had stated that a copy of the poster was published and distributed 30 days before the scheduled date of auction. The schedule of auction is attached as Annex-A and the same reads as

under:

نیلام عام

بحکم عدالت جناب محمد عاشق خاں صاحب چیئرمین بنکنگ ٹریبونل لاہور۔

درخواست اجراء نمبر 94-0/94

ڈگریدار:۔ نیشنل بنک آف پاکستان بادامی باغ برانچ لاہور

مدیونان:۔ (۱) میسرز کیمسلڈ ایکوپمنٹ (پرائیویٹ) لمیٹڈ فلیٹ نمبر 28 تھرڈ فلور اوریگا کمپلیکس مین بلیوارڈ گلبرگ II لاہور۔

[M/S CAMSLID EQUIPMENT (PVT.) LTD.]

(۲) محسن رفیق ولد محمد رفیق
(۳) اسمٰعیل رفیق ولد محمد رفیق
(۴) مسمات عائشہ ظفر زوجہ محسن رفیق
(۵) عبدالجبار شاہد ولد عبدالواحد

ساکنان 58 جی گلبرگ III لاہور۔

(۶) مسمات رضیہ سلطانہ زوجہ عبدالجبار ساکنان 173۔اے سیکٹر A-I ٹاؤن شپ لاہور
(۷) عبدالشکور ولد حاجی معراج دین ساکن 17۔ایچ گلبرگ II لاہور۔

رقم ڈگری:۔ =/1,13,09,003 روپے خرچہ =/55,403 روپے کل مبلغ =/1,13,64,406 روپے زرڈگری عدالت مذکورہ بالا نے جائیداد مرہونہ تفصیل ذیل کی فروخت بذریعہ نیلام عام کا حکم صادر فرما کر

زیر دستخطی کو کورٹ آکشنر مقرر فرمایا ہے اس اشتہار کے ذریعے اطلاع عام دی جاتی ہے کہ نیلام عام برائے فروخت جائیداد غیر منقولہ قرق شدہ موقع پر بمقام: E-23 مین مارکیٹ گلبرگ II لاہور۔ مورخہ ۲۸ جون ۱۹۹۵ء بروز بدھ بوقت 11 بجے دن ہوگی۔

تفصیل جائیداد قرق شدہ برائے نیلامی حسب ذیل ہیں:۔

پراپرٹی E-23 مین مارکیٹ گلبرگ II لاہور رقبہ تعدادی 1K-6M-25S مالیتی تقریباً ایک کروڑ پندرہ لاکھ (Rs.11500000) مطابق سروے/ایویلوایشن (EVALUATION) رپورٹ 1991ء پراپرٹی یونٹ نمبر SXXA-23-E بمعہ تعمیرات موقع

شرائط نیلام حسب ذیل ہیں

۱۔ نیلام میں حصہ لینے سے قبل ہر بولی دہندہ کہ زیر دستخطی کے پاس مبلغ -/20000 روپے زرضمانت جمع کرانے ہونگے جو کہ ناکام بولی کے اختتام پر واپس کر دیے جائیں گے۔ ۲۔ سب سے زیادہ بولی دہندہ کے نام نیلام ختم کیا جائے گا۔ ۳۔ کامیاب بولی دہندہ زر نیلام کا 25% حصہ فوری طور پر نیلام کنندہ کو ادا کرے گا بصورت دیگر جائیداد دوبارہ نیلام کر دی جائے گی اور ایسے بولی دہندہ کا زرضمانت ضبط ہو جائے گا۔ ۴۔ عدم ادائیگی زر نیلام کی صورت میں عدالت کو اختیار ہوگا کہ وہ 25% جمع شدہ رقم سے اخراجات نیلام وضع کرے اور جائیداد دوبارہ نیلام کر دے اگر جائیداد سابقہ بولی سے کم رقم پر نیلام ہوگی تو یہ فرق اس رقم سے پورا کیا جائے گا۔ ۵۔ نیلام کی حتمی منظوری عدالت حضور دے گی۔ تاہم عدالت کو پورا اختیار حاصل ہے کہ وہ کوئی بھی بولی منظور یا نامنظور کرے اور بے شک نامنظور کرنے کی وجوہات ظاہر نہ کرے۔ ۶۔ زیر دستخطی اپنی مرضی سے بولی بڑھائے گا کوئی بھی تنازعہ بابت بولی اگر اٹھایا گیا تو نیلام دوبارہ کیا جا سکتا ہے۔ ۷۔ تفصیلات جائیداد جو کہ شیڈول میں دکھائی گئی ہیں بمطابق اطلاع درست ہیں۔ ۸۔ زیر دستخطی بغیر وجہ بتائے کسی بولی یا نیلام کو منسوخ کرنے کا اختیار رکھتا ہے۔ ۹۔ بقیہ زر نیلام بولی دہندہ 15 دن کے اندر عدالت حضور میں جمع کرانے کا پابند ہوگا۔ مزید معلومات کے لئے زیر دستخطی یا بنک منیجر سے رابطہ کریں۔

دیگر شرائط موقع پر سنائی جائیں گی۔

المشتہر

زاہد حامد ایڈووکیٹ ہائی کورٹ، کورٹ آکشنر

The above stated proclamation does not show as to whether the prescribed time frame of sale as prescribed in Order XXI rule 68 C.P.C were complied with. According to the said provisions of law an interval of 30 days must elapse between the date of sale and date of proclamation being affixed on the Court-house and on property in the case of sale of immovable property. The Court Auctioneer neither in his report nor in the proclamation of sale had given the date on which the proclamations of sale were affixed on the Court house and on the property. This omission shows that the requirement of Order XXI Rule 68 were also not fulfilled and, thus, this non-compliance as per principle laid down in the cases of Yakin ud Din Khan Hazari Gir and others (AIR 1929 Lahore 441), Liaqat Ali v. Bashiran Bibi and 9 others (2005 CLC 11) and Muhammad Attique v. Jami Limited and others (PLD 2010 SC 993) was a material irregularity in the sale of the attached property.

20 The above stated attending circumstances of the present case lead to the conclusion that each step for the sale of attached property through public auction suffered from malice in law as the same were not taken in accordance with Rules 66, 67 and 68 of Order XXI C.P.C.. The sale being tainted with material irregularities caused substantial injury not only to the judgment-debtors but also to the decree-holder as through it neither the decree stood satisfied nor the judgment-debtors were absolved of their liabilities. Thus, the sale of attached property could not be declared valid on any principle of law and canon of morality.

21. Now coming to the second question as to whether the objections filed by the decree-holder Bank and judgment-debtors were within time. According to law if an application is merely for setting aside the sale and the auction itself has not been questioned to be void and without jurisdiction then limitation for such objection petition would be one month as prescribed by Article 166 of the Limitation Act, 1908 but if the sale is questioned on the basis of being null and void and of no effect then Article 166 of the Limitation Act, 1908 may have no application. Reliance in this respect may be placed on Mst. Manzoor Jahan Begum and others v. Haji Hussain Bakhsh (PLD 1966 SC 375. It is clear form the record that auction was not conducted in accordance with the provisions of Rules 66, 67 and 68 of Order XXI C.P.C. The decree-holder through its application dated 17.7.1995 and the judgment debtors through their application dated 7.11.1995 not only questioned the auction proceedings but also the sale and, thus as per judgment rendered in the case of Muhammad Attique v. Jami

Limited and others (PLD 2010 S.C 993) the said applications would be governed by Article 181 of the Limitation Act, 1908 which prescribes a period of 3 years for moving such application. In these circumstances we are of the view that the objection petitions were within time.

22. Before proceeding further it is apposite to state here that judgment debtors Nos.1 and 2 (appellants of FAO. No.290 of 1995) along with their objections also filed an application under section 5 of the Limitation Act for condonation of delay. The learned Chairman Banking Tribunal in para 3 of his impugned order dated 8.11.1995 had mentioned about application under section 5 of the Limitation Act yet he did not pass any final order for its disposal. It means that the application under section 5 of the Limitation Act remained undecided. It is settled principle of law that non-disposal of the miscellaneous applications while deciding the main case vitiates the final order. In this regard reference may be made to the cases of Rehmat Ali Kohar v. Mst. Sardaran Bibi and 15 others (PLD 1986 Lahore 283), Muhammad Umar v. Muhammad Qasim and another (1991 SCMR 1232), Pak Carpet Industries Ltd v. Government of Sindh and 2 others (1993 CLC 334), Khair Deen v. Rehm Deen and 4 others (1996 CLC 1731) and Azra Manzoor Qureshi v Faysal Bank Limited and 2 others (2005 CLD 1417). Thus, the impugned order dated 18.11.1995 is liable to be set aside on this score also.

23. The third question in this case is as to whether the sale could be confirmed by the learned Banking Tribunal. In the present case the Court Auctioneer although in the proclamation of sale had not mentioned the reserve price yet he stated the value of the attached property, i.e. 11,500,000/-. It is to be noted that this value was not estimated by the learned Banking Tribunal/ Executing Court. The Court Auctioneer on his own mentioned the same in the proclamation of sale on the basis of Survey of Evaluation Report for the year 1991; and, despite this fact he announced Rs.6,000,000/- as reserve price and thereafter conducted the auction. During the auction proceedings three persons participated in the bid. One was Malik Muhammad Ashraf, who made a bid for Rs.6,100,000/- and other two bidders, Jameel Ahmad and Haji Abdul Mannan did not raise said bid. In these circumstances the Court Auctioneer closed the auction proceedings and declared Malik Muhammad Ashraf as the highest bidder with bid of Rs.6,100,000/-. The Court Auctioneer was also not satisfied with the bid and, therefore, he in his report dated 6.7.1995 submitted as under:

"That the proceedings commenced at 11.30 A.M. Details of the proclamation of sale including particulars of the decree, description of the mortgaged property and terms an conditions of sale were read out to those present. Only 3 persons deposited earnest money of Rs.20,000/- each, namely Malik Mohammad Ashraf, Jamil Ahmad and Haji Abdul Mannan. Before the bidding commenced however, a representative of the judgment-debtors produced copies of letter dated 28.6.1995 (Annex B) from Mr. Azmat Saeed, Advocate to the effect that his Lordship Mr. Justice Munir A. Sheikh of the Lahore High Court had in Writ Petition No.8082/95 filed by Mohsin Rafiq (judgment debtor No.2), directed on 28.6.1995 that the auction and execution of the impugned judgment and decree shall not be confirmed till Ist October, 1995 and if the decretal amount is deposited by that date, the auction shall stand cancelled." Mr. Jamil Ahmad one of the persons who had deposited earnest money expressed apprehension that in view of the order of the Honourable High Court the bid money of the highest bidder would be stuck till at least 1.10.1995 and, if the writ petitioner/judgment debtor deposits the decretal amount by that date, the auction would be cancelled and the highest bidder would simply get his money back.

That the reserve price of the property was announced at Rs.60,00,000/-. Malik Mohammad Ashraf's bid was for Rs.61,00,000/- but the other 2 bidders Jamil Ahmed and Haji Abdul Mannan did not raise this bid. Malik Mohammad Ashraf and Mr. Jamil signed the auction proceedings but Haji Abdul Mannan did not wish to sign. The auction proceedings (Annex-C) were according closed with the declaration that Malik Mohammad Ashraf is the highest bidder with a bid of Rs.61,00,000/-.

That the earnest money of Rs.20,000/- each was returned to Mr. Jamil Ahmed and Haji Abdul Mannan (Annexure D and E respectively). Malik Mohammad Ashraf was allowed to bring balance amount of Rs.15,05,000/- which, together with his earnest money of Rs.20,000/- would total Rs.15,25,000/- constituting 25% of the total bid amount. In about 40 minutes Malil Mohammad Ashraf produced deposit-at-call dated 28.6.1995 issued by Allied Bank of Pakistan Ltd., Fortress Stadium Branch, Lahore Cantt bearing No.373628/21/137 in the name of the National Bank of Pakistan A/C Malik Mohammad Ashraf. Receipt (Annexure F) was issued to Malik Mohammad Ashraf. The deposit-at-

call and the earnest money of Rs.20,000/- have been deposited in an account opened with the decree holder bank in the name of the Court Auctioneer. Receipts (Annexure G and H) have been obtained form the decree-holder bank.

That the valuation of the property carried out by the decree-holder bank in 1991 was Rs.1.15 crore. It appears that the intending bidders were put off, by the likely delay in acceptance/confirmation of the highest bid as a result of the order of the High Court dated 28.6.1995 mentioned in the letter of Mr. Azmat Saeed Advocate. The property can be auctioned for higher amount in case the judgment debtor/petitioner does not deposit the decretal amount by the date mentioned in High Court's Order viz 10-1-1995." (underlining is for emphasis)

The Court Auctioneer in his above quoted report had stated that the attached property could not fetch more price due to repercussion of the order dated 28.6.1996 passed by this Court in W.P.No.8082 of 1995. In this view of the matter an ancillary question that floats to the surface is that in the eventuality that Auction Report was filed in the Court and objections thereto were either not filed or if filed found to be barred by limitation, whether the Executing Court or Banking Tribunal was to mechanically confirm such sale under Order XXI, Rule 92 C.P.C. The powers vested in the Executing Court to confirm the sale are obviously judicial and not ministerial and the absence of objection to auction report or auction does not absolve the Tribunal or Court of its responsibility to examine the same. The confirmation of sale may be disallowed by the Executing Court or Banking Tribunal if it is nullity; or, is prima facie illegal; or, suffers from any invalidity which is self evident or apparent on the face of the record; or, for any other reason it is not fit to be confirmed. In the present case, the decree was for Rs.11,364,406/- and value of the attached property as per proclamation of sale was Rs.11,500,000/. We find that there is no proportion between the market value and the price for which the attached property was knocked down to the Auction Purchaser. It was the duty of the leaned Executing Court to watch and safeguard the interest not only of the decree-holder but also of the judgment-debtors. The learned Executing Court should have not accepted shocking low bid of Rs.6,100,000/- for the reasons that: (a) it was adverse to the interest of the decree-holder and judgment-debtors as through the said bid neither the decree stood satisfied nor the judgments-debtors relieved of their obligations; and, (b) the auction was not conducted in accordance with law as its

each step was tainted with malice in law and material irregularities which caused substantial injury to the judgment-debtors. Thus, the impugned order is bad in law.

24. In the sequel, all these appeals are allowed resultantly the sale of the attached property and the order dated 8.11.1995 of the learned Banking Tribunal, Lahore, are hereby set aside and objection petitions of the appellants are accepted. The Executing Court is directed to return the purchase money to the Auction Purchaser; and, to cancel the sale certificate which was issued to the Auction Purchaser during the pendency of these appeals. No order as to costs.
KMZ/A-63/L Appeals allowed.

**2019 C L C 280**
**[Lahore]**
**Before Shahid Waheed, J**
**BASHIR AHMAD----Petitioner**
**Versus**
**ADDITIONAL DISTRICT AND SESSIONS JUDGE and others----Respondents**

Writ Petition No.34972 of 2015, decided on 6th November, 2018.

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

----O.VI, R.17---Amendment in plaint---Amendment after making final arguments---Change in character of the claim---Scope---Plaintiffs sought amendment in plaint to the extent that the word 'hibanama' may be substituted with 'oral sale' because suit land was transferred in their favour by way of oral sale but inadvertently the transaction was recorded in the plaint as gift---Trial Court dismissed the application whereas revisional court allowed the application by setting aside the order of Trial Court---Validity---Perusal of statements made by the witnesses who appeared on behalf of the plaintiffs revealed that they claimed declaration of title in respect of suit land on the basis of oral transaction of gift and thus, they could not be allowed to urge on the basis of unsanctioned mutation that in fact transaction of transferring the suit land was sale but inadvertently in the plaint it was written as gift---Although suit was one for declaration and after the proposed amendment it would continue to be a declaratory suit and there would be no change in the character of the suit, but the character of plaintiff's claim would be changed---Amendment sought to be made at the fag-end of the trial particularly after making final arguments and at the stage of announcement of judgment would prejudice the defendant in his defence which he had already filed in pursuance of the case set up by the plaintiffs in their plaint---Order passed by Revisional Court was set aside and that of Trial Court restored---Constitutional petition was allowed.

Masood A. Malik for Petitioner.

Rao M.I. Zafar Khan for Respondents Nos.2 to 4.

Date of hearing: 6th November, 2018.

**JUDGMENT**

**SHAHID WAHEED, J.---**Challenge in this constitutional petition is to the order dated 03.06.2015 whereby the Revisional Court by setting aside the order dated 01.07.2014 of the Trial Court allowed the application filed by the plaintiffs (respondents No.2 to 4) under Order VI Rule 17, C.P.C. seeking amendment in the plaint.

2. This constitutional petition has arisen in the background that the plaintiffs i.e. respondents No.2 to 4 in the year 1990 instituted a suit for permanent injunction which was later on got amended by them and thereby sought decree for declaration of title in respect of land measuring 170- kanals 17-marlas with the plea that their father Major Samiullah Khan gifted the same to them vide mutation No.1866 dated 24.04.1974. It was also maintained in the plaint that sale deed bearing No.601 dated 06.07.1986, in respect of suit land, executed by respondents Nos.5 to 7 and one Memal son of Sami Singh in favour of present petitioner, which was subsequently recorded in the revenue record vide mutation No.2430 dated 07.03.1999 was result of fraud. The suit was contested by filing written statement. On pleadings issues were framed and evidence was led. After making final arguments in the case the plaintiffs (respondents Nos.2 to 4) filed an application under Order VI Rule 17, C.P.C. before the Trial Court seeking amendment in the plaint with the following assertion:-

> "That at the ends of para 1-B, the same is inadvertently written that the father of the plaintiff made Hibba Nama in favour of the plaintiffs, actually the plaintiffs purchased the suit land from one Muhammad Azam who was attorney of Mst. Sughri, Momal, Malooki, Shakoori and that is why the Mutation No.1866 was sanctioned in favour of plaintiffs and in Mutation No.1866 the sale transaction is mentioned and the plaintiff purchased the suit land in consideration of Rs.5000/-. Copy of Sale Mutation is already annexed and exhibited with the plaint. However, the word of Hiba has been written mistakenly, in fact, it was the Sale Transaction and the same is result of typing mistake and due to over sight it was not corrected earlier, that it will meet the ends of justice, to allow the plaintiff to amend the plaint by substituting the word of "Sale" in the plaint instead of Hibba and the contents of Para No.2 of the application may kindly be allowed to insert at the ends of 1-B of the plaint and the same may also be allowed in the prayer clause of the plaint also."

The above application was resisted by the present petitioner. On consideration of the matter, the Trial Court came to the conclusion that the application under Order VI Rule 17, C.P.C. was not only belated but would also bring change in the claim of the plaintiffs. On the basis of said conclusion the application seeking amendment in the plaint was dismissed vide order dated 01.07.2014. The respondents Nos.2 to 4 thereupon filed an application under section 115, C.P.C. before the Addl. District Judge, Lahore and sought revision of the order dated 01.07.2014. The Revisional Court reversed the findings of the Trial Court and allowed the application in revision vide order dated 03.06.2015 on the ground that proposed amendment would not bring any change in the nature of the pleading and relief claimed by the plaintiffs. So, this petition.

3. Objecting to the findings of the Revisional Court, the petitioner's counsel submits that at the fag end of the trial of the suit the plaintiffs (respondents Nos.2 to 4) could not be allowed to make any amendment in the plaint which was inconsistent with the statement made by the witnesses before the Trial

Court. Responding to said objection learned counsel appearing on behalf of the plaintiffs, i.e. respondents Nos.2 to 4 submits that the plaintiffs claimed declaration of title on the basis of Mutation No.1866 dated 24.04.1974 through which the suit land was transferred in their favour by way of oral sale but inadvertently the transaction was recorded in the plaint as gift and thus this clerical error was required to be rectified and would not bring any change in the nature and complexion of the suit.

4. After hearing, I have found substance in the objection raised by petitioner's counsel. The plaintiffs (respondents Nos.2 to 4) through their suit sought declaration of title in respect of the suit land with the plea that their father Major Samiullah Khan transferred the same to them through gift. The Trial Court made the said claim as part of Issue No.2, (i.e. whether the disputed land was transferred to the plaintiffs by their father through Hibba and since then they are in cultivating possession of the same?) The onus to prove Issue No.2 was upon the plaintiffs. Being conscious of the claim set up in the plaint and onus to prove Issue No.2, one of the plaintiffs, Mst. Saira Khanum (respondent No.2), appeared before the Trial Court as PW-6. She in her examination-in-chief stated as follows:-

follows:- یہ جائیداد ۱۹۷۳ میں ہما ر ے نام ہبہ ہوئی تھی

This witness again appeared before the Trial Court in rebuttal evidence and stated as follows:-

سا ل ۱۹۷۳ میں یہ اراضی ھمارے نام ہبہ ہوئی تھی

During cross examination she stated as follows:-

ہما رے والد اس جائیداد کے مالک اس لیے نہیں تھے کیونکہ انہوں نے یہ جا نیداد
ھم تینوں بہنوں کے نام ہبہ کروا ئی تھی----------از خود کہا کہ ان سے ھما رے
نام قیمتًا ہبہ ھو ئی تھی------- یہ غلط ہے کہ مد عیا ن کے نام کبھی بھی ہبہ کا انتقال
تصدیق نہ ھوا تھا---------- ۔ مجھے علم نہ ھے کہ تحصیلدار صاحب کی عدالت سے مورخہ
۲۳۔۰۳۔۱۹۷۳ کو خارج ھوا تھا۔ انتقال ہبہ خارج ھوا تھا

The other witness, who appeared on behalf of the plaintiffs, was Allah Yar (PW-1). This witness in his examination-in-chief stated as follows:-

میجر سمیع ا للہ کی تین بیٹیاں ھیں۔ اس نے یہ زمین اپنی بیٹیوں کو ھبہ کی تھی

The second witness produced by the plaintiffs was Mukhtar Ali PW-2. He in his statement stated to the following effect:

مدعیان کو زمین ان کے والد نے بطور ہبہ دی تھی۔ان کا نام میجر سمیع ا للہ تھا۔ ہبہ کے
وقت قبضہ سا ئرہ خانم کو دے دیا۔ ہبہ سا ئرہ خانم۔ شا ہین اور آ منہ کو کیا گیا

Upon perusal of statements made by the witnesses who appeared on behalf of the plaintiffs it becomes clear that the plaintiffs claimed declaration of title in respect of the suit land on the basis of oral transaction of gift and thus they could not be allowed to urge on the basis of unsanctioned Mutation No.1866 that in fact transaction of transferring the suit land was sale but inadvertently in the plaint it was written as gift (Hiba). It is undoubtedly true that the suit was one for declaration and after the proposed amendment it would continue to be a declaratory suit. In that sense, there would be no change in the character of the suit, but the character of plaintiffs' claim would be totally changed. Thus, amendment sought to be made, at the fag end of the trial particularly after making final arguments and at the stage of announcement of judgment, could not be allowed to be made as it would totally change the character of the plaint and basis of claim qua suit land, though not character of the suit, and such amendment would certainly prejudice the defendant (present petitioner) in his defence which he had already filed in pursuance of the case set up by the plaintiffs in their plaint. This aspect of the matter was not considered by the Revisional Court and thus it fell into error while passing the impugned order dated 03.06.2015.

5. In the sequel this petition is accepted, order dated 03.06.2015 passed by Addl. District Judge is set aside and declared to have been passed without lawful authority and of no legal effect and consequently the order of the Trial Court dated 01.07.2014 is restored.

SA/B-11/L Petition accepted.

**2019 M L D 294**
**[Lahore]**
**Before Shahid Waheed, J**
**USAMA AHMAD MELA---Petitioner**
**Versus**
**MOHSIN NAWAZ RANJHA and others---Respondents**

Election Petition No.40 of 2018, heard on 19th November, 2018.

**(a) Interpretation of statutes---**

----Role of a Court---While interpreting any statute Court/Tribunal was not to alter its provision(s) but to iron out its creases so as to avoid any absurdity, inconsistency or redundancy---Court/Tribunal was duty-bound to avoid "head on clash" between two sections of the same statute and, whenever it was possible to do so, to construe provisions which appeared to conflict so that they harmonized ----Statute was an edict of the Legislature and elementary principle of interpreting or construing a statute was to gather the mens or sententia legis of the Legislature.

**(b) Elections Act (XXXIII of 2017)---**

----Ss. 144 & 145---Election petition---Contents of petition before Election Tribunal---Requirement---"Material facts" and "full particulars / material particulars"---Distinction and scope--- Distinction existed between "material facts" and "full particulars/material particulars" used in S.144(1) of the Elections Act, 2017 and the same was important because different consequences may flow from deficiency of such facts or particulars in the pleadings---Failure to plead even a single material fact led to an incomplete cause of action and if the election petition was based solely on those allegations which were vague and general in nature or lacking in material facts, such petition was liable to be summarily rejected for want of cause of action---Petition which suffered from a deficiency of material particulars, Election Tribunal had discretion to allow the petitioner to supply the required particulars even after the expiry of limitation.

H.D. Revana v. G. Puttaswamy Gowda and others AIR 1999 SC 768 rel.

**(c) Elections Act (XXXIII of 2017)---**

----Ss. 144(4) & 145---Election petition--- Maintainability ---Verification of election petition---Object and procedure---Summary rejection of election petition ---Scope---Non-compliance of mandatory requirements of S.144 of the Elections Act, 2017 and defective / incomplete or non-verification of election petition and annexure(s)---Effect---Respondent raised objection as to the maintainability of the election petition on ground that the same had not been

verified in terms of S.144(4) of the Elections Act, 2017---Validity---Object of requiring verification of election petition was to fix the responsibility for the averments and allegations in the petition on the person signing verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts---Verification of contents of the election petition was required to be made on oath to be administered by the Oath Commissioner, who was bound to record and to endorse verification/attestation, that oath had been actually, physically and duly administered to petitioner---Perusal of the rubber stamp of the Oath Commissioner, in the present case, made it clear that the petitioner was not present at the time of verification before the Oath Commissioner because he was not identified with reference to his computerized national identity card and was not clear from the stamp as to at what place, the oath was practically and physically administered---Words "declared on oath before me" used in the stamp of Oath Commissioner were not sufficient being ambiguous as they did not indicate as to what was declared on oath or whether the contents of the verification were made on oath before the Oath Commissioner and said statement being patently ambiguous did not meet with the criterion for due attestation of verification---Non-verification of the election petition in accordance with S.144(4) of Elections Act, 2017 was fatal and such defect after the expiry of limitation could not be allowed to be rectified.---Election petition was rejected under S.145 of the Elections Act, 2017, accordingly.

Lt.-Col. (Retd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana and others 2015 SCMR 1585 rel.

Muhammad Arshad Khan v. J & P Coats Pakistan Ltd. Karachi and 2 others PLD 1977 Kar. 83; Usman Dar and others v. Khawaja Muhammad Asif and others 2017 SCMR 292; Mir Saleem Ahmed Khosa v. Zafarullah Khan Jamali and others 2017 SCMR 664; Nawab Ali Wassan v. Syed Ghous Ali Shah and others 2018 SCMR 87; Saifi Development Corporation Ltd. v. Workers Union PLD 1965 (W.P.) Kar. 347; Muhammad Hussain v. The Additional District Judge, Lahore and others PLD 1966 (W.P.) Lah. 128; Khan Nasrullah Khan v. The Member, Election Commission, Government of Pakistan, Lahore and others PLD 1966 (W.P.) Lah. 850; Farooq Ahmad Khan Laghari and 37 others v. Sh. Muhammad Rashid, Chairman, Federal Land Commission and another PLD 1981 Lah. 159 and Khadim Hussain and another v. The Addl. District Judge, Faisalabad and others PLD 1990 SC 632 ref.

Muhammad Shahzad Shoukat and Taha Asif for Petitioner.
Khalid Ishaque for Respondent No.1.
Respondents Nos.2 to 5: Ex parte.
Shan Gul and Muhammad Arif Raja, Additional Advocates General, amicus curie.
Date of hearing: 19th November, 2018.

## JUDGMENT

**SHAHID WAHEED, J.---**Challenge in this election petition under Section139 of the Elections Act, 2017 is to the election of respondent No.1 Mohsin Nawaz Ranjha, as a Member of National Assembly from Constituency No.89-Sargodha-II in General Elections, 2018. The said election has been questioned on two grounds: firstly, the respondent No.1 was not, on the nomination day, qualified for, or was disqualified from, being elected as a member of the National Assembly; and, secondly the election suffers from corrupt and illegal practices.

2. Vide order dated 05.10.2018, the process, subject to question of maintainability of the election petition, was issued through the modes suggested in subsection (2) of Section 145 of the Elections Act, 2017. In response to the notice respondent No.1 through Mr. Khalid Ishaq, Advocate entered appearance before this Tribunal, whereas respondents Nos.2 to 5 had not turned up and thus, through order dated 18.10.2018, they were proceeded against ex-parte. On the next date of hearing, that is, 25.10.2018, respondent No.1 submitted written statement wherein the allegations made in the election petition were traversed by raising preliminary objection qua maintainability of election petition. The case was therefore, fixed for arguments on maintainability of the election petition.

3. The first objection to the maintainability of the election petition is that it is hit by mandatory provision of Section 144 (1) (a), (b) of the Elections Act, 2017 which requires: (i) that every election petition shall contain a precise statement on which the petitioner relies; and, (ii) full particulars of any corrupt or illegal practice or other illegal act alleged to have been committed, including the names of the parties and modes and manner alleged to have committed corrupt practice or illegal acts. It is contended that term corrupt or illegal practice is not a term of art or something alien to the scheme of law relating to election disputes but instead corrupt practice has been defined in Section 167 of the Elections Act, 2017 which implies that for making the allegation of corrupt practice what contents have to be incorporated in an election petition; and; that in the present case no details or material particulars have been incorporated in this election petition and thus, the same is liable to be rejected for being based on vague, flimsy and unsubstantiated allegation.

4, Messrs Shan Gul, and Raja Muhammad Arif, learned Addl. Advocate General, in response to notice under Section 152 of the Elections Act, 2017 entered appearance and assisted this Tribunal on the preliminary objection, under discussion. According to them: (i) the term "and" appearing between Sections 144(a) and 144(b) is conjunctive and one cannot maintain an election petition by merely complying with Section 144(a) while ignoring Section 144(b) . The material facts naturally give rise either to a corrupt practice, an illegal

practice or an illegal act and, therefore, the same have to be satisfied separately with respect to date and place; (ii) that while corrupt and illegal practice have been defined in Chapter X of the Elections Act, 2017, the term illegal act has not been defined, which may prompt the petitioner to suggest that it is only of case of corrupt or illegal practice that can be brought and not cases of other illegal acts. However, a perusal of Section 156 puts paid to such arguments because Section 156 specifically recognizes illegal acts other than corrupt and, illegal practices in the form of Section 156 clauses (a) & (b). In addition Section 231 incorporates by reference Articles 62 and 63 of the Constitution. Any violation thereof can also perpetuate an election petition, therefore, the material facts spoken of in Section 144(a) have to be complemented by the details of corrupt or illegal practice or illegal act. Elaborating this argument it is submitted that if a candidate is less than 25 years of age at the time of election then this fact after being mentioned as a material fact leads to the illegal act (when nomination paper was submitted and when he touted himself as eligible) shall have to be mentioned separately by way of amplification. According to them the above is the correct position also because the word "and" is employed to express the relation of addition, the adding of something to that which preceded. In support of above arguments reference has been made to words and phrases, 2003 Edition, Vol. I, page 381, "Muhammad Arshad Khan v. J & P Coats Pakistan Ltd. Karachi and 2 others" (PLD 1977 Kar. 83), "Usman Dar and others v. Khawaja Muhammad Asif and others" (2017 SCMR 292), "Mir Saleem Ahmed Khosa v. Zafarullah Khan Jamali and others" (2017 SCMR 664) and "Nawab Ali Wassan v. Syed Ghous Ali Shah and others" (2018 SCMR 87).

5. Responding to the above noted arguments, the petitioner's counsel submits that the word "and" occurring between clause (a) and clause (b) of subsection (1) of Section 144 has not been used to convey the idea that the said two clauses must be read conjectively; that word "and" should be read as "or" so as to maintain harmony among different provisions of the Elections Act, 2017 and to avoid any redundancy of any provision; that clause (a) of subsection (1) of Section 144 relates to Section 156(1)(a) and (b) whereas provisions of clause (b) of Section 144(1) of the Elections Act, 2017 are related to clause (c) and clause (d) of Section 156(i) of the Elections Act, 2017; that since the election of respondent No.1 has been challenged on all grounds mentioned in Section 156 (1) of the Elections Act, 2017, the election petition cannot be held to be non-complainant with Section 144 of the Elections Act, 2017 by invoking the word "if any provision " used in Section 145 of the Elections Act, 2017; and, that if there is any deficiency in the contents of the election petition, the same may be allowed to be rectified by granting permission to the petitioner under Section 149 of the Elections Act, 2017 which contemplates that the Election Tribunal may, at any time before the commencement of recording of evidence and upon

such term and on payment of such costs as it may direct, allow the petitioner to amend the election petition in such manner as may, in its opinion, be necessary for ensuring a fair and effective trial and for determining the real question at issue but shall not permit raising of a new ground of challenge to the election through such amendment. He referred to the cases of "Saifi Development Corporation Ltd. v. Workers Union" "(PLD 1965 "(W.P.) Karachi 347), "Muhammad Hussain v. The Additional District Judge, Lahore and others" "(PLD 1966 (W.P.) Lahore 128), "Khan Nasrullah Khan v. (1) The Member, Election Commission, Government of Pakistan, Lahore (2) The Returning Officer, Constituency of the National Assembly of Pakistan No.NW-11, Peshawar II, and (3) Mian Jamal Shah" "(PLD 1966 (W.P.) Lahore 850), "Farooq Ahmad Khan Laghari and 37 others v. Sh. Muhammad Rashid, Chairman, Federal Land Commission and another" "(PLD 1981 Lahore 159) and "Khadim Hussain and another v. The Addl. District Judge, Faisalabad and others" (PLD 1990 Supreme Court 632).

6. Before examining the rival contentions canvassed at the Bar qua the requirements of subsection (1) of Section 144 of the Elections Act, 2017 it would be apposite to observe here that role of the Court/Tribunal while interpreting any Statute is not to alter its provisions but to iron out its creases so as to avoid any absurdity or inconsistency or redundancy. In other words it is the duty of the Court /Tribunal to avoid "head on clesh"(sic) between two Sections of the same Act and, "whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonies". It is also said that a statute is an edict of Legislature. The elementary principle of interpreting or construing statute is to gather the mens or sententia legis of the Legislature.(sic) Keeping the said principles in mind, a conjoint reading of different provisions of the Elections Act, 2017 suggests that any election to a House and Provincial Assembly which is tainted with corrupt practice or illegal practice or illegal acts cannot be allowed to be sustained. It is for that reason Section 156 and Section 158 of the Elections Act, 2017 provide different grounds for challenging election, which may relate to either corrupt practice or illegal practice or illegal acts. It appears that the Legislature, for the said reason, through Section 144 of the Elections Act, 2017 has made election petition composite of material facts and material particulars. Clause (a) of subsection (1) of Section 144 which corresponds to Order VI Rule 2 enjoins the petitioner to narrate precise statement of the material facts, in the election petition, on which he relies while clause (b) of Section 144(1) is analogous to Order VI, Rules 4 & 6 of C.P.C.

calls for full particulars, which are necessary to amplify, refine and emblish the material facts. The purpose of clause (a) of subsection (1) of Section 144 is: (i) to give to returned candidate intimation of the case so that the case may be met, (ii) to enable the Tribunal to determine what is really at issue between the parties; and, (iii) to prevent deviations from the course which litigation on particular cause of action must take whereas the object of clause (b) of subsection (1) of Section 144 of the Elections Act, 2017 is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. The distinction between "material fact" and "full particulars/ material particulars" used in the said two clauses of Section 144(1) of the Elections Act, 2017 is important because different consequences may flow from deficiency of such facts or particulars in the pleadings. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order VI, Rule 16, C.P.C. If the election petition is based solely on those allegations which are vague and general in nature or lacking in material facts, the petition is liable to be summarily rejected for want of cause of action. In the case of a petition suffering from a deficiency of material particulars, the Tribunal has discretion to allow the petitioner to supply the required particulars even after the expiry of limitation. In this regard it would be pertinent to refer the following extract from the judgment handed down by the Indian Supreme Court in the case of "H.D. Revana v. G. Puttaswamy Gowda and others" (AIR 1999 Supreme Court 768):--

> "This Court has repeatedly pointed out the distinction between 'material facts" and "particulars". In so far as "material facts" are concerned, this court has held that they should be fully set out in the Election Petition and if any fact is not set out, the petitioner cannot be permitted to adduce the evidence relating thereto later; nor will he be permitted to amend the petition after expiry of the period of limitation prescribed for an Election Petition. As regards particulars, the consistent view expressed by this Court, is that the petition cannot be dismissed in limine for want of particulars and if the Court finds that particulars are necessary, an opportunity should be given to the petitioner to amend the petition and include the particulars."

7. In the above backdrop, I have examined the contents of the present election petition and found that it contains a precise statement of the material facts with

regard to the ground that respondent No.1 was not, on the nomination day, qualified for, or was disqualified from, being elected as a member of the National Assembly but it is lacking in material particulars of corrupt or illegal practice. The said omission is not fatal as under Section 149 of the Elections Act, 2017 the petitioner may be allowed to amend the election petition for determining the real question. Thus, the objection that the election petition is non-complaint with Section 144(1) of the Elections Act, 2017 is without any substance and, it is hereby repelled.

8. There is another objection to the instant election petition. According to subsection (4) of Section 144 of the Elections Act, 2017, the election petition and its annexures are required to be signed by petitioner and petition shall be verified in the manners laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. Grouse of respondent No.1 is that election petition has not been verified in accordance with the provisions of the Code of Civil Procedure, 1908 and, thus the same is summarily liable to be rejected.

9. There is no cavil to the proposition that the verification of the election petition is required by subsection (4) of Section 144 of the Elections Act, 2017 and it must be made in the manners laid down by Order VI, Rule 15 of the Code of Civil Procedure, 1908. The object of requiring verification of election petition is to fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. It is for that reason verification of contents of the election petition is required to be made on oath to be administered by the Oath Commissioner, who has been bound down to record and to endorse verification/attestation that oath has been actually, physically and duly administered to the election petitioner/ deponent. The mode and manner of verification/attestation has been settled by the Hon'ble Supreme Court of Pakistan in the case of "Lt.-Col. (Retd.) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana and others" (2015 SCMR 1585) and the relevant paragraph thereof reads as under:

> "Taking into account the verification of the election petition independent of the affidavit, it has been conspicuously noticed that there is no date of place mentioned in the verification i.e. at what date and what place the verification was made by the appellant. The two stamps of the oath commissioner, Lahore Cantt, affixed at the bottom of the verification

> also do not postulate the date on which the verification was made by the election petitioner. Besides, it is not reflected from the verification whether the appellant was present at the time of verification before the Oath Commissioner because he has not been identified with reference to his national identity card, rather by some Advocate, whose name and particulars are not even mentioned on the said verification. Therefore, on account of the deficiencies identified above, we hardly find the verification to be valid in terms of spirit of provisions of section 55(3) of the ROPA and in line with the law laid down by this court in various dicta. Resultantly, we have no hesitation to hold that the verification is not in accord with law"

Now in the light of above cited paragraph the attestation of verification, of the contents of the election petition, made by the Oath Commissioner is examined. In the case on hands, oath commissioner beneath the verification affixed his rubber stamp which reads as under:

> Declared on oath before me
> On 22-9-18
> Mr. Usman Ahmed Mela
> S/o Ghias Ahmed Mela
> R/o Sargodha
> Identified by In person at 9.00 A. M.
> Sd/-
> (ABDUL SHAKOOR)
> Oath Commissioner
> Lahore High Court, Lahore
> Notification No.24/General/X.B.9(b)1.
> Date Lahore 06-1-2017
> Term Expiry Date 26-12-2019

Perusal of the rubber stamp of the Oath Commissioner makes it clear that the petitioner was not present at the time of verification before the Oath Commissioner because he was not identified with reference to his computerized national identity card. It is also not clear from the stamp as to at what place, the oath was practically and physically administered. The words "declared on oath before me" used in the stamp of Oath Commissioner are not sufficient being ambiguous as they do not indicate as to what was declared on oath or whether the contents of the verification were made on oath before the Oath Commissioner. The said statement being patently ambiguous does not meet with the criterion determined by the Hon'ble Supreme Court of Pakistan for due

attestation of verification, thus irresistible conclusion is that verification of the election petition is not in accordance with law.

10. The petitioner has also enclosed his affidavit with the election petition. The question arises as to whether the affidavit enclosed with the election petition is sufficient for establishing the fact that the election petition has been verified in accordance with law. The law governing this question has been examined by the Hon'ble Supreme Court of Pakistan in the case of Ghazanfar Abbas Shah (supra). Appraising the affidavit enclosed with the election petition on the basis of above cited precedent it becomes clear that the same is also not valid for the reason: firstly, that the same rubber stamp, reproduced above, affixed by the Oath Commissioner beneath verification, has also been used by the Oath Commissioner for attesting the verification of this affidavit. Since the identification of the deponent was not made with reference to his computerized national identity card it cannot be held valid attestation; secondly, the time and place of making of affidavit has not been specified and, thirdly, the affidavit does not fulfill the requirements of the High Court Rules and Order. Non-verification of the election petition in accordance with the mandatory provision of subsection (4) of Section 144 of Elections Act, 2017 is fatal as this defect after the expiry of limitation cannot be allowed to be rectified. This flaw is thus sufficient to reject the election petition under subsection (1) of Section 145 of the Elections Act, 2017.

11. Last objection to the election petition is that election petitioner has not attached with this petition an affidavit of service to the effect that a copy of the petition along with copies of all annexures, including list of witnesses, affidavit and documentary evidence, have been sent to all respondents by registered post or courier service and thus, it is liable to be rejected. On being confronted with this objection the petitioner's counsel took me to page No.148 of the Election Petition and submitted that due compliance of clause (c) of subsection (2) of Section 144 of the Elections Act, 2017 was made at the time of filing of election petition; and, thus this objection has no substance. I have examined the contents of the affidavit of service which reads as under:-

> "I, the above named deponent do hereby solemnly affirm and declare as under:-
>
> That I have served the respondents with notice sent under registered A.D. post (along with copies of petition and Annexures thereto);
>
> That I have today filed an election petition regarding election of NA-89-Sargodha-II before the Hon'ble Election Tribunal."

The above cited contents of the affidavit indicate that along with notices the petitioner had only sent copy of the petition and annexures thereto. According to clause (c) of subsection (2) of Section 144 of the Elections Act, 2017, the petitioner was required to send a copy of election petition along with copies of all annexures including list of witnesses, affidavit and documentary evidence. It appears that the petitioner had only sent copy of election petition and its annexures but not the list of witnesses, affidavit and documentary evidence. This omission makes the service, as contemplated in the above said provision of law, defective. Second flaw is that this affidavit has also not been made in accordance with the mandatory provisions of the High Court Rules and Order. Thus, this affidavit being defective renders election petition incompetent before this Tribunal.

12. Upshot of the above discussion is that the election petition in hands is not compliant with the mandatory provisions of Section 144 of the Elections Act, 2017 and thus the same is summarily rejected.

KMZ/U-8/L Petition rejected.

**P L D 2019 Lahore 119**
**Before Shahid Waheed, J**
**ABDUL WAHAB BALOCH---Petitioner**
**Versus**
**IMRAN AHMAD KHAN NIAZI and others---Respondents**

Election Petition No.46 of 2018, decided on 19th November, 2018.

**(a) Elections Act (XXXIII of 2017)---**
----Ss. 142 & 141---Election Tribunal---Limitation for filing election petition before Election Tribunal---Period of limitation for filing election petition before Tribunal shall be computed from the date of publication in the official Gazette of the names of returned candidates.

**(b) Elections Act (XXXIII of 2017)---**
----Ss. 144(4) & 145---Civil Procedure Code (V of 1908), O. VI, R.15---Election petition---Verification of---Valid verification of election petition---Principles enumerated.

Following are the principles qua valid verification of election petition:

i) that election petition is to be verified on oath. Such verification is not to be signed in routine by the deponent but being on oath it requires to be attested either by the Oath Commissioner or any other authority competent to administer oath, which is to be practically administered;

ii) that verification on oath of an election petition though mannered in accordance with civil law yet it entails upon penal consequences and hence is mandatory;

iii) that there is no material difference between a verification on oath and a verification through an affidavit for, that is an affidavit is a sworn statement in writing while a verification is confirmation in law by Oath in writing to establish the truth, accuracy and reality of a statement of fact;

iv) the purpose of taking oath is to bind down the deponent to speak truth otherwise he or she would be liable for the curse of Allah Almighty, if the truth is not spoken;

v) that request for rectification of defective verification may be considered by the Tribunal according to the settled principle relating to amendment in the pleading during period of limitation for filing of election petition but once limitation period has already expired the defect in verification cannot be allowed to be removed;

vi) that the objection that election petitioner in his verification has failed to give reference to the paragraphs of the pleadings as to what he happened to verify on his own knowledge and what he happened to verify upon information received and believed to be true is not very material because at times the entire statement happens to be given on the basis of one's knowledge and at times on

the basis of information received and, thus, it depends upon the facts of each case, as to what category assertions belong to;

vii) that the amended election petition is also required to be verified in accordance with Order VI, Rule 15 C.P.C.;

viii) that election petition is not required to be supported by a full affidavit. Short affidavit is sufficient if it duly fulfills the requirement of Order VI, Rule 15 C.P.C.;

ix) that the words "solemn affirmation before me" in the stamp of the Oath Commissioner would be sufficient to indicate that election petitioner was duly present before the Oath Commissioner at the time of attestation and was administered oath;

x) that identification of the deponent/election petitioner before Oath Commissioner should be made with reference to his/her National Identity Card;

xi) that identification of the deponent/ election petitioner by an Advocate who has mentioned of knowing the election petitioner personally is sufficient for the purpose of identification before the Oath Commissioner;

xii) that identification of the deponent by an Advocate, whose name and particulars are not mentioned on the verification, is not valid;

xiii) that the date and place of verification, that is, at what date and at what place the verification was made by the deponent should be specified;

xiv) That only that affidavit shall be treated valid for the purpose of verification of the election petition which is in conformity with the requirements mentioned in the High Court Rules and Orders read with Order XIX, C.P.C.; and,

xv) that in order to meet with the real object and the spirit of the election laws which require verification on oath, Oath Commissioner at the time of verification of the election petition and also the affidavit, must record and endorse the verification/ attestation that the oath has been actually, physically and duly administered to the election petitioner/deponent; and it is the duty of election petitioner to insist and ensure that the said endorsement is made. [p. 139] B

Zia ur Rehman v. Syed Ahmad Hussain and others 2014 SCMR 1015; Lt. Col.(Rtd) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana 2015 SCMR 1585 and Muhammad Nawaz Chandio v. Muhammad Ismail Rahu 2016 SCMR 875 ref.

Engr. Iqbal Zafar Jhagra and others v. Khalilur Rehman and 4 others 2000 SCMR 250; Sardarzada Zafar Abbas and others v. Syed Hassan Murtaza and others PLD 2005 SC 600; Malik Umar Aslam v. Sumera Malik and another PLD 2007 SC 362; Moulvi Abdul Qadir and others v. Moulvi Abdul Wassay and others 2010 SCMR 1877; Zia ur Rehman v. Syed Ahmad Hussain and others 2014 SCMR 1015; Inayatullah v. Syed Khurshid Ahmad Shah and others 2014 SCMR 1477; Hina Manzoor v. Malik Ibrar Ahmed and others PLD 2015 SC 396; Ch.Zawwar Hussain Warrich v. Muhammad Aamir Iqbal and others 2015 SCMR 1186; Lt. Col.(Rtd) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood

Sargana and others 2015 SCMR 1585; Sardar Muhammad Naseem Khan v. Returning Officer and others 2015 SCMR 1698; Muhammad Ibrahim Jatoi v. Aftab Shaban Mirani and others 2016 SCMR 722; Feroze Ahmad Jamali v. Masroor Ahmad Khan Jatoi 2016 SCMR 750; Ch. Muhammad Ayaz v. Asif Mehmood and others 2016 SCMR 849; Muhammad Nawaz Chandio v. Muhammad Ismail Rahu 2016 SCMR 875 and Sultan Mahmood Hinjra v. Malik Ghulam Mustafa Khar and others 2016 SCMR 1312 rel.

**(c) Elections Act (XXXIII of 2017)-**

----S. 144(4)---Civil Procedure Code (V of 1908), O. VI, R. 15---Election petition---Verification of---Non-compliance of mandatory requirements of S.144(4) of the Elections Act, 2017---Effect---Defective/ incomplete or non-verification of election petition and annexure(s)---Obligations of petitioner vis- -vis verification of his/her pleadings on oath---Non-compliance of O.VI, R.15, C.P.C.---Effect---Petitioner before the Election Tribunal was required to give reference to paragraphs of the petition which he was verifying to be correct according to his knowledge and those paragraphs which were correct according to his belief and non-compliance of said requirements would render election petition as not valid.

Sardarzada Zafar Abbas and others v. Syed Hassan Murtaza and others PLD 2005 SC 600 distinguished.

**(d) Document---**

----Construction of---Proper construction of a document was a question of law and not a question of fact.

Gulzar Khan v. Shahzad Bibi and another PLD 1974 SC 204; Amir Abdullah Khan through Legal Heirs and others v. Col. Muhammad Attaullah Khan PLD 1990 SC 972 and Mst. Maryam Bibi and others v. Muhammad Ali through L.Rs. 2007 SCMR 281 rel.

**(e) Elections Act (XXXIII of 2017)---**

----S. 144(4) --- Civil Procedure Code (V of 1908), O.VI, R.15---Election petition---Verification of---Non-compliance of mandatory requirements of S.144(4) of the Elections Act, 2017---Effect---Defective/ incomplete or non-verification of election petition and annexure(s)---Non-compliance of O.VI, R.15, C.P.C.---Effect---Importance and Legislative intent and object of requirement of verification on oath of election petition---Scope----Oath was one of the important components of verification of election petitions and provided justification to bring result of an election under judicial scrutiny and control, so as to ensure that the true will of the people was reflected in the results; and, that only persons who were eligible and qualified under the Constitution obtain the representation---Other object for the verification of pleadings on oath was to fix responsibility for averments and allegations in an Election Petition on the person signing such verification and, at the same time, to discourage wild and

irresponsible allegation(s)---Law ordained parties to approach Election Tribunal with genuine grievance on truthful facts and where false facts were pleaded on oath and false evidence was produced to mislead the Election Tribunal calling upon it to interfere with people's verdict of election, misconduct of the party was always viewed seriously by initiating criminal proceedings against it under P.P.C.---Omission of the word "oath" in attestation of an Oath Commissioner was to lead to the conclusion that verification of an election petition was not made on oath and was thus not in accordance with O.VI, R.15, C.P.C.

**(f) Maxim---**
----"Ambiquitas verborum patens nulla verificatione excluditur"---Patently ambiguous on its face cannot be made clear by external proof---Where the document or deed is ungrammatical and could not be read literally so as to give any clear meaning without adding or removing some words, there was patent ambiguity and oral evidence was not admissible to supply the defect.
Mubeen-ud-Din Qazi for Petitioner.
Babar Awan, Sajid Munawar Qureshi and Muhammad Ilyas Khan for Respondent No.1.
Respondent Nos. 2 to 10: Ex parte.
Shan Gul and Muhammad Arif Raja, Additional Advocate Generals, Punjab: Amicus curiae.
Date of hearing: 19th November, 2018.

## JUDGMENT

**SHAHID WAHEED, J.---**The election of respondent No.1, Imran Ahmad Khan Niazi, as a Member of National Assembly from constituency NA. 95 (Mianwali-I) in General Elections, 2018 has been challenged through this election petition under Section 139 of the Elections Act, 2017 by the petitioner, Abdul Wahab Baloch, who is a defeated candidate, inter alia, on four grounds, that is, firstly, the nomination papers of the respondent No.1 were invalid; secondly, the respondent No.1 was not, on the nomination day, qualified under Article 62(1)(d)(f) of the Constitution of the Islamic of the Republic of Pakistan, 1973 to contest election; thirdly, the respondent No.1 had failed to comply with the provisions of the Constitution of the Islamic Republic of Pakistan, 1973, the Elections Act, 2017 and the rules framed thereunder as he had failed to fulfill the mandatory conditions incorporated in the nomination papers as well as affidavit attached therewith under the direction of the Hon'ble Supreme Court of Pakistan, with the object to procure the result invalidly of the election in his favour; and, lastly the election of respondent No.1 has been procured by corrupt practice.
2. Vide order dated 05.10.2018 process, subject to question of maintainability of the election petition, as per modes suggested in sub- section (2) of Section 145

of the Elections Act, 2017 was issued. In response to notice Mr. Babar Awan, Advocate, entered appearance on behalf of respondent No.1, whereas respondent No.8, Sardar Bahadar Khan, appeared in person. The other respondents, to wit,(sic) respondents Nos.2 to 5, 7, 9 and 10 had not appeared and, thus, they were proceeded against ex parte vide order dated 18.10.2018. Respondent No.6, Muhammad Khalid, however, sent a letter dated 15.10.2018 through courier stating therein that he had nothing to say in favour or against the election petition. The said letter was taken on record. On the next date of hearing, that is, 25.10.2018 respondent No.1 submitted written statement, copy whereof was handed over to petitioner's counsel; respondent No.8 made a request that he did not want to file written statement and, thus, his right to file written statement was closed; and, that respondent No.6 was not in attendance, therefore, he was proceeded against ex-parte. Thereafter, the case was fixed for arguments on the question of maintainability of the election petition.

3. Mr. Shan Gul and Mr. Muhammad Arif Raja, learned Additional Advocate Generals, in response to notice under Section 152 of the Elections Act, 2017 entered appearance and assisted this Tribunal on the questions to be determined at threshold.

4. Before examining the question qua maintainability of the present election petition it would be apposite to state that according to Article 225 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") no election to a House or Provincial Assembly can be called in question except by an election petition presented to such Tribunal and in such manner as may be determined by the Act of Majlis-e-Shoora (Parliament). Such law made in pursuance of Article 225 of the Constitution is the Elections Act, 2017. The entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Elections Act, 2017, different stages of the process being dealt with by different provisions of the Act, there can be no election to a House or a Provincial Assembly except as provided by the Elections Act, 2017 and again, no such election may be questioned except in the manner provided by the Elections Act, 2017. So, the Elections Act, 2017 is a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. Thus, the right to dispute an election being statutory creation is subject to statutory limitation. An election petition is a statutory proceeding to which principles of equity do not apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it and thus, in the trial of election disputes, Tribunal is put in a straightjacket. In the above backdrop it has to be seen whether the election petition at hands is compliant with the provisions of the Elections Act, 2017 or whether the objections with regard to maintainability of the election petition have any substance.

5. First objection canvassed on behalf of the respondent No.1 is that the present election petition is barred by time. Elaborating this objection it is submitted that as per Section 142 (1) of the Elections Act, 2017, election petition was required to be presented to this Tribunal within 45 days of the issuance of notification of the name of the returned candidate by the Election Commission of Pakistan. According to learned counsel appearing on behalf of respondent No.1 the Election Commission of Pakistan on 07.08.2018 issued notification of the names of the returned candidates and that from the said date the last date for filing the election petition before this Tribunal was 21.09.2018 whereas the same was filed on 22.09.2018 and, thus, it was patently barred by time; and, that since the provisions of Section 5 of the Limitation Act, 1908 do not apply to the election petition, same is liable to be dismissed on this short ground. I am afraid this objection is not well founded for two reasons. Firstly, Section 142 of the Elections Act, 2017 contemplates that an election petition shall be presented to the Election Tribunal within 45 days of the publication in the official Gazette of the names of the returned candidates. It means that period of limitation for filing election petition before this Tribunal shall be computed from the date of publication in the official Gazette of the names of returned candidates. It is true that on 07.08.2018 the Election Commission of Pakistan in pursuance of subsection (1) of Section 98 of the Elections Act, 2017 issued notification of the names of candidates returned to the National Assembly of Pakistan as a result of General Elections, 2018 but the same was published in the Gazette of Pakistan on 29.08.2018. The period of limitation for presenting the election petition before this Tribunal, thus, started running from the date of publication in the official Gazette of the names of the returned candidates, that is, 29.08.2018 and from the said date the last date for filing election petition was 12.10.2018. Since the election petition was presented to this Tribunal on 21.09.2018, it could not be held that the same was out of time. Secondly, assuming that argument canvassed on behalf of respondent No.1 is correct and last date for filing the election petition before this Tribunal was 21.09.2018, even then the presentation of election petition before this Tribunal on 22.09.2018 on account of benefit provided in Section 4 of the Limitation Act, 1908 read with Section 10 of the General Clauses Act, 1897 cannot be held barred by time as on 21.09.2018 the Tribunal and its office was closed due to 9th/10th Muharram Holidays.

6. Second objection is that the election petition is liable to be rejected under Section 145 of the Elections Act, 2017 as the same has not been verified in the manner laid down in the Civil Procedure Code, 1908 (Act V of 1908). It is argued that provisions of Section 144 (4) of the Elections Act, 2017 are mandatory in nature as the spirit of law is to ensure that the person making the allegations of corrupt practice realizes the seriousness thereof as such a charge would be akin to a criminal charge, since it entails the party indulging in such practice with different penalties. It is, therefore, equally essential that particulars of the charge or allegation are clearly and precisely stated on oath in the election petition to afford a fair opportunity to the person against whom it is levelled to

effectively counter the same. Mr. Babar Awan, Advocate by making reference to the cases of Zia ur Rehman v. Sved Ahmad Hussain and others (2014 SCMR 1015), Lt. Col. (Rtd) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana (2015 SCMR 1585) and Muhammad Nawaz Chandio v. Muhammad Ismail Rahu (2016 SCMR 875) submits that verification clause of the election petition suffers from defects; that is to say (a) that a verification clause is printed which has been signed by the petitioner, however, if stamp/seal of the Oath Commissioner is available thereon, there is no need to mention that the Oath has been administered by the Oath Commissioner; (b) that the time and place have not been mentioned on the verification clause; however, the date has been mentioned i.e. 18th day of September 2018. The petition has been prepared on 18.09.2018 in Lahore as written at page 25 of the petition whereas the same was verified on Oath on the same day, thus, in the said circumstances, the omission of time and place is substantial in nature; (c) that the petitioner in purported verification has failed to specifically disclose that as to what number of paragraphs/grounds of the petition have been verified by the petitioner on his own knowledge and what he has verified upon the information received by him and that only a vague assertion has been made; that the petitioner has in contravention to law only stated in the verification clause that paragraphs Nos.1, 2, 4, 6a, d, f, h, j, k, m, n, o, p, q, w, x, cc and ff are correct without specifying the source, i.e., information, knowledge or belief. Thus, purported verification is defective and petition is liable to be dismissed; (d) that the petition has not been verified at all in accordance with law and verification of election petition has not been made on Oath before the Oath Commissioner as required under the law. The seal/stamp of Oath Commissioner available on verification clause pertains to some purported Affidavit. It shows that the petitioner never appeared before the Oath Commissioner for verification of the election petition in contravention to the mandatory requirement of law, consequently making the election petition incompetent and liable to be summary rejection: and, (e) that the contents of the purported seal/stamp of the Oath Commissioner are unclear, vague and not legible and, therefore, the said verification is defective and not in accordance with law.

7. The law governing preliminary objection relating to verification of the election petition has been provided in subsection (4) of Section 144 of the Elections Act, 2017 which postulates that an election petition and its annexures shall be signed by the petitioner and the petition shall be verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908) for verification of the pleadings. The Code of Civil Procedure (C.P.C.) 1908 through its Order VI, Rule 15, C.P.C. prescribes the manner of verification of pleadings which reads as under:

> Verification of Pleadings:--(1) Save as otherwise provided by any law for the time being in force, every pleadings shall be verified on oath or solemn affirmation at the foot by the party or by one of the parties pleading or

by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

2). The person verifying shall specify, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon information received and belief to be true.

3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was singed."

The following are the main features of the verification in accordance with above cited provisions of C.P.C.

i) it has to be on oath or solemn affirmation;

ii) the person verifying shall specify the paragraphs, which he verifies on his own knowledge and paragraphs which are believed to be true by him separately;

iii) the verification shall be signed by the person making it; and

iv) it shall contain the date and place when and where signatures were appended.

The above said provision of law is in parametria to Section 55(3) of the previous law, i.e. the Representation of the People Act, 1976 and Section 36(3) of the Senate (Elections) Act, 1975, which have been under consideration before the Hon'ble Supreme Court of Pakistan in different cases, and, thus, survey thereof would be helpful to resolve preliminary question with regard to validity of verification given at the bottom of the present election petition. I will begin survey of the case law by referring to the case of Engr. Iqbal Zafar Jhagra and others v. Khalilur Rehman and 4 others (2000 SCMR 250) wherein it was held as follows:

"Subsection (3) of section 36 (ibid) clearly requires that every petition and every Schedule or Annexures shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure for verification of pleadings. The verification of pleadings has been provided under Order VI, Rule 15, C.P.C. which when read with section 139, C.P.C., clearly shows that the pleadings are to be verified on oath and the oath is to be administered by a person, who is duly authorized in that behalf."

Second judgment on the subject rendered in the case of Sardarzada Zafar Abbas and others v. Syed Hassan Murtaza and others (PLD 2005 SC 600) wherein the Hon'ble Supreme Court of Pakistan after examining the provisions of Order VI, Rule 15, C.P.C. held as follows: "

"The Code contains such provisions under Order VI, rule 15, which requires the verification of pleadings on oath. Such verification is not to be signed in routine by the deponent but being on oath, it requires to be attested either by the Oath Commissioner or any other authority competent to administer oath. It needs hardly to be emphasized that every oath is to be practically administered.----------

---------- under election laws such verification on oath is mandatory because of being followed by penal consequences under section 63(a) of the Act that makes it mandatory for the Tribunal to dismiss election petition if the provisions of sections 54 and 55 of the Act have not been complied with. Similar view was taken by this Court in Iqbal Zafar Jhagra's case (2000 SCMR 250), though related to the Senate elections. It is, therefore, settled that the verification on oath of an election petition though mannered in accordance with civil law yet it entails upon penal consequences and hence is mandatory We have considered this aspect thoroughly and have come to the conclusion that in the given circumstances, there is no material difference between a verification on oath and a verification through an affidavit. An affidavit is a sworn statement in writing while a verification is a confirmation in law by oath in order to establish the truth, accuracy and reality of a statement of fact. Thus, there is practically no difference whatsoever by verifying a statement on oath and by verifying the same statement on affidavit."

In the case of Malik Umar Aslam v. Sumera Malik and another (PLD 2007 SC 362) it was held as follows:

"Under section 55(3) of the Act, 1976, it has been made obligatory upon the person, who has challenged the Elections, to verify the same in the manner prescribed for verification of plaint by C.P.C. thus by reference, the provisions of Order VI, Rule 15 C.P.C. have been made applicable. As per its provision, every pleadings is required to be verified on oath or solemn affirmation at the foot by the party or by one of the parties to pleadings or by some other person to the satisfaction of the Court acquainted with the facts of the case. It may not be out of context to note that the verification of the pleadings on oath was introduced by the Law Reforms Ordinance (XII of 1972) read with section 6 of the Oaths Act, 1873, by adding the words "on oath or solemn affirmation" after the word verified in Rule 15(i) of Order VI, C.P.C. It is also pertinent to note that after the said importance of the same amendment in presence of verified pleadings on oath, the court has been empowered to proceed case ex parte against the opponents and pass a decree, under Order IX, rule 6(1), C.P.C. without calling for an affidavit in ex parte proof. We believe that there is no point to address ourselves on this question namely if verification on oath has not been made before the person authorized to administer the oath, the same would not be considered to be valid verification because for the purpose of taking oath one has to bind down himself to speak the truth otherwise he or she would be liable for the curse of Almighty Allah if the truth is not spoken. Under section 6 of the Oaths Act, 1873, the procedure has been prescribed for taking the oath duly attested by an authorize person. Admittedly in instant case, verification has not been made on oath before an authorized person, theref re, the appellant, on realizing the major defect in the Election

Petition, submitted an application seeking amendment in the petition, to the extent of verifying it on oath, accordingly.---------- ---------- ---------- At this juncture, it would be appropriate to attend to the argument of the learned counsel for appellant that the Tribunal should have allowed the application for the amendment, enabling the appellant to submit the Election Petition duly verified or attested on oath and to remove the defect in view of provision of section 62 (3) of the Act, 1976 and according to him, amendment in the plaint or petition is permissible at any stage as it has been held in S.M. Ayub v. Yousaf Shah (PLD 1967 SC 486).---------- ---------- In the case in hand, the appellant knowing well the mandatory provision of section 55 (3) of the Act, 1976, did not apply for amendment within the prescribed period of limitation for filing of Election Petition. Undoubtedly, if during period of limitation for filing of petition such an amendment is sought, the Court may consider the request according to the settled principle relating to amendment in the pleadings but once limitation period has already expired, then it is the duty of the Court to examine whether a right; which has been created on account of bar of limitation in favour of opposite side can be snatched by allowing amendment in the pleadings, enabling the plaintiff (petitioner) to put up a better/perfect case against defendant (respondent). In this behalf the consistent practice of the Courts is that amendment in such matters, where limitation creates a hurdle, is not to be allowed on condoning the delay, particularly where no request has been made to enlarge the period of limitation. For the above proposition we are fortified by the judgments in the cases of Bhagwanji v. Alembic Chemical Works (AIR 1948 PC 100) and Saeed Sehgal v. Khurshid Hasan (PLD 1964 SC 598)."

Next is the case of Moulvi Abdul Qadir and others v. Moulvi Abdul Wassay and others (2010 SCMR 1877) wherein it was held as follows:

"It is well-settled that question of law, pronounced or declared by this Court in terms of Article 189 of the Constitution has binding effect on all the functionaries, both executive and particularly the judicial authorities. The superior Courts, Tribunals have obligation to implement and adhere to the judgment of the Supreme Court. We feel no hesitation in holding that the Election Tribunal, perhaps on account of non-availability of proper assistance, proceeded to decide the cases against the appellants for the reasons mentioned hereinabove. This Court in the case of Bashir Ahmad Bhabhan (supra) has settled the question with regard to verifying the pleadings notwithstanding the numbered paragraphs or the pleadings, what he verifies on his own knowledge and what he verifies upon information received and believed to be true. This provision of law in fact cannot be considered to be mandatory as a person can verify the

paras in the pleadings on his own knowledge without verifying and para upon receipt of the information, same are believed to be true."

The relevant extract from the judgment rendered in the case of Zia ur Rehman v. Syed Ahmad Hussain and others (2014 SCMR 1015) reads as under:

"Admittedly both the election petitions filed by the respondents in the afore-mentioned appeals were not verified on oath in the manner prescribed under the afore-quoted provision. If the law requires a particular thing to be done in a particular manner it has to be done accordingly, otherwise it would not be in compliance with the legislative intent. Non-compliance of this provision carries a penal consequence in terms of section 63 of the Representation of the People Act whereas no penal provision is prescribed for non-compliance with Order VI, rule 15 of the Civil Procedure Code".

In the case of Inayatullah v. Syed Khurshid Ahmad Shah and others (2014 SCMR 1477) it was settled as follows:

"The rubber stamp of the Oath Commissioner wherein blank spaces have been filled show that the affidavit was sworn on 17.06.2013. However, the attestation has been made on 18.6.2013. The verification on the petition itself, for whatever it is worth, also states in its body that the verification was made on 17th June, 2013, but this verification is also incorrect bearing in mind that the copy of the Election Petition was sent to the respondents on the following day i.e. 18-6-2013. The affidavit of service which has been signed by the appellant states on oath "that before filing of petition [appellant] [sic] have served it to the respondents through notice by courier, the receipts of those are appended herewith". This statement has been verified on 17-6-2013 and the attestation has also been made on 17-6-2013. This affidavit of service is itself belied and rendered false by the courier receipts which show that the copy of the petition was sent on 18-6-2013 and not on 17-6-2013."

In the case of Hina Manzoor v. Malik Ibrar Ahmed and others (PLD 2015 SC 396) importance of verification of an Oath Commissioner was discussed in following words:

"It is now well settled that merely affixing signature at the foot of the election petition and/ or under its verification clauses, without the same being attested/verified by an Oath Commissioner, or some other authorized person, by itself, does not meet the requirement of verification as prescribed by Order VI, rule 15, C.P.C., and thus renders the petition non-compliant with the provisions of section 55 (3) of the ROPA, essentially entailing its dismissal in terms of section 63 (a) of the ROPA. "

In the case of Ch. Zawwar Hussain Warrich v Muhammad Aamir Iqbal and others (2015 SCMR 1186) filing of affidavit along with election petition was found sufficient compliance of law in following terms:

"We have come to the conclusion that, since the affidavit had been filed along with the election petition and had been duly attested by the Oath Commissioner, there was sufficient compliance with the provision of section 55(3) of the ROPA and as a consequence, the penalty under section 63(a) is not attracted."

Manner and mode of making verification or affidavit was discussed in detail in the case of Lt. Col (Rtd) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana and others (2015 SCMR 1585), relevant extract is as follows:

"With regards to verification of election petitions on oath, it is clear from the provisions of section 55(3) of the ROPA that an election petition has to be verified in accordance with the provisions of Order VI, Rule 15, C.P.C., which provide the basics as to how pleadings have to be verified, what shall be the contents of the verification of pleadings and how they have to be attested by the oath commissioner when read with other relevant provisions of law. Be that as it may, in addition to the law cited by both the sides (from some other dicta), it is conclusively settled by this Court that verification of an election petition is mandatory and a petition which lacks proper verification shall be summarily dismissed by the tribunal, even if the respondent has not asked for or prayed for its dismissal. ---------- ---------- Taking into account the verification of the election petition independent of the affidavit, it has been conspicuously noticed that there is no date or place mentioned in the verification i.e. at what date and what place the verification was made by the appellant. The two stamps of the oath commissioner, Lahore Cantt, affixed at the bottom of the verification also do not postulate the date on which the verification was made by the election petitioner. Besides, it is not reflected from the verification whether the appellant was present at the time of verification before the oath commissioner because he has not been identified with reference to his national identity card, rather by some Advocate, whose name and particulars are not even mentioned on the said verification. Therefore on account of the deficiencies identified above, we hardly find the verification to be valid in terms of spirit of provision of section 55 (3) of the ROPA and in line with the law laid down by this Court in various dicta. Resultantly, we have no hesitation to hold that the verification is not in accord with the law." ---------- ---------- ----------

From the High Court Rules and Orders reproduced in the preceding para, it is clear to our mind that an affidavit has to meet the following requisites:

1. Identification of deponent (Rule 11)
2. Particulars of deponent and identifier to be mentioned at the foot of the affidavit (Rule 11)
3. Time and place of the making of the affidavit to be specified (Rule 11)

4. Certification by Court/Magistrate/Other Officer at the foot of the affidavit that such affidavit was made before him (Rule 12)
5. Date, Signature and name of office and designation of the Court/Magistrate/Other Officer to be subscribed underneath the Certification (Rule 12)
6. Every exhibit referred to in the affidavit to be dated and initialed by the Court/Magistrate/Other Officer (Rule 12)
7. Where deponent of an affidavit does not understand the contents of an affidavit, the Court/Magistrate/Other Officer administering oath must read out the contents of an affidavit to such person so that he understands. Where such is the case, the Court/Magistrate/Other Officer shall note at the foot of the affidavit that the affidavit has been read out to the deponent and he understands its contents (Rule 14)
8. Deponent to sign/mark and verify the affidavit and the Court, Magistrate or other officer administering the oath or affirmation to attest the affidavit (Rule 15)
9. Oath to be administered by the Court/Magistrate/Other officer in accordance with the Oaths Act, 1878 and affidavit to be verified by deponent and attested by Court/Magistrate/Other officer on forms appended thereto (Rule 16).----------

It is also relevant to note here that in an ordinary lis (suit etc) requiring verification and support by an affidavit, if the verification or affidavit is flawed, such lapse may be considered an irregularity and be treated as a curable defect, but we are not laying down any hard and fast rule, because the matter before us is not pertaining to ordinary litigation, however in the case of an election petition the law is very stringent and imperative. Therefore if the election petition has not been verified in accordance with law, this cannot be treated as a curable defect and the Election Tribunal particularly after the lapse of the period of limitation prescribed for filing of election petition, cannot permit the election petitioner to cure the same.---------- We have applied our mind to this aspect of the matter and hold that in order to meet the real object and the spirit of the election laws which require verification on oath, in an ideal situation, the Oath Commissioner at the time of verification of the petition etc. and also the affidavit, must record and endorse verification/ attestation that the oath has been actually, physically and duly administered to the election petitioner/deponent. But as the law has not been very clear till now, we should resort to the principle of presumption stipulated by Article 129(e) ibid in this case for avoiding the knock out of the petition for an omission and lapse on part of the Oath Commissioner. But for the future we hold that where the election petition or the affidavit is sought to be attested by the Oath Commissioner, the election petitioner shall

insist and shall ensure that the requisite endorsement about the administration of oath is made, otherwise the election petition/affidavit shall not be considered to have been attested on oath and thus the election petition shall be liable to be, inter alia, dismissed on the above score. We consciously and deliberately neither apply this rule to the instant case nor any other matter pending at any forum (election tribunal or in appeals)."

Requirement of making verification on Oath of the amended election petition was highlighted in the case of Sardar Muhammad Naseem Khan v. Returning Officer and others (2015 SCMR 1698) in following terms:

"The amended petition in this case for all intents and purposes shall be a final, independent and separate document (election petition) which had to be verified per the mandate of law. It is conceded by the learned counsel for the appellant, when confronted with the fact that the amended election petition filed by the appellant has not been verified in accordance with law, that if the original election petition is ignored from consideration, the amended petition will be hit by the provisions of sections 55(3) and 63 of the Act. Obviously on account of the above, the impugned decision of the Tribunal is unexceptionable."

In the case of Muhammad Ibrahim Jatoi v. Aftab Shaban Mirani and others (2016 SCMR 722) short affidavit in support of election petition which duly fulfills the requirement of Order VI, rule 15, C.P.C. was found sufficient in following words:

"As regards the argument now raised that the election petition is not supported by a full affidavit as per the requirement of the provisions of the Sindh Chief Court Rules, suffice it to say that when one looks at Section 55 of the Act, the only requirement of law is regarding verification as per the provisions of Order VI, rule 15 of the Code of Civil Procedure, 1908 (C.P.C.) and not vis-a-vis any affidavit required to be given in support of the election petition. Therefore, the argument about a full length affidavit has no substance. As far as the verification of the election petition otherwise is concerned, we have examined the document and find that a short affidavit to that effect in support thereof has been given which duly fulfills the requirements of Order VI, Rule 15, C.P.C. as has been held in the judgment reported as Sardarzada Zafar Abbas and others v. Syed Hassan Murtaza and others (PLD 2005 SC 600) and Lt. Col.(R) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana and others (2015 SCMR 1585)

In the case of Feroze Ahmad Jamali v. Masroor Ahmad Khan Jatoi 2016 SCMR 750) the words "on solemn affirmation before me" in the stamp of Oath Commissioner were construed that the deponent was duly present before the Oath Commissioner at the time of attestation and was administered Oath; and, identification of deponent by Advocate knowing the deponent personally was found valid. The relevant extract of the judgment is reproduced below:

"Besides we have examined the verification part of the election petition and we find that it complies with the provisions of Order VI, Rule 15 of the Code of Civil Procedure, 1908 (C.P.C.) in letter and spirit. The reasons of the learned Tribunal and the argument of the respondent that it does not mention the date, day and place of the verification or the proper identification of the appellant, suffice it say that at the bottom of the petition (in the verification portion), though not in typed form the date has been clearly written by hand. There is another stamp of the Oath Commissioner appearing on the left of the verification portion of the election petition which mentions the date as 26.6.2013 (albeit also written by hand). With respect to attestation, the Oath Commissioner in clear and unequivocal terms has stamped on 'S.A before me' (i.e. on solemn affirmation before me), which clearly indicates that the appellant was duly present before the Oath Commissioner at the time of attestation and was administered oath. It is also spelt out from the Oath Commissioner's stamp that the election petition was attested at Sukkur. As regards identification of the appellant, he has been duly identified by Mukesh Kumar, Advocate who has mentioned of knowing the appellant personally; thus we are of the candid view that in the light of the law laid down by this Court in Lt. Col. (Rtd) Ghazanfar Abbas Shah v. Mehr Khalid Mehmood Sargana and others (2015 SCMR 1585) there is no defect in the verification."

In the case of Ch. Muhammad Ayaz v. Asif Mehmood and others (2016 SCMR 849) default in respect of verification of election petition was not allowed to be removed after period of limitation in following words.

"It has been observed that the above quoted provisions specifically state that verification is to be made at the time of filing of the election petition and any default in this regard would be considered to be a significant omission and fatal. Admittedly the appellant had sought amendment in the election petition after the period of limitation as such the petition, in the light of the above provisions, could not have been considered and allowed and warranted dismissal being not maintainable on this very score, Keeping in view the above provisions verification of the election petition was a mandatory requirement and that too in accordance with the provisions of Order VI, Rule 15(2) of C.P.C. specifying to numbered paragraphs of the pleadings, what he verifies on his own knowledge and what he verifies upon information received and believed to be true. It is an admitted position that the appellant had initially not verified the election petition filed by him which is apparent as he subsequently filed application seeking amendment to do so and that also with an application for condonation of delay. In the light of the above whether the election petition was maintainable and the deficiency could have been allowed to be rectified and that also after the passing of the period of limitation and in

circumstances non-compliance of the mandatory provisions of Section 55(3) of the Act is fatal to the maintainability to the election petition.

In the case of Muhammad Nawaz Chandio v. Muhammad Ismail Rahu (2016 SCMR 875) importance of verification of election petition was highlighted in following words:

"Adverting first to the contention of the learned counsel for the Appellant that the Election Petition was not verified in accordance with law i.e. under Rule 15, C.P.C., hence, did not comply with the mandatory requirement of section 55(3) of ROPA and, therefore, merited summary dismissal on this ground. We have examined the Election Petition, a copy whereof is available on the record. It bears verification on solemn affirmation that what has been stated therein is true to the best of knowledge and belief of the Election Petitioner. It bears the stamp and signature of the Oath Commissioner. The place (Hyderabad) whereat the contents of the Election Petition were verified is also stated therein. The date is also mentioned by the Oath Commissioner. The Election Petitioner i.e. the present Respondent No.1 entered the witness box as PW-1 and owned the said Election Petition by identifying his signatures thereupon. In this view of the matter, it appears that the requirement of Order VI, Rule 15, C.P.C. has in essence been complied with. The additional requirements enjoined upon the Oath Commissioner referred to by the learned counsel for the Appellant by relying upon the judgment of this Court in the case of Lt. Col. (Ret) Ghazanfar Abbas's case (supra) are not really relevant as such requirement, if applicable, would be mandatory in the future as has been specifically mentioned in the said judgment. In this view of the matter, the learned Election Tribunal has correctly held that the Election Petition could not be dismissed on the ground that it was not duly verified.

Last case on the subject is the case of Sultan Mahmood Hinjra v. Malik Ghulam Mustafa Khar and others (2016 SCMR 1312) wherein it was held as follows:

"From the above, it is crystal clear that verification of an election petition in the prescribed manner is a mandatory requirement and that too in accordance with the provisions of Order VI, Rule 15, C.P.C. specifying to numbered paragraphs of the pleadings what he verifies of his own knowledge and what he verifies upon information received and believed to be true. From the record it reveals that the Appellant while filing his election petition did not comply with the mandatory requirements with regard to the verification of the election petition and to cure such defect subsequently submitted an affidavit in this regard, wherein the entire contents of his election petition were reproduced. It would be pertinent to mention at this juncture that although the provisions relating to the verification of pleadings are generally directory in nature, the position is different in election laws by virtue of section 63 of the ROPA, 1976 which casts upon the Tribunal a duty to dismiss the election petition if

the provisions of section 54 or 55 of the ROPA, 1976 have not been complied with, as such its compliance has been held to be mandatory in nature by virtue of the penal consequences prescribed under section 63 of the ROPA, 1976.----------When the affidavit at hand is examined in the light of the above it transpires that certain essential requirements are missing therefrom. Firstly, it has not been mentioned whether the Respondent No.1 was administered oath by the Oath Commissioner before the attestation was made. Secondly, it has not been specified whether the respondent No.1 was duly identified before the Oath Commissioner. In this regard, it has simply been stated at the foot of the affidavit that the Respondent No.1 was present before the Oath Commissioner in person, however, the details of the person identifying the Respondent No.1 have not been mentioned whereas according to the above quoted provisions, the Oath Commissioner is bound to specify at the foot of the affidavit the name and description of the person by whom identification of the deponent was made and in this regard a certificate has to be appended. Furthermore, it is also not clear from the affidavit that the Respondent No.1 was identified with reference to his ID card and in this regard, no ID card number is given, as such the identification does not seem to have been made. There is yet, another aspect to the matter. The affidavit in question does not make any reference to the numbered paragraphs contained therein which the Respondent No.1 verifies on his own knowledge and what he verifies upon information received and believed to be true. Further, the affidavit in question also does not make any reference to the verification of the annexures appended along with the petition, which although have been mentioned in the said affidavit".

8. The above survey of case law indicates the following principles qua valid verification of election petition:

i) that election petition is to be verified on oath. Such verification is not to be signed in routine by the deponent but being on oath it requires to be attested either by the Oath Commissioner or any other authority competent to administer oath, which is to be practically administered;

ii) that verification on oath of an election petition though mannered in accordance with civil law yet it entails upon penal consequences and hence is mandatory;

iii) that there is no material difference between a verification on oath and a verification through an affidavit for, that is an affidavit is a sworn statement in writing while a verification is confirmation in law by Oath in writing to establish the truth, accuracy and reality of a statement of fact;

iv) the purpose of taking oath is to bind down the deponent to speak truth otherwise he or she would be liable for the curse of Allah Almighty, if the truth is not spoken;

v) that request for rectification of defective verification may be considered by the Tribunal according to the settled principle relating to amendment in the pleading during period of limitation for filing of election petition but once limitation period has already expired the defect in verification cannot be allowed to be removed;

vi) that the objection that election petitioner in his verification has failed to give reference to the paragraphs of the pleadings as to what he happened to verify on his own knowledge and what he happened to verify upon information received and believed to be true is not very material because at times the entire statement happens to be given on the basis of one's knowledge and at times on the basis of information received and, thus, it depends upon the facts of each case, as to what category assertions belong to;

vii) that the amended election petition is also required to be verified in accordance with Order VI, Rule 15, C.P.C.;

viii) that election petition is not required to be supported by a full affidavit. Short affidavit is sufficient if it duly fulfills the requirement of Order VI, Rule 15, C.P.C.;

ix) that the words "solemn affirmation before me" in the stamp of the Oath Commissioner would be sufficient to indicate that election petitioner was duly present before the Oath Commissioner at the time of attestation and was administered oath;

x) that identification of the deponent/election petitioner before Oath Commissioner should be made with reference to his/her National Identity Card;

xi) that identification of the deponent/ election petitioner by an Advocate who has mentioned of knowing the election petitioner personally is sufficient for the purpose of identification before the Oath Commissioner;

xii) that identification of the deponent by an Advocate, whose name and particulars are not mentioned on the verification, is not valid;

xiii) that the date and place of verification, that is, at what date and at what place the verification was made by the deponent should be specified;

xiv) That only that affidavit shall be treated valid for the purpose of verification of the election petition which is in conformity with the requirements mentioned in the High Court Rules and Orders read with Order XIX, C.P.C.; and,

xv) that in order to meet with the real object and the spirit of the election laws which require verification on oath, Oath Commissioner at the time of verification of the election petition and also the affidavit, must record and endorse the verification/ attestation that the oath has been actually,

physically and duly administered to the election petitioner/deponent; and it is the duty of election petitioner to insist and ensure that the said endorsement is made.

9. In the light of above stated principles of law, I now proceed to examine the validity of verification of the present election petition. In the case on hands following verification has been given at the bottom of the petition.

" It is verified on oath at Islamabad on this 18th day of September, 2018 that the contents of paragraphs 1, 2, 4, 6a, d, f h, j, k, n, o , p, q, w, x, cc and ff are correct and paragraphs 5, 6b, c, 2, I, 1, r, s, t, u, v, y, z, aa, bb, dd, ee, gg, to the best of my knowledge and belief are true and correct."

The petitioner, who is an Advocate of Supreme Court and also Member of the Sindh Bar Council through this petition has made a prayer that a declaration be issued to the effect that: (a) nomination of respondent No.1 was invalid;
(b) respondent No.1 as returned candidate was not on the nomination day, qualified for, rather was disqualified from, being elected or to hold elective office of member of National Assembly from constituency NA.95- Mainwali-I under Article 62(1), (d), (e) and (f) and Article 63(1)(o) and (p) of the Constitution of the Islamic Republic of Pakistan, 1973; and, (c) respondent No.1 has been guilty of corrupt practice throughout. The said declaration has been sought inter alia on the basis of (i) judgment of paternity in the case of Anan Luisa White v. Imran Khan by Superior Court of the State of California for County of Los Angeles, (ii) copy of order of appointing guardian of minor, (iii) copy of consent of proposed guardian, (iv) copy of declaration Carolina White etc, (v) tweets between Tyriana Jad Khan and Jemima, (vi) biography "Imran v. Imran untold story" written by Frank Huzur; and (vii) book of Reham Khan. It means that all the paragraphs of the election petition are not happened to be correct according to knowledge of the petitioner and thus the principle settled in the case of Sardarzada Zafar Abbas and others v. Sved Hssan Murtaza and others (PLD 2005 SC 600) cannot be applied here. The petitioner was, thus, required to give reference to paragraphs of the petition which he was verifying to be correct according to his knowledge and the paragraphs which were correct according to his belief. This requirement has not been complied with and, thus, the verification given at the bottom of present petition, reproduced hereinabove, being not in accordance with provisions of Order VI Rule 15 CPC is not valid.

10. Second limb of the objection to the verification is that the same was not made on oath, which is evident from the stamp of the Oath Commissioner affixed beneath the verification. Answer to this aspect of the objection may be given after appraising the contents of stamp of the Oath Commissioner. Since the stamp of Oath Commissioner is not clear and legible, the Xerox copy thereof is pasted below for proper appreciation.

I made an effort with the assistance of learned counsel for the parties to read the above pasted stamp of the Oath Commissioner. With great labour following words are deciphered from the said stamp:

"This affidavit has been ..
before me on this 18 SEP 2018 Day of
..20 ...
who is personally known/ identified
by Abdul Wahab Baloch
Certified further that the contents of
the Affidavit have been read
and----------
has ----------
Serial No.----------
ASAD ABBAS JAFRI, ADVOCATE HIGH COURT OATH COMMISSIONER ISLAMABAD."

First feature of above pasted rubber stamp of the Oath Commissioner is that it relates to some affidavit and not with regard to verification typed at the bottom of election petition; second striking feature is that word "oath" is missing; and lastly, the line "who is personally known/ identified by Abdul Wahab Baloch" is defective/ ambiguous/ ungrammatical. I confronted petitioner's counsel with the above noted features and asked as to how on the basis of said stamp attestation of the verification of election petition can be held valid. In response, he has submitted that this is a question of fact to be proved on evidence; and, that if at this stage Tribunal wants to understand true meaning of the stamp or to read the missing letters then Oath Commissioner may be summoned. The reply is neither persuasive nor satisfactory. According to the case of Gulzar Khan v. Shahzad Bibi and another PLD 1974 SC 204, Amir Abdullah Khan through Legal Heirs and others v. Col.(R) Muhammad Attaullah Khan (PLD 1990 SC 972) and Mst. Maryam Bibi and others v Muhammad Ali through L.Rs (2007 SCMR 281), the question of the proper construction of document is a question of law and not of fact.

11. Oath is one of the important components of the verification of election petition. In fact, it is Oath which provides justification to bring the result of the election under judicial scrutiny and control so as to ensure that the true will of the people is reflected in the results; and, to secure that only the persons who are eligible and qualified under the Constitution obtain the representation. The other object for the verification of pleadings on Oath is to fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, to discourage wild and irresponsible allegation as firstly; the success of a candidate who has won at an election cannot be lightly interfered with; secondly, setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch as re-election involves an enormous load on the public exchequer and administration; and, thirdly, false cases not only

contribute to the work load of the Tribunal and kill its precious time but create hurdle in the ways of genuine litigants who sincerely need assistance of the Tribunal for obtaining justice. Law, thus, ordains the parties to approach Tribunal with genuine grievance on truthful facts. Where false facts are pleaded on oath and false evidence is produced to mislead the Tribunal calling upon it to interfere with people's verdict of election, misconduct of the party is always viewed seriously by initiating criminal proceedings against it under Section 193, P.P.C. In the present case the petitioner has challenged the election of respondent No.1 primarily on the allegation that he is not of good character and is commonly known as one who violates Islamic Injunctions and, that he is not sagacious, righteous, honest and Ameen. These are serious allegations and, therefore, required to be declared on Oath, which is missing. It appears that the word "Oath" has been deliberately omitted or got omitted in the attestation or stamp of the Oath Commissioner so as to avoid any consequence on not being proved the allegation set out in the petition. This is adroit maneuvers. It is in this perspective this Tribunal neither can read nor supply the word "Oath" in the attestation of the Oath Commissioner so as to make it perfect. Even otherwise, it is not the function of Tribunal to make instrument but to interpret it. Omission of the word "Oath" in the attestation of Oath Commissioner leads to the conclusion that verification of election petition was not made on Oath and thus it is not in accordance with Order VI, rule 15, C.P.C. This defect is fatal and renders present election petition incompetent.

12. There is another flaw in the attestation of verification by the Oath Commissioner. It is not reflected from the verification/attestation whether the petitioner was present at the time of verification before the Oath Commissioner because he had not been verified with reference to his identity card. The line "who is personally known/identified by Abdul Wahab Baloch" occurring in the above pasted stamp of the Oath Commissioner makes the attestation ambiguous. It is not clear from the said line as to whether petitioner namely Abdul Wahab Baloch was personally known to the Oath Commissioner or whether the petitioner himself disclosed his identity or someone who was his namesake had identified him before the Oath Commissioner. At the best this can be said to be a patent ambiguity in the stamp of the Oath Commissioner. It is settled principle of law that where the document or deed is ungrammatical and cannot be read literally so as to give any clear meaning without adding or removing some words, there is patent ambiguity and oral evidence is not admissible to supply the defect. Exactly, the same principle is conveyed through the maxim ambiguitas verborum patens nulla verificatione excluditur (that which is patently ambiguous on its face cannot be made clear by external proof). The above stated patent ambiguity renders the attestation of the Oath Commissioner void for uncertainty and consequently it is held that verification was not made in accordance with law and resultantly election petition being non-compliant with the mandatory provision of Section 144(4) of the Elections Act, 2017 merits to be summarily rejected.

13. There is yet another defect in the election petition. According to Section 144 of the Elections Act, 2017 election petition shall, inter alia, contain affidavit of service to the effect that copy of the petition along with copies of all annexures, including list of witnesses, affidavit and documentary evidence, have been sent to all respondents by registered post or courier service. In order to meet this requirement the petitioner has appended affidavit of service, available at page 440 of this file, which reads as under:

> " I, Abdul Wahab Baloch, deponent hereby state on oath that a copy of the petition along with copies of all annexures, including list of witnesses, affidavit and documentary evidence have been served to all the respondents by registered post at their addresses."
>
> Deponent

Underneath the above cited petitioner's solemn affirmation, the following statement is typed.

> Sworn at Islamabad this 18th day of September 2018, before me. The affidavit is filed on behalf of Abdul Wahab Baloch.
>
> Oath Commissioner

The above statement was though typed at the bottom of petitioner's solemn affirmation but not signed by the Oath Commissioner and thus, it cannot be taken into consideration to hold that the petitioner made the affirmation of the facts stated in the affidavit on Oath before the Oath Commissioner. However, beneath the said statement there is a rubber stamp of Oath Commissioner which, is selfsame the rubber stamp pasted above and thus for reasons recorded about it in preceding paragraphs, being ambiguous renders affidavit of service defective and invalid. Notwithstanding the defective affidavit, there is another aspect which indicates that provisions of clause (c) of subsection (2) of Section 144 of the Elections Act, 2017 were not complied with. The petitioner has also placed on record copy of the notice which was sent to all respondents of the instant petition. This notice is available at page 438 of this file and reads as follows:

> "Please take notice that 1 am filing election petition before the Hon'ble Election Tribunal for N.A-95 (Mianwali-1)/Lahore High Court to challenge the election Notification dated 07.08.2018 of respondent No.1 (Imran Ahmad Khan Niazi) as returned candidate from the above constituency."

Perusal of the above cited notice makes it pellucid that the petitioner through said notice had not sent copy of the election petition along with copies of annexures, including list of witnesses, affidavit and documentary evidence to all respondents. It means that affidavit of service, available at page 440 of this file is false and, thus, election petition under Section 144 of the Elections Act, 2017 is liable to be rejected at the threshold.

14. Upshot of above discussion is that election petition in hands is non-compliant with the mandatory provisions of Section 144 of the Elections Act, 2017 and, therefore, the same is hereby rejected.

KMZ/A-75/L Petition dismissed.

**2019 C L C 483**

**[Lahore]**

**Before Mamoon Rashid Sheikh and Shahid Waheed, JJ**

**DAAN KHAN (DECEASED) through Legal Heirs----Appellant**

**Versus**

**ASSISTANT COLLECTOR (NOTIFIED)----Respondent**

I.C.A. No.255415 of 2018, decided on 23rd January, 2019.

**Constitution of Pakistan---**

----Art. 199---Civil Procedure Code (V of 1908) O. IX, Rr. 3 & 4---Intra-court appeal---Dismissal of Constitutional petition for non-prosecution---Application to restore Constitutional petition under O.IX, R. 4, C.P.C.---Filing of a fresh Constitutional petition after dismissal of earlier petition for non-prosecution---Res judicata, principle of---Applicability---Scope---Application of O. IX, R. 4, C.P.C.---Scope---Question before the High Court was whether petitioner, after dismissal of petitioner's application for restoration of Constitutional petition, could file a second Constitutional petition on the same subject-matter---Held, after dismissal of first Constitutional petition for non-prosecution, petitioner under O. IX, R. 4, C.P.C. could either have brought a fresh Constitutional petition, or applied for an order to set the dismissal aside, and in the present case , the petitioner chose to file an application for restoration of the Constitutional petition---High Court observed that had the petitioner not availed remedy of application for restoration of earlier Constitutional petition under O. IX, R. 4, C.P.C., then second Constitutional petition would have been maintainable, and therefore in the present case, second Constitutional petition was not maintainable---Intra-court appeal was dismissed, in circumstances.

Dr. M. A. Haseeb Khan and others v. Sikandar Shaheen and 9 others PLD 1980 SC 139 and Shamim Akhtar v. Muhammad Tufail 2002 MLD 1716 distinguished.

Ch. Muhammad Amin Javed Appellant.
Asif Mehmood Cheema, Additional Advocate General for Respondent.
Date of hearing: 23rd January, 2019.

## JUDGMENT

**SHAHID WAHEED, J.----**The genesis of the dispute involved in this case is the order dated 26.07.1979 whereby the Notified Officer/respondent on the complaint under Sections 10/11 of the Displaced Persons (Compensation and Rehabilitation) Act, 1958, filed by one Muhammad Bashir, the general attorney of Muhammad Ishaq, cancelled the allotment of land measuring 82 Kanals 17 Marlas situated in Sikandarpura District Kasur made in favour of the predecessor of the present appellants namely Sher Khan vide mutation No.132 dated 22.04.1956 after having got confirmation of claim against Khata No.5657 of RL-II. The cancellation order dated 26.07.1979 was challenged before this Court through W.P. No.814-R of 1979. This petition was accepted vide order dated 25.10.1992 and the case was remanded to the respondent with a direction to take evidence regarding the appellants as legal heirs of Sher Khan even after summoning record from the Central Record Room. On remand the Notified Officer again cancelled the allotment vide order dated 27.07.1993. The appellants feeling aggrieved challenged the said cancellation before this Court through W.P. No.192-R of 1993. On 16.02.1998 neither party appeared when W.P. No.192-R of 1993 was called on for hearing, the learned Single Judge-in-Chamber dismissed the petition for want of prosecution. After a lapse of more than a decade the appellant moved an application i.e. C.M. No.01 of 2010 for recalling of order dated 16.02.1998. This application was dismissed being barred by time vide order dated 14.04.2010. Subsequently, the appellant brought a fresh constitutional petition i.e. W.P. No.104-R of 2010 questioning the order dated 27.07.1993 of the Notified Officer. This petition was dismissed on the ground of laches and also that the same being second writ petition was not maintainable. So, this appeal.

2. It is contended on behalf of the appellants that on the basis of principle settled in the cases of "Dr. M. A. Haseeb Khan and others v. Sikandar Shaheen and 9 others" (PLD 1980 Supreme Court 139) and "Shamim Akhtar v. Muhammad Tufail" (2002 MLD 1716) the second constitutional petition was maintainable and the same could not be considered to be hit by principle of res judicata or laches.

3. The argument canvassed at the Bar is not well founded. It is an admitted fact that the appellants' earlier constitutional petition i.e. W.P. No.192-R of 1993 was dismissed for non-prosecution vide order dated 16.02.1998 under Order IX

Rule 3, C.P.C. According to Rule 4 of Order IX, C.P.C. the appellant had two remedies, to wit, to bring a fresh constitutional petition or to apply for an order to set the dismissal aside. The appellant elected the second option and filed an application for revival of earlier petition i.e. W.P. No.192-R of 1993 but the same was dismissed vide order dated 14.04.2010 on the ground of limitation. Now a question arises as to whether after availing the remedy for restoration of earlier constitutional petition, the appellants could resort to the other remedy provided in Rule 4 of Order IX, C.P.C. Answer to this question is available in a recent judgment handed down by the Hon'ble Supreme Court of Pakistan in the case of "Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others" (PLD 2018 Supreme Court 828) wherein it has been held that "the moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, Rule (2), C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order, 1984 and principles of res-judicata as articulated in section 11, C.P.C. and its explanations". On the basis of said precedent the conclusion is that the appellants' second constitutional petition i.e. W.P. No.104-R of 2010, giving rise to instant appeal, was not competent.

4. The precedents cited by the appellants' counsel are inapt. In the cases of "Dr. M.A. Haseeb Khan and others v. Sikandar Shaheen and 9 others" (PLD 1980 Supreme Court 139) and "Shamim Akhtar v. Muhammad Tufail" (2002 MLD 1716) it was held that when the first writ petition was not decided on merits but was dismissed for non-prosecution, for such reason alone bar could not be placed for filing a fresh writ petition. This is not the case here. Had the appellants not availed the remedy of filing an application of restoration of earlier constitutional petition, their second constitutional petition on the basis of principle settled in the above cited cases and under Order IX, Rule 4, C.P.C.

would have been maintainable. In these attending circumstances, we are of the view that the order passed by the learned Single Judge-in-Chamber is valid and thus, interference therewith is uncalled for.

5. In the sequel, this appeal being devoid of any merit is dismissed.
KMZ/D-1/L Appeal dismissed.

**P L D 2019 Lahore 234**
**Before Shahid Waheed and Ch. Muhammad Iqbal, JJ**
**PAKISTAN MEDICAL AND DENTAL COUNCIL through Authorised Representative---Appellant**
**Versus**
**MUHAMMAD JUNAID ALAM and others---Respondents**

I.-C.A. No.246925 of 2018, decided on 6th November, 2018.

**(a) Pakistan Medical and Dental Council Ordinance (XXXII of 1962)---**

----Ss. 15 & 33 [as amended by Pakistan Medical and Dental Council (Amendment) Act (XIX of 2012)]--- Pakistan Registration of Medical and Dental Practitioners Regulations, 2008, Reglns. 48 & 60---Registration of foreign medical qualified doctor---Pre-conditions---Respondents were doctors qualified from abroad who assailed provisions of Reglns. 48 & 60 of Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 with regard to their registration as medical practitioners---Single Judge of High Court in exercise of Constitutional jurisdiction declared Reglns. 48 & 60 of Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 as ultra vires the provisions of S.15 read with S.33 of Pakistan Medical and Dental Council Ordinance, 1962---Validity---Two conditions under Reglns. 48 & 60 of Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 were imposed on a student who wanted to get medical education in foreign country, firstly to obtain NOC from Pakistan Medical and Dental Council (PMDC) prior to joining course abroad and secondly to secure more than 60% marks in FSc.; in case of failure to meet said two conditions, a candidate was not eligible for processing of his registration of qualification and to appear in National Examination Board Examination---Section 15 of Pakistan Medical and Dental Council Ordinance, 1962 did not prescribe any embargo or restriction on medical students to get admission in a foreign country rather it only conferred an authority upon PMDC or the Council to hold examination for evaluation and assessment of sufficient medical knowledge and skill possessed by a candidate and if it was satisfied, then such candidate was to be registered as a practitioner---Pakistan Medical and Dental Council, while framing Reglns. 48 & 60 of Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 exceeded its jurisdiction---Restrictions imposed by PMDC under guise of Reglns. 48 & 60 of Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 did not secure any support from provisions of Ss.15 & 33 of Pakistan Medical and Dental Council Ordinance, 1962 as amended in 2012---Single Judge of High Court had rightly declared Reglns. 48 & 60 of Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 as ultra vires---Division Bench of High Court declined to interfere in the matter---Intra-court appeal was dismissed in circumstances.

Khawaja Ahmad Hassaan v. Government of Punjab and others 2005 SCMR 186; Suo Motu Case No.13 of 2009 (PLD 2011 SC 619); Zarai Taraqiati Bank Ltd. and others v. Said Rehman and others 2013 PLC (CS) 1223; Devi Das Gopal Krishnan and others v. State of Punjab and others AIR 1967 SC 1895; Muhammad Amin Muhammad Bashir Limited v. Government of Pakistan through Secretary Ministry of Finance, Central Secretariat, Islamabad and others 2015 PTD 1100; National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Ltd. 2016 SCMR 550; Pakistan v. Aryan Petro Chemical Industries (Pvt.) Ltd. 2003 SCMR 370; The Bible, The Quran and Science; Al-Jehad Trust through Raeesul Mujahidden Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others PLD 1996 SC 324; Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another 2012 SCMR 6 and Dossani Travels (Pvt.) Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others PLD 2014 SC 1 ref.

**(b) Pakistan Medical and Dental Council Ordinance (XXXII of 1962)---**

----Ss. 15 & 33---Pakistan Registration of Medical and Dental Practitioners Regulations, 2008, Regln. 48---Foreign qualified medical doctors---Registration---Scope---No authority or power has been given by the statute, i.e., S.15 read with S. 33 of Pakistan Medical and Dental Council Ordinance, 1962 to make Regln. 48 of Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 to restrain foreign medical qualified doctors to get registration as medical practitioner after passing required National Examination Board Examination (NEB).
Ch. Muhammad Umar, Advocate.

**ORDER**

This single order shall decide the present Intra Court Appeal No.246925 of 2018 and connected I.C.As. Nos. 246929 of 2018, 246937 of 2018, 246950 of 2018, 246824 of 2018, 246947 of 2018, 246948 of 2018, 246949 of 2018, 246951 of 2018, 246952 of 2018, 246953 of 2018, 246954 of 2018, 246955 of 2018, 246946 of 2018, 246927 of 2018, 246930 of 2018, 246939 of 2018, 246941 of 2018, 246926 of 2018, 246942 of 2018, 246945 of 2018, 246940 of 2018, 246932 of 2018, 246928 of 2018, 246933 of 2018, 246931 of 2018 and 246936 of 2018 as common questions of law and facts are involved in all the appeals and have arisen out of the same judgment.

Through this Intra Court Appeal ("ICA") the appellant has challenged the judgment dated 09.10.2018 whereby the learned Single Judge in Chamber while allowing Writ Petition filed by respondent No.1 declared Regulation Nos.48 and 60 of the Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 ("the Regulations, 2008") ultra vires of the provisions of section 15 read

with Section 33 of the Punjab Medical and Dental Council Ordinance, 1962 ("the Ordinance, 1962") as amended in the year 2012 (through the Pakistan Medical and Dental Council (Amendment) Act, 2012) and directed the appellant to allow the respondents to appear in the forthcoming National Examination Board Examination (NEB Examination) and if they are found in possession of sufficient knowledge and skill, be registered as practitioner under the Ordinance, 1962.

2. Learned counsel for the appellant submits:

(i) that regulations 48 and 60 were framed under the provisions of Section 33 of the Ordinance, 1962;

(ii) that the object of these regulations is to maintain the better standard of medical education in the country. Through the aforementioned regulations the condition to get NOC from PM&DC has been imposed on those students who intend to get medical education in foreign countries as otherwise they would not be eligible under Regulation No. 60 of the Regulations, 2018 to appear in NEB Examination;

(iii) that PM&DC being regulatory body is competent to make such regulations so as to establish a uniform minimum standard of basic and higher qualifications in medicine and dentistry and,

(iv) that there is no conflict between the regulations and Section 15 as well as 33 of the Ordinance, 1962.

3. Question which falls for determination in this appeal is whether the Regulations, 2008 are consistent with the provisions of the Ordinance, 1962. Law governing this question is well settled, and that is, that while interpreting the vires of a law, rule or regulation through a court makes utmost effort to avoid the grant of any declaration, pronouncing any subordinate enactment or rule or regulation as ultra vires but if it becomes inevitable, it may declare any law or rule or regulation as ultra vires on the following grounds:

i) it is without jurisdiction, or in excess of jurisdiction;

ii) it is beyond the scope and purpose of the statute;

iii) it is result of excessive delegation, or,

iv) it is against the fundamental right.

In this regard reliance is placed on paras 29, 31 and 32 of the case reported as Khawaja Ahmad Hassaan v. Government of Punjab and others (2005 SCMR 186), wherein it is held as under:-

29. It is a well-recognized principle of interpretation of statutes that if the rules framed under the statute are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then those provisions must be regarded as ultra vires of the statute and cannot be given effect to. (Barisal Cooperative Central Bank v. Benoy Bhusan AIR 1934 Cal. 537; Municipal Corporation v. Saw Willie, AIR 1942 Rang 70, 74)"

31. A rule-making body cannot frame rules in conflict with or derogating from the substantive provisions of the law or statute, under which the rules are framed. No doubt that the rules-making authority has been conferred upon the Government but a rule, which the rule-making authority has power to make will normally be declared invalid only on the following, grounds:--

(1) Bad faith, that is to say that powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden;

(2) that it shows on its face a misconstruction of the enabling Act or a failure to comply with the conditions prescribed under the Act for the exercise of the powers; and

(3) that it is not capable of being related to any of the purposes mentioned in the Act. (Shankar Lal Laxmi Narayan Rathi v. Authority under Minimum Wages Act, 1979 M PLJ 15 (D B).

Rules cannot go beyond the scope of the Act M.P. Kumaraswami Raja AIR 1955 Mad. 326 nor can they, by themselves, enlarge the scope of statutory provisions. K. Mathuvadivelu v. RT Officer, AIR 1956 Mad. 143. They cannot also militate against the provision under which they were made.Kashi Prasad Saksena ro. State of U.P.AIR 1967 All. 173.

32. There is no cavil with the proposition that "the power of rule making is an incidental power that must follow and not run parallel to the present Act. These are meant to deal with details and can neither be a substitute for the fundamentals of the Act nor can add to them. PLD 1975 Azad J&K 81. There are two main checks in this country on the power of the Legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to abdication and self-effacement. The only requirement of law in such

situations is to insist that the subordinate body charged with the duty of making rules must strictly confine itself within the sphere of its authority for the exercise of its subordinate legislative power and in each case it is the duty of the Courts in appropriate proceedings to be satisfied that the rules and regulations so made are:--

(a) by the authority mentioned in the Act, and

(b) that they are within the scope of the power delegated therein. (PLD 1966 Lah. 287).

The Hon'ble apex Court in the case reported as Suo Motu Case No.13 of 2009 (PLD 2011 SC 619) has held as under:-

"18. From an examination of the above case law it is clear that a rulemaking body cannot frame rules in conflict with, or in derogation of, the substantive provisions of the law or statute, under which the rules are framed. Rules cannot go beyond the scope of the Act. Thus, we are inclined to hold that no rule can be made which is inconsistent with the parent statute, whereas, no regulation can be made inconsistent with the parent statute or the rules made thereunder and the provisions of these rules or regulations, as the case may be, to the extent of their inconsistency with the parent statute or the rules shall be inoperative.

In the case of Zarai Taraqiati Bank Ltd. and others v. Said Rehman and others (2013 PLC (CS) 1223), it has been held that:-

16. The "rules" and "regulations" framed under any Act are meant to regulate and limit the statutory authority. All statutory authorities or bodies derive their powers from statutes which create them and from the rules or regulations framed thereunder. Any order passed or action taken which is in derogation or in excess of their powers can be assailed as ultra vires. Rules and regulations being forms of subordinate legislation do not have substantial difference as power to frame them is rooted in the statute. Statutory bodies are invariably authorized under the Act to make or adopt rules and regulations not inconsistent with the Act, with respect to such matters which fall within their lawful domain to carry out the purposes of the Act. This rule making power of such bodies, called 'delegated legislation' has assumed importance in the contemporary age. "The justification for delegated legislation is threefold. First, there is pressure on parliamentary time. Second, the technicality of subject matter necessitates prior consultation and expert advice on interests concerned. Third, the need for flexibility is established because it is not possible to foresee every administrative

difficulty that may arise to make adjustment that may be called for after the statute has begun to operate. Delegated legislation fills those needs.

17. Broadly the salient characteristics of statutory rules are threefold:--

(i) Rules or Regulations are framed by statutory or public body;

(ii) Those are framed under the authority or powers conferred in the statute;

(iii) Those have statutory Governmental approval or statutory sanction."

In the judgment reported as Devi Das Gopal Krishnan and others v. State of Punjab and others (AIR 1967 SC 1895) Indian Supreme Court summing up the parameters of delegated legislation held:--

..

An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.

Further in the judgment reported as Muhammad Amin Muhammad Bashir Limited v. Government of Pakistan through Secretary Ministry of Finance, Central Secretariat, Islamabad and others (2015 PTD 1100), the Hon'ble august Supreme Court held that:-

"7. Can any executive authority be authorized to overrule a substantive provision of law such as section 25? Is the non obstante clause in section 25B valid? On the face of it, it is not possible for us to uphold the granting or delegation of authority to any executive or other body which entitles it to overrule a substantive provision of law. The principles of delegated legislation are very clear and hardly require any reiteration by

us at this late stage. In brief, they entitle the delegate to carry out the mandate of the legislature, either by framing rules, or regulations, which translate and apply the substantive principles of law set out in the parent legislation or by recourse to detailed administrative directions and instructions for the implementation of the law. They are intended to enforce the law, not override it. They can fill in details but not vary the underlying statutory principles. In case of conflict they must yield to the legislative will. They are below and not above the law. The minutiae can be filled in but the basic law can neither be added to nor subtracted from."

In the case reported as National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Limited (2016 SCMR 550) the Hon'ble apex Court held that:-

"11. NEPRA Rules, 1998 are framed by the Authority under Section 46 of the Act, 1997 with the approval of the Federal Government. Rules and or Regulations are the progeny or off spring of a Statute and are to be strictly in conformity with the provisions of the Statute where under same are framed. It is settled proposition of law that the rules framed under a Statute are to remain within the precinct of the Statute itself and cannot transgress the limits and parameters of the parent Statute itself. All efforts are to be made to interpret the rules so as to bring it in conformity and without injuring the intent and spirit of the Statute, where it is not possible then the rules in as much as it is injuring the very intent and spirit which must yield to the Statute. This view finds support from a case reported as Ziauddin v. Punjab Local Government (1985 SCMR 365 at 368), wherein it was held as under:-

"Rules framed under the statute could not go beyond and over reach the statute itself. To make implementation of statutory provision consistent harmonious directory effect must be given to requirement of Rule".

12. In another case reported as Pakistan v. Aryan Petro Chemical Industries (Pvt) Ltd (2003 SCMR 370) in paragraph 11 of the judgment, it was held that "This is a settled principle that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section completes, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment. The rules framed under a statute if are inconsistent

with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid"

5. Now we proceed to examine Regulations, 2018 in the light of above stated principle of law. Admittedly legislature keeping in view the needs of the society promulgated the Ordinance, 1962 with the object to establish a uniform minimum standard of basic and higher qualification in medicine and dentistry. To achieve the said objective, section 15 of the Ordinance, 1962 as amended in 2012 provides that the Council shall conduct an examination for assessment of medical knowledge and skill of a candidates so as to select the most competent, intelligent and suitable medical practitioner. It is for that reason the PMDC in exercise of powers conferred upon it under Section 33 of the Ordinance, 1962 framed Regulations, 2008 published on 26.01.2009. Since the entire controversy in these appeals is centered around the issue as to whether Regulations 48 and 60 of the Regulations, 2008 are intra vires of Sections 15 and 33 of the Ordinance, 1962 or otherwise, it shall be appropriate to examine the provisions of Section 15 of the Ordinance, 1962, which is reads as under:-

"15. Power of the Council to certify certain persons to be possessed of sufficient medical qualification.- (1) If, after an examination by a board constituted by the Council, the Council is satisfied that a person holding a qualification granted by a medical institution outside Pakistan, is possessed of sufficient knowledge and skill to be registered as a practitioner for the purpose of this Ordinance, it may recommend to the Federal Government to issue a notification in favour of such person to register him and his qualification. Upon such notification, the Council shall register the qualification possessed by the person without it being entered in any of the Schedules of this Ordinance.

(2) The Council shall register the qualification granted by a medical institution outside Pakistan, possessed by the person by maintaining a separate list in the register.".

The above provisions of law empower the PM&DC to make assessment or evaluation regarding sufficient medical knowledge and skill through an examination administered by the Board constituted by the Council. To regulate this mechanism of conducting the examination the PM&DC or interchangeably the council is bestowed with specific power to make regulations under the provisions of Section 33 of the Ordinance, 1962 with permission of the Federal Government. Section 33 is as follows:-

"33.---(1). The Council may, with the previous sanction of the Federal Government make Regulations generally to carry out the purposes of

this Ordinance and without prejudice to the generality of this power, such Regulations may provide for---

(a) The management of the property of the Council and the maintenance and audit of its accounts;

(b) The summoning and holding of meetings of the Council, the times and places where such meetings are to be held, the conduct of business threat and the number of members necessary to constitute a quorum;

(c) The powers and duties of the President and Vice President;

(d) The mode of appointment of the Executive Committee and other Committees, the summoning and holding of meetings, and the conduct of business of such Committees.

(e) The tenure of office and the powers and duties of the Registrar and other officers and servants of the Council.

(f) The appointment, powers duties and procedure of medical and dental inspectors;

(g) The procedure for maintenance, compilation and publication of the Register, list of medical practitioners possessing registerable licences or diplomas, and the fees to be charged for registration and if necessary for opening of sub-offices or branches for this purpose;

(h) The procedure at an inquiry held under subsection (1) of section 31; and

(i) Any matter for which under this Ordinance provision may be made by Regulations.

(2) Notwithstanding anything contained in subsection (1) the Council shall make Regulations which may provide for---

(a) prescribing a uniform minimum standard of courses of training for obtaining graduate and post-graduate medical and dental qualifications to be included or included respectively in the First, Third and Fifth Schedules;

(b) prescribing minimum requirements for the content and duration of courses of study as aforesaid;

(c) prescribing the conditions for admission to courses of training as aforesaid;
(d) prescribing minimum qualifications and experience required of teachers for appointment in medical and dental institutions;
(e) prescribing the standards of examinations, methods of conducting the examinations and other requirements to be satisfied for securing recognition of medical and dental qualifications under this Ordinance;
(f) prescribing the qualifications and experience required of examiners for professional examinations in medicine and dentistry antecedent to the granting of re cognized medical qualifications;
(g) registration of medical or dental students at any medical or dental college or school or any university and the fees payable in respect of such registration.

Admittedly Regulations, 2008 are framed under Section 33 of the Ordinance 1962. The vires of Regulations 48 and 60 are under judicial scrutiny before this Court. The said regulations are reproduced as under:-

48. On the commencement of these regulations, a person who gets admission in any medical or dental course in a foreign country without being in possession of a valid No Objection Certificate issued by the Council to him prior to joining the course abroad shall not be eligible for processing of registration of his qualification if it is not included in the Second, Third or Fifth Schedule to the PM&DC Ordinance, 1962. No person shall be allowed to appear in the National Examination Board examination without the eligibility certificate issued by the Council. Persons admitted in medical and dental courses on or before the approval of these regulations shall be issued eligibility without the no objection certificate by the Council provided they fulfill all other requirements.
60. A candidate who acquires admission after the end of the year of commencement of these regulations into a foreign medical school with less than 60% marks in F.Sc. premedical or equivalent qualification shall not be entertained for NEB Examination under any circumstances.

A conjoint reading of Regulations 48 and 60 of the Regulations, 2008 makes it clear that: (a) two conditions have been imposed on a student who wants to get medical education in a foreign country, that is, firstly, to obtain NOC from PM&DC prior to joining the course abroad and, secondly, to secure more than 60% marks in F.Sc.; and, (b) in case of failure to meet the said two conditions he shall not be eligible for processing of his registration of qualification and to appear in the NEB Examination. On the other hand, section 15 of the Ordinance,1962 does not prescribe any embargo or restriction on the medical students to get education in a foreign country, rather it only confers an authority upon PM&DC or the Council to hold examination for evaluation and assessment of the sufficient medical knowledge and skill possessed by the candidate and if it is satisfied then register the candidate as a practitioner. It is, therefore, clear

that the PM&DC while framing Regulations 48 and 60 of Regulation, 2008 exceeded its jurisdiction.

6. Undeniably the PM&DC is established under the Ordinance, 1962 and it has to function within the parameters described in the very legislated law and it has no unfettered power to make regulations at its whims and caprice or in contravention of the main statute. There is no authority or power given by the statute i.e Section 15 read with Section 33 of the Ordinance, 1962 to make regulation 48 to restrain the foreign medical qualified doctors to get registration as medical practitioner after passing the required NEB Examination. Although it is desirable that a stringent scrutiny of eligibility, qualification and skill is to be evaluated and assessed in the said examination yet it is inappropriate to oust a candidate who obtains medical education from a foreign country solely on the ground that he had not obtained any NOC from the Council prior to joining course: It is simply an arbitrary approach of the Council as it has no backing of the Ordinance, 1962.

As regards Regulation 60, it is suffice to say that it is not only contrary to the provisions of Sections 15 and 33 of the Ordinance, 1962 but also discriminatory in character as the Council, on the one hand, through the said regulation creates a bar on a student / candidate, who secures less than 60% marks in F.Sc., to obtain medical education abroad and, on the other hand, through letter dated 16.01.2017 allowed private medical colleges to give admission to the students who have secured above 50% marks in F.Sc.

7. There is another aspect of the matter which is worth consideration that under Article 8 of the Constitution of Islamic Republic of Pakistan, 1973, and law inconsistent with or in derogation of fundamental rights of the citizens of this country are considered to be void. The superior Courts are saddled with unalienable obligation to protect, preserve and safeguard such rights and any statutory provision or rule, regulations or instructions, militating with the fundamental rights, such legislation or rule as the case may be deserved to be struck down without any hesitation. To acquire education is a fundamental right under Article 9 of the Constitution which cannot be allowed to be usurped in the garb of Regulations 48 or 60 by imposing unreasonable and discriminatory conditions upon the students who are/were intending to get medical education from foreign educational institutions.

8. "Knowledge is power is an edge". Today the era of ignorance is gradually fading away and exploration of reason, science, technology and recovery of astonishing new horizens has blasted the knowledge and education. No society or civilization can survive any longer without knowledge or education. It is glowing trait of Islam and Islamic teachings which specially lays extraordinary emphasis upon the Muslim and generally upon the entire humanity to enlighten itself with the jewel of education, its significance and elevated standards. Following verses from Holy Quran are quoted herein below.

قَالَ اَعُوْذُ بِاللّٰهِ اَنْ اَكُوْنَ مِنَ الْجٰهِلِيْنَ ﴿٦٧﴾

۵۸۸ آپ نے کہا میں پناہ مانگتا ہوں خدا سے کہ میں شامل ہو جاؤں جاہلوں (کے گروہ) میں

**Sura Baqra Ayat 119:**

**Sura Baqra Ayat 119**

وَلَئِنِ اتَّبَعْتَ اَهْوَآءَهُمْ بَعْدَ

اور اگر (بفرض محال) آپ پیروی کریں ان کی خواہشوں کی اس علم کے بعد بھی

**Urdu Translation of Ayat 145 of Sura Baqra is as under:**

آپ پیروی کریں۔ ان کی خواہشوں کی اس کے بعد کہ آچکا آپ کے پاس علم تو یقیناً آپ اس وقت ظالموں میں (شمار) ہوں گے۔

**Urdu Translation of Ayat 268 and 269 of Sura Baqra is as under:**

شیطان ڈراتا ہے تمہیں تنگ دستی سے اور حکم کرتا ہے تم کو بے حیائی کا اور اللہ تعالیٰ وعدہ فرماتا ہے تم سے اپنی بخشش کا اور فضل (وکرم) کا اور اللہ تعالیٰ بڑی وسعت والا سب کچھ جاننے والا ہے۔ عطا فرماتا ہے دانائی جسے چاہتا ہے اور جسے عطا کی گئی دانائی تو یقیناً اسے دے دی گئی بہت بھلائی اور نہیں نصیحت قبول کرتے مگر عقل مند۔

اور نہیں جانتا اس کے صحیح معنی کو بغیر اللہ تعالیٰ کے اور پختہ علم والے کہتے ہیں ہم ایمان لائے ساتھ اس کے سب ہمارے رب کے پاس سے ہے اور نہیں نصیحت قبول کرتے مگر عقل مند۔

**Urdu Translation of Sura Al Imran Ayat 18 is as under:.**

شہادت دی اللہ تعالیٰ نے (اس بات کی کہ) بیشک نہیں کوئی خدا سوائے اس کے اور (یہی گواہی دی) فرشتوں نے اور اہل علم نے (ان سب نے یہ بھی گواہی دی کہ وہ) قائم فرمانے والا ہے۔ عدل وانصاف کو نہیں کوئی معبود سوائے اس کے (جو) عزت والا حکمت والا ہے۔

**Urdu Translation of Sura Al Mujadla Ayat 11 is as under:.**

اٹھ کھڑے ہو تو اٹھ کھڑے ہوا کرو۔ اللہ تعالیٰ ان کے جو تم میں سے ایمان لے آئے اور جن کو علم دیا گیا درجات بلند فرما دے گا۔ اور اللہ تعالیٰ جو تم کرتے ہو اسے خوب آگاہ ہے۔

**Sura Al Alaq Ayat 4,5.**

الَّذِيْ عَلَّمَ بِالْقَلَمِ ﴿٤﴾ عَلَّمَ الْاِنْسَانَ

جس نے علم سکھایا قلم کے واسطے سے ۔۔۔ اس نے سکھایا انسان کو

مَا لَمْ يَعْلَمْ ﴿٥﴾

جو وہ نہیں جانتا تھا

**Sura Taha Ayat 114.**

رَّبِّ زِدْنِيْ عِلْمًا ﴿١١٤﴾

کہیے کہ رب! اور زیادہ کر میرے علم کو

**Urdu Translation of Sura Araf Ayat 52 is as under:**

اور بے شک لے آئے ہم ان کے پاس ایک کتاب جسے ہم نے واضح کر دیا ہے (اپنے) علم (کامل) سے درآں حالیکہ وہ ہدایت اور رحمت ہے، اس قوم کے لیے جو ایمان لاتے ہیں۔

In Surah Baqrah, Allah Almighty has declared the superiority of Adam over the angles because of knowledge and emphasized as under:

**"And He taught Adam the nature of all things; then He placed them Before the angels, and said: "Tell Me The nature of these if ye are right".**

**They said: "Glory to Thee: of knowledge We have none, save what Thou Hast taught us: in truth it is Thou Who art perfect in knowledge and wisdom. [2:31-32]"**

**In another place of the same Surah The Quran says that We send the Prophets to teach people wisdom. Text from English translation is as under:-**

**"But the best of provisions is right conduct so fear me, O ye that are wise". (2:197).**

Similarly, the Holy Prophet (Peace be upon him) has laid extraordinary emphasize on acquiring knowledge in the following Hadiths:

**(Sahih Bukhari) Jild Awal Page 109.**

كتاب العلم

باب ٤٣ فضل العلم وقول الله عز وجل يرفع الله الذين آمنوا منكم والذين أوتوا العلم درجات والله بما تعملون خبير وقوله رب زدني علما

باب ٤٤ من سئل علما وهو مشتغل في حديثه فأتم الحديث ثم أجاب السائل

علم

علم کی فضیلت کے بارے میں اللہ تعالیٰ کا ارشاد ہے جو لوگ تم میں سے ایمان لے آئے ہیں اور انہیں علم دیا گیا ہے، اللہ ان کے مراتب بلند کر دے گا اور جو کچھ تم کرتے ہو، اللہ اس سے باخبر ہے، اور اللہ تعالیٰ کا فرمان، کہ اے میرے پروردگار میرا علم زیادہ کر۔

جس شخص سے کوئی علمی مسئلہ دریافت کیا جائے اور وہ کسی بات میں مشغول ہو، تو اپنی پہلی بات کو پورا کرے، پھر سائل کو جواب دے۔

**Mishkat.**

كتاب العلم

علم کی خوبیاں اور اسکی فضیلت کا بیان

پہلی فصل

١٨٤ عن عبد الله ابن عمرو قال قال رسول الله صلى الله عليه وسلم بلغوا عني ولو آية وحدثوا عن بني إسرائيل ولا حرج ومن كذب علي متعمدا فليتبوأ مقعده من النار۔ (رواه البخاري)

عبداللہ بن عمرو سے روایت ہے کہا رسول اللہ صلی اللہ علیہ وسلم نے فرمایا میری طرف سے پہنچا دو اگرچہ ایک آیت ہو اور بنی اسرائیل سے حدیث بیان کرو کوئی گناہ نہیں ہے جس نے مجھ پر جان بوجھ کر جھوٹ بولا پس چاہیے کہ پکڑے اپنا ٹھکانا دوزخ میں۔ (بخاری)

١٨٥ عن سمرة بن جندب والمغيرة بن شعبة قالا قال رسول الله صلى الله عليه وسلم من حدث عني بحديث يرى أنه كذب فهو أحد الكاذبين۔ (رواه مسلم)

سمرہ بن جندب اور مغیرہ بن شعبہ سے روایت ہے کہا ان دونوں نے رسول اللہ صلی اللہ علیہ وسلم نے فرمایا جس نے مجھ سے کوئی حدیث بیان کی اور وہ گمان رکھتا ہے کہ وہ جھوٹ ہے پس وہ ایک ہے جھوٹوں میں سے۔ (مسلم)

١٩٠ وَعَنْ مُعَاوِيَةَ قَالَ قَالَ رَسُوْلُ اللّٰهِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ مَنْ يُّرِدِ اللّٰهُ بِهٖ خَيْرًا يُّفَقِّهْهُ فِي الدِّيْنِ وَإِنَّمَا أَنَا قَاسِمٌ وَاللّٰهُ يُعْطِيْ۔

(مُتَّفَقٌ عَلَيْهِ)

معاویہؓ سے روایت ہے کہا رسول اللہ صلی اللہ علیہ وسلم نے فرمایا جس شخص کے ساتھ اللہ تعالیٰ بھلائی کا ارادہ کرے اسے دین میں سمجھ دیتا ہے۔ سوائے اس کے نہیں میں بانٹتا ہوں اور اللہ تعالیٰ دیتا ہے۔

(متفق علیہ)

١٩١ وَعَنْ أَبِيْ هُرَيْرَةَ قَالَ قَالَ رَسُوْلُ اللّٰهِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ النَّاسُ مَعَادِنُ كَمَعَادِنِ الذَّهَبِ وَالْفِضَّةِ خِيَارُهُمْ فِي الْجَاهِلِيَّةِ خِيَارُهُمْ فِي الْإِسْلَامِ إِذَا فَقِهُوْا۔ رَوَاهُ مُسْلِمٌ

ابوہریرہؓ سے روایت ہے کہا رسول اللہ صلی اللہ علیہ وسلم نے فرمایا لوگ کان ہیں جیسے سونے اور چاندی کی کان ہوتی ہے۔ جاہلیت میں ان کے بہتر اسلام میں بہتر ہیں جبکہ سمجھیں۔

(مسلم)

١٩٢ وَعَنِ ابْنِ مَسْعُوْدٍ قَالَ قَالَ رَسُوْلُ اللّٰهِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ لَا حَسَدَ إِلَّا فِي اثْنَتَيْنِ رَجُلٌ آتَاهُ اللّٰهُ مَالًا فَسُلِّطَ عَلٰى هَلَكَتِهٖ فِي الْحَقِّ وَرَجُلٌ آتَاهُ اللّٰهُ الْحِكْمَةَ فَهُوَ يَقْضِيْ بِهَا وَيُعَلِّمُهَا۔

(مُتَّفَقٌ عَلَيْهِ)

ابن مسعودؓ سے روایت ہے کہا رسول اللہ صلی اللہ علیہ وسلم نے فرمایا جسد نہیں ہے مگر دو شخصوں میں ایک وہ آدمی اللہ نے جسے مال دیا اور حق میں اسے خرچ کرنے کی توفیق دی ہے اور دوسرا شخص اللہ نے اس کو حکمت دی پس وہ اس کے ساتھ حکم کرتا ہے اور فیصلہ کرتا ہے۔

(متفق علیہ)

١٩٣ وَعَنْ أَبِيْ هُرَيْرَةَ قَالَ قَالَ رَسُوْلُ اللّٰهِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ إِذَا مَاتَ الْإِنْسَانُ انْقَطَعَ عَنْهُ عَمَلُهٗ إِلَّا مِنْ ثَلَاثَةٍ صَدَقَةٍ جَارِيَةٍ أَوْ عِلْمٍ يُنْتَفَعُ بِهٖ أَوْ وَلَدٍ صَالِحٍ يَّدْعُوْ لَهٗ۔

(رَوَاهُ مُسْلِمٌ)

ابوہریرہؓ سے روایت ہے کہا رسول اللہ صلی اللہ علیہ وسلم نے فرمایا جب آدمی مرجاتا ہے اس کے عمل کا ثواب موقوف ہوجاتا ہے مگر تین عملوں کا ثواب باقی رہتا ہے صدقہ جاری یا علم کہ نفع لیا جائے اس کے ساتھ یا اولاد جو اس کے لیے دعا کرے۔

(مسلم)

**Sunan Abu Dawood**

بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِيْمِ

# أَوَّلُ كِتَابِ الْعِلْمِ

## بَابٌ ٩٢ فِيْ فَضْلِ الْعِلْمِ

٢٤٥ - حَدَّثَنَا مُسَدَّدُ بْنُ مُسَرْهَدٍ نَا عَبْدُ اللّٰهِ بْنُ دَاوُدَ قَالَ سَمِعْتُ عَاصِمَ بْنَ رَجَاءِ بْنِ حَيْوَةَ يُحَدِّثُ عَنْ دَاوُدَ بْنِ جَمِيْلٍ عَنْ كَثِيْرِ بْنِ قَيْسٍ قَالَ كُنْتُ جَالِسًا مَعَ أَبِي الدَّرْدَاءِ فِيْ مَسْجِدِ دِمَشْقَ فَجَاءَهٗ رَجُلٌ فَقَالَ يَا أَبَا الدَّرْدَاءِ إِنِّيْ جِئْتُكَ مِنْ مَدِيْنَةِ الرَّسُوْلِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ لِحَدِيْثٍ بَلَغَنِيْ أَنَّكَ تُحَدِّثُهٗ عَنْ رَسُوْلِ اللّٰهِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ مَا جِئْتُ لِحَاجَةٍ قَالَ فَإِنِّيْ سَمِعْتُ رَسُوْلَ اللّٰهِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ يَقُوْلُ مَنْ سَلَكَ طَرِيْقًا

## كِتَابُ الْعِلْمِ شروع!

### علم حاصل کرنے کی فضیلت اور اس طرف رغبت دلانا

مسدد، عبداللہ بن داؤد، عاصم بن رجاء، داؤد بن جمیل، کثیر بن قیس سے روایت ہے کہ میں ابی الدرداء کے ساتھ دمشق کی مسجد میں بیٹھا تھا اتنے میں ان کے پاس ایک شخص آیا اور ان سے کہا میں تمہارے پاس رسول اللہ صلی اللہ علیہ وسلم کے مدینہ سے آیا ہوں ایک حدیث کے واسطے مجھے خبر پہنچی ہے کہ تم اس حدیث کو نقل کرتے ہو رسول اللہ صلی اللہ علیہ وسلم سے اور میں کسی اور غرض کے لیے نہیں آیا ہوں ابوالدرداء نے کہا تو میں نے آنحضرت سے سنا آپ فرماتے تھے جو شخص علم حاصل کرنے کے لیے راہ چلے اللہ تعالیٰ اس کے سبب سے اس کو بہشت کی راہ چلاتا ہے اور طالب علم

يطلب فيه علما سلك الله به طريقا من طرق
الجنة وإن الملائكة لتضع أجنحتها رضا
لطالب العلم وإن العالم ليستغفر له من في
السموات والأرض والحيتان في جوف الماء
وإن فضل العالم على العابد كفضل القمر
ليلة البدر على سائر الكواكب وإن العلماء
ورثة الأنبياء وإن الأنبياء لم يورثوا دينارا
ولا درهما إنما ورثوا العلم فمن أخذه أخذ
بحظ وافر ۔

کی خوشی کے لئے فرشتے اس کے روبرو اپنے پر بچھاتے
ہیں اور بے شک عالم کے لئے بخشش چاہتے ہیں جو
آسمان اور زمین میں رہنے والے ہیں یہاں تک کہ مچھلیاں
پانی میں اور عابد کے اوپر عالم کی فضیلت ایسی ہے جیسے
چودھویں رات کے چاند کی بزرگی تمام تاروں پر ہے
اور مقرر پیغمبروں کے وارث عالم ہی ہیں اور پیغمبروں
نے کسی کو اپنا وارث درہم و دینار کا نہ کیا بجز علم
کے اپنی میراث میں کچھ نہ چھوڑا تو جس نے علم حاصل کیا
اسی نے کامل حصہ لیا ۔

ف ۱ : یعنی وہ حصہ جو پیغمبروں نے حاصل کیا تھا دنیا میں علم سے زیادہ کوئی نعمت نہیں ہے اس نعمت کو
روز بروز ترقی ہے کبھی زوال نہیں جس قدر علم کو خرچ کرو اسی قدر بڑھتا جاتا ہے برخلاف مال کے کہ خرچ
کرنے سے کم ہو جاتا ہے ۔

۲۴۶ ۔ حدثنا محمد بن الوزير الدمشقي
نا الوليد قال لقيت شبيب بن شيبة فحدثني
به عن عثمان بن أبي سودة عن أبي الدرداء بمعناه
يعني عن النبي صلى الله عليه وسلم ۔

محمد بن الوزیر، ولید، شبیب، عثمان
ابو الدرداء رضی اللہ تعالیٰ عنہ نے رسول اللہ صلی اللہ
علیہ وآلہ وبارک وسلم سے اسی طرح روایت
کیا ہے ۔

۲۴۷ ۔ حدثنا أحمد بن يونس نا زائدة
عن الأعمش عن أبي صالح عن أبي هريرة قال
قال رسول الله صلى الله عليه وسلم ما من رجل
يسلك طريقا يطلب فيه علما إلا سهل الله له
به طريقا إلى الجنة ومن أبطأ به عمله لم يسرع
به نسبه ۔

احمد بن یونس، زائدہ، اعمش، ابو صالح
ابو ہریرہؓ سے روایت ہے کہ رسول اللہ صلی اللہ علیہ وسلم
نے فرمایا ایسا کوئی شخص نہیں ہے جو علم دین کا سیکھنے کے
لئے راہ چلے لیکن اللہ تعالیٰ اس کی برکت سے بہشت
کی راہ آسان کر دیگا اور جس کیساتھ اس کے عمل نے دیر لگائی
تو اس کیساتھ اس کا نسب کچھ شتابی نہ کرے گا ۔

ف ۱ : یہ بہشت کی بشارت ہے طالب علم اور دینداروں کے حق میں علم دین تفسیر و حدیث و فقہ ہے اور جو
علم کو تفسیر و حدیث میں کام آوے جیسے صرف و نحو وغیرہ اور جس سے مسلمانوں کو فیض و ہدایت ہو وہ سب
علم دین میں داخل ہے مگر نیت خالص ہونا چاہیئے ۔
ف ۲ : یعنی بدون نیک عمل کے ذات کچھ کام نہ آوے گی، مصرع بندگی باید پیمبر زادگی منظور نیست ۔

As well as
"Seek knowledge from the cradle to grave."
In another Hadith, it has been said:-
"Seek knowledge even as far as China."
Martyr of Islam has been bestowed outstanding grandeur and glory and while comparing an "Alam" with a martyr, the Holy Prophet (P.B.U.H.) has said:

"A drop of sweat of the brow of thinker is better than the thousand blood drops of the martyr"

Similarly on another occasion it has been said:

"Whoever seeks a way to acquire knowledge Allah will make easy his way to Paradise" [Sahih Muslim]

In another Hadith regarding the need of knowledge, the Holy Prophet (P.B.U.H.) has said:

"Seeking knowledge is obligatory upon every Muslim" .[Sunan Ibn Majah]

Dr. Maurice Bucaille in a book titled, "The Bible, The Quran and Science" has proved the Islam as a scientific religion emphasizing on the need of scientific inquiry.

Moreover the glory of education and its need for the development of society/nation remained vibrant in the catalogue of great Muslim educationist reformers such as Sir Syed Ahmad Khan and similarly the significance of knowledge even could not have been escaped from the vision of Quaid-e-Azam, who in his Presidential Address at All India Muslim League, Lahore on March 23, 1940 said:

"Come forward as servants of Islam, organize the people economically, socially, educationally and politically and I am sure that you will be a power that will be accepted by everybody."

He also said:-

"You must concentrate on gaining knowledge and education. It is your foremost responsibility. Political awareness of the era is also part of your education. You must be aware of international events and environment. Education is a matter of life and death for our country".

Further the Charter of United Nations also protect the gaining of primary and higher education, Article 26 whereof is as under:-

"In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation "of armaments".

Moreover the universl declaration on human rights has been adopted by the UNESCO on October, 5, 2005 and Pakistan is signatory to it which obligated upon ratifying state to ensure the dissemination of information to its citizens. To achieve the above objective, our legislature admitting significance of education through Article 25-A of the Constitution has declared it as a fundamental right of the citizens.

In the successful life of an individual, the education plays an important role. Generally, it is considered to be the foundation of society which brings

economic wealth, social prosperity, political stability and maintaining healthy population. In case of deficit of educated people, the further progress of the society is stopped. Educated individuals enjoy respect among the comity of nations and can effectively contribute to the development of their country and society by inventing new devices and discoveries.

The imposition of condition upon acquiring the better education amounts to violation of fundamental right of education as guaranteed under Article 25-A of the Constitution and any provision circumventing such fundamental right has to crumble down. Reliance is placed on Al-Jehad Trust through Raeesul Mujahidden Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324). Further to receive better or higher education is undoubtedly a fundamental right guaranteed under Articles 4 and 9 of the Constitution which has direct bearing upon the quality of life of a citizen and such preserved and safeguarded right cannot be taken away by any executive rule making authority without any legal foundation. The Hon'ble Supreme Court of Pakistan in a case reported as Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another (2012 SCMR 6), wherein it has been held as under:-

> "33. Right to education is a fundamental right as it ultimately affects the quality of life which has nexus with other Fundamental Rights guaranteed by the Constitution under Articles 4 and 9 of the Constitution of Islamic Republic of Pakistan. Awareness of rights and duties, growth of civic consciousness in a society, enjoyment of Fundamental Rights guaranteed under the Constitution and legal empowerment of people depend to a great extent on the quality of education. People cannot be free in the real sense unless they are properly educated."

Moreover under Article 18 of the Constitution, Freedom of trade, business or profession is also a fundamental right subject to certain qualification, (if any, as prescribed by law), every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Admittedly respondent obtained medical education, ancillary skills and expertise with the legitimate two fold expectations firstly to enter into the laudable medical profession and secondly for the better quality of life as well.

9. The Hon'ble Supreme Court of Pakistan in the case reported as Dossani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt) Ltd and others (PLD 2014 Supreme Court 1) held that the constitution of a country is an organic whole and the import of a certain provision has to be construed in the context of the overall scheme of the Constitution. By qualifying the right to business and trade, the Constitution makers wanted to create a balance between the societal needs and the rights of an individual, which could not be circumvented or taken

away by means of any sub-delegated rule making executive authority. In the light of above, the restrictions imposed by PM&DC under the guise of Regulations 48 and 60 of the Regulations, 2008 which unambiguously secure no support from the provisions of Sections 15 and 33 of the Ordinance, 1962 as amended in 2012, were rightly declared as ultra vires by the learned Single Bench.

11. In view of the above these appeals have no merit, which are hereby dismissed in limine.

MH/P-2/L Intra-court appeals dismissed.

**P L D 2019 Lahore 333**
**Before Shahid Waheed, J**
**Mst. WARIS JAN and another---Petitioners**
**Versus**
**LIAQAT ALI and others---Respondents**

Civil Revisions Nos. 3204 and 2946 of 2015, heard on 14th January, 2019.

**(a) Contract Act (IX of 1872)---**

----S. 62---Qanun-e-Shahadat (10 of 1984) Art. 102---Novation of contract---Proof of novation of contract, essential ingredients---Scope---"Novation of contract" was where new contract was substituted for a contract in existence, either between the same parties or between different parties, and the consideration mutually being the discharge of the old contract---When an agreement was substituted, both such agreements were supposed to be read together to form a complete subsisting agreement---For proving of novation of contract it must be shown that firstly there was existence of a previous valid agreement; secondly, there was an agreement of the parties to cancel the first agreement; thirdly that there was agreement of the parties that the second agreement replaced the first one; and fourthly to prove validity of the second agreement---Novation was a form of affirmative plea and the party who canvassed the same had the burden of proving it by satisfactory evidence---Article 102 of the Qanun-e-Shahadat, 1984 forbade proving contents of writing otherwise than by writing itself and best evidence about contents of a document was the document itself and production of the same was required by law in proof of its contents and basic requirement of law was to see the terms incorporated in such a document.

Benjamin v. Alfred George Jordine (1982) 7 A.C. 345 and Hazratullah v. District Council, Haripur 1997 SCMR 1570 rel.

**(b) Contract---**

----Principles of contract law---Validity of contracts/transactions by illiterate persons---Fraud and undue influence in a contractual arrangement---Burden of proof---Maxim "non est factum"---Exceptions in adjudication by Courts for illiterate person(s) vis- -vis performance of contractual obligations---Scope---"Non est factum" ("it is not my deed,) was a defence in contract law which allowed a signing party to escape performance of an agreement which was fundamentally different from what he or she intended to execute or sign---Person challenging the validity of a transaction, ordinarily, on the ground of fraud or undue influence, had to discharge burden of proof---Major exception to said rule was when such burden of proof would shift if it were brought to the notice of the Courts such person was illiterate---Illiteracy was regarded as a misfortune and not a privilege and some measure of protection was accorded to illiterate persons in their contractual transactions---Burden of proof in respect of genuineness of a transaction with an illiterate person and a document allegedly executed by such a person lay on the beneficiary of such document, who was

legally obliged to prove and satisfy the Court; firstly, that such document was executed by an illiterate person; secondly that such illiterate person had complete knowledge and full understanding about the contents of the document; thirdly that such document was read over to him/her and terms of the same were adequately explained to him/her; and fourthly, that he/she had independent and disinterested advice on the matter before coming into the transaction and executing the document---Incumbent upon a person who wrote any document at the request, or on behalf, or in the name of any illiterate person to also to write on such document, his/her own name as the writer thereof and his address as well as the endorsement to the effect that such document was written in presence of the such person's consultant who could read and write the language of the document; and understood the contractual transaction; and had no conflict of interest and had advised the illiterate person about the contractual transaction---Factor of advice could not be treated lightly as a mere formality and law contemplated effective, meaningful and purposeful consultation of the illiterates with a person who could read and write the language of the document, comprehend the implication of contractual transaction, and had no conflict of interest; in order to establish "consensus ad idem"

Mitti Bewa v. Daitari Nayak and others AIR 1982 Orissa 174; Umesh Bondre v. Wilfred Fernandes AIR 2007 Bombay 29; Mt. Farid-ud-Nisa v. Munshi Mukhtar Ahmad and another AIR 1925 PC 204; Chainta Dasya v. Bhalkur Das AIR 1930 Calcutta 591; Parasnath v. Tileshra Kuav (1965) All LJ 1080; Daya Shankar v. Smt. Bachi and othes AIR 1982 All 376; Janat Bibi v. Sikandar Ali and others PLD 1990 SC 642; Amirzada Khan and another v. Itbar Khan and others 2001 SCMR 609; Khawas Khan through legal heirs v. Sabir Hussain Shah and others 2004 SCMR 1259; Muhammad Ashraf Khan v. Khan Siddique and others 2010 SCMR 1116; Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi and others 2013 SCMR 868; Phul Peer Shah v. Hafeez Fatima 2016 SCMR 1225 and Moiz Abbas v. Mrs. Latifa and others 2019 SCMR 74 rel.

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

----S. 12---Suit for specific performance of agreement to sell immoveable property---Requirements---Deposit of balance amount--- Pleadings---Essentials---Plaintiff in a suit for specific performance of agreement to sell immoveable property ought to plead and prove not only his willingness, which was a mental process, but also his/her readiness which was something do with translating will into action, and such suit should have been preceded by necessary preparation by plaintiff for being a position to be ready financially to pay the purchase price.

Muhammad Yaqub v. Muhammad Nasrullah Khan and others PLD 1986 SC 497; Mst. Amina Bibi v. Mudassar Aziz PLD 2003 SC 430; Mubarak Ali v. Tula Khan alias Sadullah Khan 1985 SCMR 236; Muhammad Yaqub v. Muhammad Nasrullah Khan and others PLD 1986 SC 497; Bishambhar Nath Agrawal v. Kishan Chand and others AIR 1998 Allahabad 195; Bootay Khan through legal

heirs v. Muhammad Rafiq and others PLD 2003 SC 518 and Hamood Mehmood v. Mst. Shabana Ishaque and others 2017 SCMR 2022 rel.
Muhammad Anwar Butt for Petitioner (in C.R.No.3204 of 2015).
Javed Iqbal Saif for Petitioner (in C.R.No.2946 of 2015).
Qari Nadeem Ahmad Awaisi for Respondent No.1.
Date of hearing: 14th January, 2019.

## JUDGMENT

**SHAHID WAHEED, J.**---This judgment shall govern C.R.No.3204 of 2015 along with its complementary revision bearing No.2946 of 2015 as both of them are of the defendants and arise out of a suit for specific performance of an agreement to sell a piece of land measuring 15 Kanals in Chak No.62-D, Pakpattan, belonging to the applicant of C.R.No.3204 of 2015, Mst. Waris Jan, first defendant who, it is alleged, agreed to sell the same to the plaintiff, Liaqat Ali (respondent No.1) but subsequently resiled from the agreement and sold the same to Muhammad Jahangir, Muhammad Ameer, Nazeer Ahmad, Muhammad Abbas and Muhammad Ashiq (respondents Nos.2 to 6 herein and applicants of C.R.No.2946 of 2015), second defendant, who purchased it without notice of the agreement.

2. The plaintiff's case, in substance, is that Mst. Waris Jan, first defendant, who was owner of land measuring 30 Kanals situated at Chak No.62-D, Pakpattan, the details whereof have been given in paragraph No.1 of the plaint, entered into negotiations for sale of the same with him. As a result of negotiations, on 30th May, 2007 Mst. Waris Jan through a written agreement agreed to sell her land to the plaintiff for a consideration of Rs.487,500/-. Out of this consideration, a sum of Rs.20,000/- was paid by the plaintiff to the first defendant in presence of the witnesses and it was agreed that balance amount of Rs.467,500/- would be payable on 5th July, 2007 and thereafter, the land would be transferred in favour of the plaintiff through oral sale mutation. This agreement stood unperformed till 5th July, 2007. The plaintiff and the first defendant, however, mutually decided to cancel the first agreement and through a fresh written agreement dated 19th July, 2007 the first defendant agreed to sell her land measuring 15 Kanals of Chak No.62-D, Pakpattan to the plaintiff for a consideration of Rs.243,750/-. The amount paid by the plaintiff under the first agreement was treated as earnest money in the second agreement and it was agreed that the first defendant upon receiving of balance sale amount of Rs.223,750/- till 20th October, 2007 would transfer land in favour of the plaintiff. The first defendant, Mst. Waris Jan, partially performing the agreement put the plaintiff, Liaqat Ali in possession of the suit land. The plaintiff had been ready and willing to perform his part of the agreement. On 14th October, 2007 the first defendant, to meet the needs of her husband, demanded Rs.130,000/- from the plaintiff, which was paid at Chak No.62/D, Pakpattan in presence of the witnesses but receipt

thereof was not obtained as the parties had cordial relations and mutual confidence inter se. The first defendant, however, went back on her promise and did not execute the conveyance in favour of the plaintiff and on the other hand she sold the suit land to the second defendant who knowing the agreement got the suit land transferred in their name vide oral sale mutation No.1221 dated 16th November, 2007 for a consideration of Rs.750,000/-. The plaintiff was thus, obliged to bring the suit claiming specific performance of the agreement dated 19th July, 2007 with the declaration that mutation No.1221 was void.

3. The suit was contested by both sets of defendants. The first defendant in her written statement contended, inter alia, that she had never agreed to sell her land to the plaintiff and the story of agreement of sale as set up by the plaintiff was entirely false. She stated that the suit land was given to the plaintiff on lease with the understanding that he would himself get possession by evicting one Muhammad Yasin therefrom but he in connivance with the stamp vendor/deed writer fraudulently got written agreement to sell on the stamp paper. She also denied receiving of earnest money or any other amount under the agreement. She, however, admitted the sale of suit land to the second defendant.

4. The second defendant in their written statement reiterated the defence of the first defendant with a further plea that they were bona fide purchasers for value having no notice of any agreement to sell of the suit land with the plaintiff.

5. On pleadings, the Trial Court framed following issues, which are not happily worded and composed:

1) Whether the defendant entered into an agreement to sell with the plaintiff on 03.5.07 for 30-K landed property for Rs.4,87,500/- and received Rs.20,000/- as earnest money. Later on entered into an other agreement to sell while concealing this agreement, on 19.7.2007 he agreed to sell 15-K of property for Rs.243750/- and Rs.20,000/- previously received by the defendant deemed to be earnest money and later on, on 14.7.07 defendant No.1 through her husband received an other installment of Rs.130,000/- and after receiving remaining amount defendant is under obligation to transfer the suit property in his name? O.P.P.
2) Whether the plaintiff was lessee of the defendant and plaintiff in connivance with the scribe and stamp vendor obtained thumb impression of the defendant on disputed deed? O.P.D.
3) Whether the plaintiff has no cause of action to file the suit? OPD.
4) Whether the plaintiff has filed the suit only to harass the defendant and in case of dismissal of the suit defendant is entitled to recover special cost under section 35-A C.P.C.? O.P.D.

4-A) Whether the defendants Nos.2 to 6 are bona fide purchasers of suit property, without notice and with consideration, if so, its affects? O.P.D. 2 to 6.

5) Relief.

6. The Trial Court came to the conclusion, on the evidence adduced by the parties, that the story of agreement to sell (Ex.P-1), as alleged by the plaintiff, was established and it was in pursuance of said agreement that the plaintiff was put in possession of the suit land. It was held that the defendants' story was not correct and that the plaintiff did advance a sum of Rs.20,000/- as earnest money and subsequently Rs.130,000/- to the first defendant. So far as the second defendants were concerned it was held that they were not bona fide purchasers for value without notice. In view of these findings the Trial Court through judgment dated 14th November, 2012 accepted the claim for specific performance and accordingly issued a decree in favour of the plaintiff. Through the said decree the plaintiff was directed to pay the remaining consideration amount of Rs.93,750/- within fifteen days from the decree.

7. Against this decision, the defendants jointly took an appeal to the District Court. The appeal was heard by the Additional District Judge, Pakpattan. The first Appellate Court held, concurring with the Trial Court, that case of concluded agreement between the parties was established by the evidence adduced in the case and the fact of the plaintiff being put in possession of the suit land could be regarded as an act of part performance of the agreement. The result was that the appeal was dismissed vide judgment and decree dated 11th September, 2015.

8. The first defendant has brought application in revision i.e. C.R. No.3204 of 2015 whereas the second defendant through their revisional application i.e. C.R.No.2946 of 2015 have sought revision of the decrees of the Courts below.

9. The learned counsel for the applicants contend before me that the findings upon which the Courts below disbelieved the story of the defendants and decreed the claim for specific performance are not proper findings of facts which may be legitimately inferred from the evidence adduced in this case.

10. In the case on hands, issue No.1, though is composed in an unusual manner, was material and, it may be conveniently said, consisted of four parts, to wit, firstly, whether the first defendant on 30th May, 2007 had executed written agreement to sell her 30 Kanals land to the plaintiff for a consideration of Rs.487,500/- and received Rs.20,000/- as earnest money; secondly, whether the first defendant entered into another agreement dated 19th July, 2007 (Ex.P-1) while cancelling the earlier agreement dated 30th May, 2007, agreeing to sell her 15 Kanals of land for Rs.243,750/- and deeming Rs.20,000/- previously received by her to be earnest money; thirdly, whether on 14th July, 2007 the first defendant had received another installment of Rs.130,000/-; and, fourthly, whether the first defendant was under obligation to transfer the suit land in the name of the plaintiff. Burden to prove the said four components of issue No.1 was upon the plaintiff. Similarly, the Courts below were also required to return

their findings on each component of issue No.1. Before proceeding further, let me observe here that since the subordinate Courts have not recorded finding qua each of the components, I am obliged to examine the same on the basis of evidence available on record.

11. A careful reading of the averments made in the plaint suggests that claim of the plaintiff for specific performance was based on two agreements. The first agreement was dated 30th May, 2007 whereas the second was allegedly executed on 19th July, 2007. It was maintained in the plaint that the first defendant through the first agreement dated 30th May, 2007 had agreed to sell her land measuring 30 Kanals in Chak No.62-D, Pakpattan to the plaintiff for a consideration of Rs.487,500/-; out of which Rs.20,000/- were paid as earnest money and balance amount was agreed to be payable on 5th July, 2007; that this agreement stood unperformed and resultantly parties to the agreement through a fresh written agreement dated 19th July, 2007 (Ex.P-1) decided to cancel the first agreement and it was agreed that first defendant would sell her only 15 Kanals land of Chak No.62-D, Pakpattan and the plaintiff would purchase the same at the rate of Rs.243,750/-. It was further agreed that amount of Rs.20,000/- paid under the first agreement would be treated as earnest money of the second agreement (Ex.P-1) and upon payment of balance amount on 20th October, 2007 the first defendant would transfer the suit land in favour of the plaintiff either through sale mutation or registered sale deed. In fact the plaintiff through these assertions wanted to present that initial agreement dated 30th May, 2007 was subsequently substituted by another agreement dated 19th July, 2007 (Ex.P-1). This was a plea of "novation of contract" as contemplated in Section 62 of the Contract Act, 1872 and explained by the House of Lords[1]. The "novation of contract", according to House of Lords, is that where there being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. It is now well settled that when an agreement is substituted, both the agreements are supposed to be read together to form a complete subsisting agreement. Thus, to prove a novation, four elements must be shown, that is, (a) the existence of a previous valid agreement; (b), the agreement of the parties to cancel the first agreement; (c) the agreement of the parties that the second agreement replaces the first one; and, (d) the validity of the second, agreement. From a legal standpoint a novation is a form of affirmative plea and the party who canvasses a novation has the burden of proving it by clear satisfactory evidence. The plaintiff was, therefore, required to prove the terms and conditions of sale, which as per para 2 of the plaint, were reduced to the form of agreement dated 30th May, 2007. Article 102 of the Qanun-e-Shahadat, 1984 forbids proving the contents of writing otherwise than by writing itself. The best evidence about the contents of a document is,

[1] **Benjamin v. Alfred George Jordine (1982) 7 A.C. 345**

therefore, the document itself and it is the production of the document that is required by law in proof of its contents. The basic requirement of law is to see the terms incorporated in the document[2]. Rao Ali Bahadar (PW-5) during the course of cross-examination stated that agreement dated 30th May, 2007 was handed over to Liaqat Ali, the plaintiff. The plaintiff though produced oral evidence to prove the agreement dated 30th May, 2007 but the same was not admissible as the original agreement was not produced before the Court. This omission leads to the conclusion that the existence of the first agreement dated 30th May, 2007 and payment thereunder was not proved and resultantly the plaintiff also failed to prove the agreement of the parties to cancel the first agreement and that the second agreement (Ex.P-1) replaced the first.

12. Now, the validity of the second agreement to sell dated 19th July, 2007 (Ex.P-1) is examined. It is an admitted fact that the first defendant (Mst. Waris Jan) and her husband (Muhammad Amin) were illiterate persons. Their thumb impressions on the agreement (Ex.P-1) are eloquent testimony in support. The defence set up by the first defendant was that she had merely intended to give the land on lease to the plaintiff for a period of one year and had thumb-marked an agreement believing the same to be a lease-deed (Patta nama); that the plaintiff in connivance with the stamp vendor/deed writer fraudulently got written agreement to sell instead of lease-deed; that plaintiff was not in possession of the suit land; that one Yasin son of Ghulam Farid being lessee was in possession of suit land; and, that the alleged agreement to sell was void being based on fraud and without consideration. The maxim "non est factum" (Latin for "it is not my deed", which is a defence in contract law that allows signing party to escape performance of an agreement which is fundamentally different from what he or she intended to execute or sign) was thus found imbedded in the defence of the first defendant. It is contended on behalf of the plaintiff that it is settled principle of law that in a suit for specific performance where the defendant admits his/her thumb impression on the sale agreement but alleges that his/her thumb impression was obtained through fraud or misrepresentation on blank papers which have been converted into sale agreement subsequently, the burden to prove the same lies on the defendant; and, that since in the instant case the first defendant did not appear in the witness box to state her own case on oath and did not offer herself to be cross-examined by the plaintiff, a presumption would arise that the case set up by her was not correct. The said argument is neither well founded nor sufficient to prove the validity of the agreement to sell dated 19th July, 2007 (Ex.P-1). Ordinarily, the person who challenges the validity of a transaction on the ground of fraud, undue influence, etc. and charges his opponent with bad faith has to discharge the burden of proof which rests on him. But the major exception to this rule is that the initial burden would not shift to the party who challenges the transaction and will instead be

[2] **Hazratullah v. District Council, Haripur (1997 SCMR 1570)**

cast on the person who relies on such deed or document if it is brought to the notice of the Courts that grantor is illiterate. Even otherwise in the case on hands the suit was for specific performance, and, therefore, it was for the plaintiff to prove his case, and agreement for sale (Ex.P-1) and non-examination of the first defendant in the Court was of no consequence, especially when she was not called upon to prove any other aspect but her defence only by cross-examining the plaintiff's witnesses and, therefore, no adverse inference could be drawn against the first defendant because she did not enter the witness-box[3].

13. Here the document in question was executed by Mst. Waris Jan, the first defendant, who was under disability requiring reliance on others for advice as to contractual transaction. And that was her illiteracy. Her husband, Muhammad Amin, was also illiterate. Since illiteracy is sympathetically regarded as a misfortune and not a privilege, some measure of protection is accorded to illiterate, whether be a woman or man, in their contractual transactions. The case law[4] on the subject, under consideration, suggests that the burden of proof in respect of genuineness of a transaction with an illiterate person and a document allegedly executed by such a person lies on the beneficiary of the document, who is legally obliged to prove and satisfy the Court: firstly, that the document was executed by an illiterate person; secondly, that illiterate person had complete knowledge and full understanding about the contents of the document; thirdly, the document was read over to him/her and terms of the same were adequately explained to him/her; and, fourthly, that he/she had independent and disinterested advice in the matter before coming into the transaction and executing the document. The essence of the above stated principle is to prevent any overreaching out or fraud being perpetrated on illiterates by reason of their inability to read and write. In furtherance of this object it is, therefore, incumbent upon a person who writes any document at the request, or on behalf, or in the name of any illiterate person also to write on such document, his own name as the writer thereof and his address as well as the endorsement to the effect that document was written in presence of the seller's consultant (that is, who (i) can read and write the language of the document; (ii) understands the contractual transaction; and (iii) having no conflict of interest has advised the illiterate person about the contractual transaction). Such Verification Note/Statement shall be equivalent to a statement: (a) that he was instructed to write such document by the person it purports to have been written and the document fully and correctly represents his/her instructions; and (b) if the document purports to be signed with the signature or mark of the illiterate

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**[3] Mitti Bewa v. Daitari Nayak and others (AIR 1982 Orissa 174) & Umesh Bondre v. Wilfred Fernandes (AIR 2007 Bombay 29)**

**[4] Mt. Farid-ud-Nisa v. Munshi Mukhtar Ahmad and another (AIR 1925 PC 204), Chainta Dasya v. Bhalkur Das (AIR 1930 Calcutta 591), Parasnath v. Tileshra Kuav (1965) All LJ 1080), Daya Shankar v. Smt. Bachi and others (AIR 1982 All 376), Janat Bibi v. Sikandar Ali and others (PLD 1990 SC 642), Amirzada Khan and another v. Itbar Khan and others (2001 SCMR 609), Khawas Khan through legal heirs v. Sabir Hussain Shah and others (2004 SCMR 1259), Muhammad Ashraf Khan v. Khan Siddique and others (2010 SCMR 1116), Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi and others (2013 SCMR 868) & Phul Peer Shah v. Hafeez Fatima (2016 SCMR 1225)**

person, that prior to being so signed or marked, it was read over and explained to the illiterate person, and that the signature or mark was made by such person.

14. In order to prove the validity of second agreement to sell dated 19th July, 2007 (Ex.P-1), the plaintiff firstly produced deed writer/stamp vendor namely Kamal Khan before the Trial Court as PW-1. The statement of this witness was important as he was the independent person who could depose as to whether while executing agreement (Ex.P-1) the requirements, stated in the preceding paragraph, were complied with. This witness deposed that the agreement was written by him; that at the time of writing of the agreement husband of the first defendant, namely Muhammad Amin was present; that terms and conditions of the agreement were written upon instructions of Mst. Waris Jan; and, that upon completion of writing, thumb impression of Mst. Waris Jan, Liaqat Ali, and signatures of the marginal witnesses were obtained on the agreement (Ex.P-1). He did not state that at the time of execution of the agreement to sell the transaction was explained to Mst. Waris Jan. It means that the agreement (Ex.P-1) was neither read over to Mst. Waris Jan nor terms of the same were adequately explained to her. This was a material omission. The second witness who appeared on behalf of the plaintiff was Muhammad Shah Bodla, Advocate (PW-2). He was Notary Public. He deposed before the Trial Court that on 19th July, 2007 Mst. Waris Jan and Liaqat Ali presented agreement (Ex.P-1) before him for verification; that at the time of verification Mst. Waris Jan affixed her thumb impression (Ex.P-1/5) in his presence; that Liaqat Ali also affixed his thumb impression; that document was entered in his register vide serial No.270; that at the time of verification the document was explained and read over to Mst. Waris Jan and she admitted the contents thereof; and, that he had not made any endorsement on Ex.P-1 to the effect that document was read over and explained to Mst. Waris Jan. The statement of PW-2 was inconsequential as the document (Ex.P-1) stood complete before PW-1. Since PW-1 had not explained and read over the terms of agreement (Ex.P-1) to Mst. Waris Jan, the subsequent attempt by PW-2 was just an exercise to overcome the omission, which was a sham exercise. Although the marginal witnesses of the agreement (Ex.P-1) i.e. PW-4 and PW-5 deposed before the Trial Court that the terms of the agreement were explained to the first defendant and her husband Muhammad Amin yet the same could not be taken into consideration for the reasons: firstly, that they were closely related to the plaintiff; and, secondly, that the same being contradictory to the statement of independent witness (PW-1) appeared to be an afterthought so as to cover the illegality which was committed by the deed writer (PW-1) while getting the agreement (Ex.P-1) executed. Notwithstanding the above, there is another flaw in the plaintiff's case. The plaintiff was under burden to prove and satisfy the Court that Mst. Waris Jan had independent and disinterested advice in the matter before coming into the transaction and executing the agreement (Ex.P-1). The evidence available on record suggests that at the time of execution of agreement (Ex.P-1) Mst. Waris Jan was only

accompanied by her husband, Muhammad Amin. Here question arises as to whether presence of Muhammad Amin, in the given facts and circumstances of the case, would mean that at the time of execution of agreement Mst. Waris Jan had an independent advice qua the contractual transaction. In my view, answer to this question is in the negative. The factor of advice cannot be treated lightly as a mere formality. To protect illiterate persons from the overpowering influence of another person to enter into conveyance and transactions relating to their property, the law contemplates effective, meaningful and purposeful consultation of the illiterates with a person who can read and write the language of the document, comprehend the implication of contractual transaction, and, has no conflict of interest with him/her so as to eliminate any room for complaint and to establish "consensus ad idem", that is, intention of the parties forming the contract. It is an admitted fact that Muhammad Amin was also illiterate. He was under disability to understand the contractual transaction and in turn to render any advice to his wife Mst. Waris Jan qua the effect and implication of the agreement (Ex.P-1). His presence at the time of execution of agreement (Ex.P-1) and advice, if any, to his wife was thus of no avail. Thus, it could not be held that the first defendant had entered into the transaction of sale after getting independent and disinterested advice and resultantly the agreement (Ex.P-1) was valid.

15. The third component of the issue No.1 is whether on 14th October, 2007 the first defendant had received a further amount of Rs.130,000/- from the plaintiff. It was maintained in paragraph No.3 of the plaint that a sum of Rs.130,000/- under the agreement was paid to the first defendant on 14th October, 2007 in presence of the witnesses but receipt thereof was not obtained as the plaintiff had been maintaining cordial relations with the first defendant. The above stated assertion of the plaintiff makes the matter pellucid that the transaction of payment of Rs.130,000/- was oral. The plaintiff was, therefore, required to state in the plaint the date, time, place and names of the witnesses before whom the transaction of payment of amount had taken place. Such requirement was sine qua non for proving the oral financial transaction. Though the plaintiff had stated the date and place of making payment of Rs.130,000/- in the plaint yet omitted to mention the names of the witnesses before whom the said amount was paid to the first defendant, and thus the statement of the witnesses could not be considered as per principle settled in the case of Moiz Abbas[5] and the conclusion would be that the plaintiff had failed to prove the making of payment of Rs.130,000/- to the first defendant.

16. The last component of issue No.1 is whether the first defendant was under obligation to transfer the suit land in the name of the plaintiff. In other words whether the plaintiff was entitled to apply for specific performance of the

[5] **Moiz Abbas v. Mrs. Latifa and others (2019 SCMR 74)**

agreement dated 19th July, 2007 (Ex.P-1). It is now well settled law that remedy for a specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to the settled principles of law and not arbitrarily. The Court, however, is not bound to grant the relief just because there was a valid agreement to sell. The plaint of a suit for specific performance, therefore, must be in conformity with the requirements prescribed in Form Nos.47 and 48 given in Appendix-A of the First Schedule to the Code of Civil Procedure, 1908. Para No.2 of Form No.47 requires the plaintiff to state in the plaint that he has applied to the defendant specifically to perform the agreement on his part but defendant has not done so. Para No.2 of Form No.48 requires the plaintiff to state in the plaint that on such and such date the plaintiff tendered---------- Rupees to the defendant and demanded a transfer of the suit property by a sufficient instrument. Para No.3 of Form No.48 requires the plaintiff to state that on the---------- day of---------- the plaintiff again demanded such transfer (or defendant refused to transfer the same to the plaintiff). It means that in a suit for specific performance it is incumbent upon the plaintiff not only to set out agreement on the basis of which he sues in all details but also to plead that he had applied to the defendant specifically to perform the agreement pleaded by him but the defendant had not done so. The plaintiff should also plead that he had been and is still ready and willing to specifically perform his part of the agreement.[6]

17. In the present case the essential term of the agreement (Ex.P-1) was that the plaintiff would make the balance payment on 20th October, 2007; and, that upon payment the first defendant would appear on the same date before the concerned officer for transfer of suit property in favour of the plaintiff. The plaintiff neither in the plaint nor during the course of evidence while appearing before Trial Court as PW-3 stated that he adhering to the terms and conditions of the agreement (Ex.P-1) tendered balance amount to the first defendant and went to the office of the concerned officer for transfer of suit land. Same is the status of the statement of other witnesses who appeared on behalf of the plaintiff. In other words the plaintiff had violated the essential term of the agreement (Ex.P-1) and, therefore, per Section 24(b) of the Specific Relief Act, 1877, he was not entitled to specific performance.[7]

18. There is yet another good ground for which the suit must fail. The plaintiff, as stated above, in his suit ought to have pleaded and proved not only his willingness, which was mental process, but also his readiness, which was something to do with translating that will into action and was preceded by necessary preparation for being in a position to be ready, that is, to be

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**[6] Muhammad Yaqub v. Muhammad Nasrullah Khan and others (PLD 1986 Supreme Court 497) & Mst. Amina Bibi v. Mudassar Aziz (PLD 2003 SC 430)**

**[7] Mubarak Ali v. Tula Khan alias Sadullah Khan (1985 SCMR 236) & Muhammad Yaqub v. Muhammad Nasrullah Khan and others (PLD 1986 SC 497)**

financially able to pay the purchase price.[8] To adjudge whether the plaintiff was ready and willing to perform his part of the agreement (Ex.P-1), the conduct of the plaintiff prior and subsequent to the filing of the suit was relevant. It was for this reason it was mandatory for the plaintiff to prove that at the relevant time he had sufficient money to pay the remaining sale price[9]; and, to apply to the Court, on his first appearance, for getting permission to deposit the balance amount[10]. On the contrary, the plaintiff had neither stated in the plaint nor deposed in his evidence that on or before 20th October, 2007 he was in possession of the balance amount and tendered the same to the first defendant for performing his part of the agreement. Even the plaintiff on his first appearance before the Trial Court had not tendered the balance amount and thus, according to the principle settled in the case of Hamood Mehmood he was not entitled to the decree as prayed for in the plaint. This aspect of the matter was not considered by the Courts below and therefore, their findings in respect of issue No.1 are not sustainable in the eye of law and the same are accordingly reversed.

19. As regards issue No.4-A it is suffice to say that since the plaintiff had failed to prove issue No.1, the sale of suit land through mutation No.1221 dated 16th November, 2007 in favour of second defendant could not be held invalid and without consideration, particularly when the first defendant had admitted the same. This issue is, therefore, decided in favour of the second defendant.

20. On the basis of my findings on issues Nos.1 and 4-A, the findings qua other issues of the Courts below are hereby reversed. However, in the given facts and circumstances of the case, the defendants are not held entitled for special costs.

21. Upshot of the above discussion is that the plaintiff had failed to prove not only the agreement (Ex.P-1) but also his readiness and willingness to perform the terms and conditions stated therein and thus, the decree could not be issued in his favour. This application in revision is, therefore, accepted and while setting aside the decrees of the Courts below the suit of the plaintiff is dismissed with no order as to costs.

KMZ/W-2/L Revision accepted.

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[8] **Bishambhar Nath Agrawal v. Kishan Chand and others (AIR 1998 Allahabad 195)**
[9] **Bootay Khan through legal heirs v. Muhammad Rafiq and others (PLD 2003 SC 518)**
[10] **Hamood Mehmood v. Mst. Shabana Ishaque and others (2017 SCMR 2022)**

**P L D 2019 Lahore 515**
**Before Shahid Waheed, J**
**NESTLE PAKISTAN---Petitioner**
**Versus**

**DIRECTOR PESSI and others---Respondents**

Writ Petition No.58700 of 2017, decided on 29th April, 2019.

**(a) Constitution of Pakistan---**
----Arts. 9, 37 & 38---Fundamental right to security of person and right to life---Promotion of social justice and eradication of social evils---Promotion of social and economic well-being of the people---Constitutional mandate for provision of social security to workers by State as an obligation, discussed.
William Shakespeare in his Merchant of Venice; Kohinoor Chemical Co. Ltd. and another v. Sindh Employees' Social Security Institution and another PLD 1977 SC 197 rel.

**(b) Interpretation of the Constitution---**
----Fundamental Rights and Principles of Policy---Reading and construction---Scope---Principles contained in Part-II, Chapter-2 of the Constitution along with Fundamental Rights constituted conscious of Constitution and supplemented each other---Principles of Policy gave sustenance to orderly growth and development of personality of every citizen whereas Fundamental Rights made the same solemn and dignified---Said principles were not enforceable at law yet the same were fundamental in the governance of the country and State was duty bound to apply said principles in making laws and building a just social order.

**(c) Provincial Employees' Social Security Ordinance (X of 1965)--**
----Preamble & S. 1---Interpretation of provisions of Provincial Employees' Social Security Ordinance, 1965---Provincial Employees' Social Security Ordinance, 1965 was a beneficial or remedial legislation conceived as means of ameliorating the lot of working class, and as such, it would be in keeping with the accepted principle of interpretation, that it should be so construed as to advance remedy and suppress mischief, or else it would frustrate the Legislative intent.
Wlliam Shakespeare in his Merchant of Venice rel.

**(d) Constitution of Pakistan---**
----Arts. 141 & 142 ---Distribution of Legislative Powers and Legislative functions---Delegation of legislative powers to executive---Essential Legislative functions---Legislative policy---Principles, rationale and scope---Power of delegation was a constituent element of Legislative policy as a whole under Arts. 141 & 142 of the Constitution and other relative Articles---Legislature, for making a law wholesome and pragmatic so as to promote the Principles of

Policy of the Constitution, at times adopted a generous degree of latitude and considered it convenient and necessary not to provide complete details by determining all factors or matters specifically for all cases and, therefore had taken the form of delegated legislation leaving it to some authority to fill in details or determine factors or matters in which a law shall be applied---Legislature, however, could not strip itself of its essential functions and vest the same with an extraneous authority---Essential legislative function must at least consist of determination of Legislative policy and its formulation as a binding rule of conduct---Where law passed by the Legislature, declared the Legislative policy and lay down standard or principle which was enacted into a rule of law, it could leave the ancillary or subsidiary task of a statute to subordinate bodies, which must do it within the framework of the law which made the delegation and could not go beyond such limits of the policy and standard laid down in the law---Under the Constitution, the Legislature has plenary powers within its allotted field and there could be no abdication of Legislative function or authority by complete effacement, or even partially in respect of particular topic or matter entrusted by the Constitution to the Legislature---Power to make subsidiary or ancillary legislation may, however, be entrusted by Legislature to another body of its choice, provided there was enunciation of policy, principles or standards either expressly or by implication for the guidance of the delegate in that behalf---Entrustment of power without guidance amounted to excessive delegation of legislative authority.
Muir Mills Co. Ltd. v. Suti Mills Mazdoor Union, Kanpur AIR 1955 SC 170; Pamadi Subbarama Chetty v. Mirza Zewar Ali AIR 1960 Mysore 14; Haji Ghulam Zamin and another v. A.B. Khondkar and others PLD 1965 Dacca 156; Messrs Devi Das Gopal Krishnan v. State of Punjab and others AIR 1967 SC 1895; Dacca Pictue Palace Ltd v. Pakistan through Secretary, Ministry of Education and Information and others PLD 1969 Dacca 1; Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries AIR 1985 SC 278; Haryana Unrecognised Schools Association v. State of Haryana AIR 1996 SC 2108; Messrs Gadoon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641; Khawaja Ahmad Hassaan v. Government of Punjab and others 2005 SCMR 186; Engineer Iqbal Zafar Jhagra and another v. Federation of Pakistan and others 2013 SCMR 1337; Province of Sindh through Chief Secretary and others v. M.Q.M through Deputy Convener and others PLD 2014 SC 531 and Flying Cement Company v. Federation of Pakistan and others PLD 2016 Lah. 35 ref.

**(e) Provincial Employees' Social Security Ordinance (X of 1965)--**
----Ss.71, 20, 2(8)(f) & Preamble [as amended by Provincial Employees Social Security (Amendment) Ordinance (1 of 2019), Ss.2 & 3]---Legislative scheme to provide social security to certain workers---Review and modifications of wage limits, contribution and benefits---Amount and payment of contributions---Determination of wage limits and contributions by executive---Permissible

delegation of legislative authority---Scope---Petitioners, inter alia, impugned amendments brought about in Ss. 71, 20 & 2(8) of the Provincial Employees' Social Security Ordinance, 1965 by Provincial Employees Social Security (Amendment) Ordinance, 2019 whereby determination of wage limits were taken out of hand of Legislature and given to the Executive on the grounds that the same amounted to excessive delegation of legislative power---Held, that element of delegation was implied in provisions of Ss.2(8)(f), 20(1) & 71 of the Provincial Employees' Social Security Ordinance, 1965 as the Legislature had authorized the Government to do something which it might do itself---Reasonably clear statement of policy in provisions and Preamble of Provincial Employees' Social Security Ordinance, 1965 existed in and thus it could not be contended that questions of policy had been left to the delegate---Appraisal of framework under the law suggested that power delegated upon Government was not uncontrolled but was confined within banks which kept it from overflowing---In the present case, delegation of power was on the Provincial Government which was the highest executive in the province of Punjab, and was responsible to the Provincial Assembly---Legislature on account of paucity of time could not know as to the detail of the fluctuating prices of consumer goods and living costs during a year and for such matter could not also be in a position to review or modify the wage limits---Since procedure in bringing amendment in law had become a stumbling block in enhancing benefits under Provincial Employees' Social Security Ordinance, 1965, Legislature in implementing the socio-economic policy pursuant to the establishment of a welfare State as contemplated by the Constitution, thought it prudent to delegate power of review or modification of wage limits, rate of contribution and benefits to Provincial Government---Framework in said context was provided in under Provincial Employees' Social Security Ordinance, 1965 and left it to the Government to exercise discretion in manner laid down within the said framework---Impugned amendments could not be regarded as an abdication of function by Legislature but the same was valid delegation of discretion to achieve purpose of law---Constitutional petitions were dismissed, in circumstances.

Samual Johanson; Vasantal Maganbhai v. State of Bombay (1961) SCR 341; Poineer Cement Limited v. The Government of Punjab and others 2017 PLC 199; Associated Provincial Picture Houses v. Wednesbary Corporation (1947) 1-KB 233; The Chairman East Pakistan Railway Board, Chittagong v. Abdul Majid Sardar, Ticket Collector, Pakistan Eastern Railway, Laksam PLD 1966 SC 725; Lahore Improvement Trust, Lahore through its Chairman v. The Custodian Evacuee Property, West Pakistan Lahore and 4 others PLD 1971 SC 811; Messrs Mustafa Impex and others v. The Government of Pakistan through Secretary Finance, Islamabad and others PLD 2016 SC 808 and Pakistan Medical and Dental Council through President and 3 others v. Muhammad Fahad Malik 2018 SCMR 1956 rel.

**(f) Delegated Legislation---**
----Generous degree of latitude in matter of delegation was permissible to the Legislature in socially benefit socially beneficial legislation.
Umer Abdullah, Haroon Duggal, Rafey Altaf, Saleem Baig, Munawar Ahmad Javed, Omer Alvi, Muhammad Umer Riaz, Mian Mahmood Rasheed, Habib-ur-Rehman and Khalil-ur-Rehman for Petitioners.
Muhammad Arif Raja,Addl. A.G. for Government of the Punjab for Respondent.
Ahmad Ali Ranjha for PESSI along with Muhammad Hanif Raja, D.G.-PESSI and Shoaib Tabish Law Officer-PESSI for Respondent.
Dates of hearing: 24th and 29th April, 2019.

## JUDGMENT

**SHAHID WAHEED, J.---**This batch of constitutional petitions, 240 in number, whose details are mentioned in the Appendix hereto, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, involves the question whether the existing provisions of Sections 2(8)(f), 20(1) and 71 of the Punjab Employees' Social Security Ordinance, 1965 (Ordinance X of 1965) suffer from the vice of excessive delegation and inter alia for that reason the notifications issued by the Government of Punjab under the said provisions of law determining the wage limits for the purpose of levy of social security contribution are void and inoperative.

2. Before adverting to the challenge thrown in these petitions it will be pertinent to mention that social security to the workers would involve providing or framing such schemes or services or facilities and amenities, which can enable the workers to lead a decent minimum standard of life below which no one should fall and having financial or economic security to fall back upon in the event of loosing job for whatsoever may be the reason in the circumstances beyond their control. It represents basically a system of protection of individuals who are in need of such protection by the State as an agent of the society. Such protection is relevant in contingencies such as sickness, injury or death which are beyond their control. In this context, it is function of the State to secure to its citizens "social, economic and political justice", to guarantee "freedom of thought, expression, belief, faith and worship", and to ensure "equality of status and of opportunity", and the prosperity of the people and the integrity of the territories of the Federation. This is what the preamble to the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") says and that is what is elaborated in the two important Chapters of the Constitution on Fundamental rights and Principles of Policy. The most important provision of Chapter 1, Part II of the Constitution is Article 9 which guarantees right to life. The word "life" is of wider connotation and, it appears, for this reason, William Shakespeare in his Merchant of Venice has said "you take my life, when you do take the means whereby I live" (Act IV, Scene 1) and now in continuation thereof it is well

settled that right to food, water, decent environment, education, medical care and livelihood are inherent in right to life; which also encompasses within its fold right to social security as the ultimate aim of social security is to ensure every secured person the means which will enable him and the members of his family to lead a respectable life.

3. The specific provision relating to social security can also be seen in the Principles of Policy included in Part-II, Chapter-2, of the Constitution which are proclamations for the governance of the country. Article 37 of the Constitution enjoins the State to secure the welfare of the people by: promoting, with special care, the educational and economic interests of backward classes or areas; ensuring inexpensive and expeditious justice; and, making provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment. Article 38(b) says that the State shall provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure; clause (c) envisages that the State shall provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means; clause (d) contemplates that the State shall provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment, whereas, clause (e) provides that the State shall reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan. These constitutional provisions express the social philosophy in labour issues. And that is to restore the dignity of poor, the weak and the oppressed, who contributes to the welfare of the society against hazards. The principles contained in Part-II, Chap.-2 of the Constitution along with fundamental rights constitute conscious of the Constitution. They supplement each other. In fact the Principles of Policy give sustenance to the orderly growth and development of personality of every citizen whereas fundamental rights make them solemn and dignified. Although the said principles are not enforceable at law yet the same are fundamental in the governance of the country and the State is duty bound to apply these principles in making laws and building a just social order. Adopting the philosophy of the Constitution, the Government has enacted many labour legislations, including the West Pakistan Employees' Social Security Ordinance, 1965 (Ordinance X of 1965) for protecting the rights of the labour class. It is a beneficial or remedial legislation conceived as a means of ameliorating the lot of working class, and as such, it would be in keeping with the accepted principle of interpretation, that it should be so construed as to advance the remedy and suppress the mischief, or else it would frustrate the legislative intents.[1]

4. The West Pakistan Employees' Social Security Ordinance, 1965 (W. P. Ordinance X of 1965) was promulgated on 4th June 1965. The word "Provincial" was substituted for "West Pakistan" by the Federal Adaptation of Laws Order, 1975 (P.O. 4 of 1975). In the unamended Ordinance the expression "employee" was defined in sub section (8) of Section 2 and clause (f) thereof was couched in the words "any person employed on wages exceeding one thousand rupees per mensem". The words "one thousand five hundred" were substituted for "one thousand" by the Labour Laws (Amendment) Act, 1985. The words "three thousand" were substituted for words "one thousand five hundred" by the Labour Laws (Amendment) Ordinance, 1993 and the Labour Laws (Amendment) Act, 1994 and proviso was also added that an employee shall not cease to be an employee for the reason that his monthly wages exceed three thousand rupees. The words "five thousands" were substituted for "three thousands" by the Labour Laws (Amendment) Ordinance, 2001. On 29th October, 2002 the Provincial Employees' Social Security (Amendment) Ordinance, 2002 was promulgated and through it for subsection (8) of Section 2 the words "employee means any person employed, whether directly or through any other person for wages or otherwise to do any skilled or unskilled, supervisory, clerical, manual or other work in, or in connection with the affairs of an industry or establishment, under a contract of service or apprenticeship, whether written or oral, expressed or implied but does not include" were added. Clause (f) of subsection (8) of Section 2 was further amended through the Finance Act, 2008 and the word "ten" was substituted for "five" and the amended section 2(8)(f) was worded as under:

2. Definitions. In this Ordinance, unless the context otherwise requires, following expressions shall have the meanings hereby respectively assigned to them, that is to say.

(8) "employee" means any person employed, whether directly or through any other person for wages or otherwise to do any skilled or unskilled, supervisory, clerical, manual or other work in, or in connection with the affairs of an industry or establishment, under a contract of service or apprenticeship, whether written or oral, expressed or implied but does not include--

(f) any person employed on wages exceeding ten thousand rupees per mensem:

Provided that an employee shall not cease to be an employee for the reason that his monthly wages exceed ten thousand rupees.

The other provision of the Ordinance X of 1965, that is, Section 20(1) was firstly amended through the Labour Laws (Amendment) Act, 1994 and in subsection (1) the words "provided that no contribution shall be payable on so much of an employee's wages as in excess of one hundred and twenty rupees per

[1] **Kohinoor Chemical Co. Ltd. And another v. Sindh Employees' Social Security Institution and another PLD 1977 SC 197**

day or three thousand rupees per month" were added; secondly, in the proviso to subsection (1) for the words "one hundred and twenty rupees per day or three thousand rupees per month" the words "two hundred rupees per day or five thousand rupees per month" were substituted vide the Provincial Employees' Social Security (Amendment) Ordinance, 2002; and, thirdly, through the Finance Act, 2008 in subsection (1) after the word "rate" the words "not more than six percent" were inserted whereas in the proviso for the words "two" , the word "four" and for the word "five", the word "ten" respectively were substituted and amended section 20(1) was thus as under:

20. Amount and payment of Contribution:- (1)Subject to the other provisions of this Chapter, the employer shall, in respect of every employee, whether employed by him directly or through any other person pay to the Institution a contribution at such times, at such rate not more than six percent and subject to such conditions as may be prescribed:

Provided that no contribution shall be payable on so much of an employees' wages as is in excess of four hundred rupees per day or ten thousand rupees per month.

The method of review and modification of wage limits, contribution and benefits is provided in Section 71 of the Ordinance X of 1965. The first amendment in this Section was made through the Labour Laws (Amendment) Act, 1994 and in subsection (1) for the words "subsection (4) of Section 20" the words "clause (f) of subsection (8) of section 2" were substituted and in subsection (2) for the words "subsection (4) of Section 20" the words "clause (f) of subsection (8) of Section 2" were substituted and the same prior to 2013 was to the following effect:

71. Review and modification of wage limits, contribution and benefits:-

(1) In January of each year, the Governing Body shall review the wage limits specified in clause (f) of sub section (8) of section 2 and the rates of contribution and benefits provided under this Ordinance in the light of any changes in wage levels or living costs and shall submit a report thereon together with its recommendations to Government.

(2) Government may, after considering the said report and recommendations, by notification, enhance or reduce the wages limits specified in clause (f) of subsection (8) of section 2 or the rates of benefits payable under this Ordinance.

5. After the Constitution (Eighteenth Amendment) Act, 2010 the subject of labour was devolved upon the Provinces and, thus, the Government of Punjab on 13th December 2013 promulgated the Provincial Employees' Social Security (Amendment) Act, 2013. The word "Provincial" was substituted for "Punjab". By virtue of section 3 of the Provincial Employees' Social Security (Amendment) Act, 2013 an amendment was made in subsection (8) for clause (f) of section 2 of the Ordinance X of 1965 and now the same reads as under:

2. Definitions. In this Ordinance, unless the context otherwise requires, following expressions shall have the meanings hereby respectively assigned to them, that is to say.

(8) "employee" means any person employed, whether directly or through any other person for wages or otherwise to do any skilled or unskilled, supervisory, clerical, manual or other work in, or in connection with the affairs of an industry or establishment, under a contract of service or apprenticeship, whether written or oral, expressed or implied but does not include--

(f) any person employed on wages exceeding the wages determined by the Government under Section 71 "

It is appropriate to mention here that during pendency of these petitions further amendment was made in the said provision and following proviso was added through the Provincial Employees' Social Security (Amendment) Ordinance, 2019 and now clause (f) of subsection (8) of Section 2 reads as under:

"(f) any person employed on wages exceeding the wages determined by the Government under section 71:

Provided that an employee shall not cease to be an employee for the sole reason that his monthly wages exceed the wages determined by the Government under section 71 of the Ordinance."

The second material amendment was made in Section 20 (1) of the Ordinance X of 1965 which was to the following effect:

20. Amount and payment of contributions. (1) Subject to the other provisions of this Chapter, the employer shall, in respect of every employee, whether employed by him directly or through any other person pay to the Institution a contribution at such times, at the rate of six per cent and subject to such conditions as may be prescribed:

Provided that no contribution shall be payable on so much of an employee's wages as is in excess of the wages determined by the Government under Section 71.

The third amendment, relevant for the controversy at hands, relates to Section 71 of the Ordinance X of 1965. In the said Section 71 the words "specified in clause (f) of subsection (8) of section 2", wherever occur was omitted. Now the amended Section 71 reads as under:

71. Review and modification of wage limits, contribution and benefits.---(1) In January of each year, the Governing Body shall review the wage limits and the rates of contribution and benefits provided under this Ordinance in the light of any changes in wage levels or living costs and shall submit a report thereon together with its recommendations to Government.

(2) Government may, after considering the said report and recommendations, by notification, enhance or reduce the wage limits or the rates of benefits payable under this Ordinance.

6. By way of these petitions the amendments made in the Ordinance X of 1965 through the Provincial Employees' Social Security (Amendment) Act, 2013 have been impeached on the following grounds: First, that the amendments brought in Sections 2(8)(f) and 71 of the Ordinance X of 1965 have the effect of taking the determination of wage limits out of the hands of the Legislature and given to the Executive in violation of the Constitution. The delegation is excessive as no standards have been provided for exercise of power by the Executive. Second, that this is the case where Provincial legislature has effectively surrendered its legislative powers to the Provincial Government. The question is not of the intrinsic importance of the particular statute or the fact that legislation is for the welfare of labour, but of the constitutional processes of legislation which are an essential part of the system of Government. The failure to enact standards for guidance equates to transference of essential legislative function. Third, that Section 71 purports to empower the Executive to not only determine who is or is not an employee for the purposes of the Ordinance X of 1965. By removing the amount specified in Section 2(8) (f) and substituting it with phrase "exceeding the wages determined by the Government under Section 71", the Legislature has left it open for the Executive to become the arbiter of whether or not a law applies to the individual. As such, the provisions of the Ordinance X of 1965 as amended by the Provincial Employees' Social Security (Amendment) Act, 2013 are beyond the scope of proper delegation of authority to the Executive. Fourth, that Section 71 also purports to empower the Executive to decide the rates of wages that justify entitlement to benefit under the Ordinance X of 1965. This is again an example of excessive delegation. Fifth, that even on the touchstone of basic constitutional principles such as rule of law, the inalienable right of persons to be dealt with fairly and in accordance with law and the right to carry out their trade, business or professions, these provisions are problematic. The rule of law requires certainty so that citizens can govern themselves accordingly. In this case, by legislating away the power to make the most essential of determinations with respect to the Ordinance X of 1965 to an overzealous, capricious and arbitrary Executive which has no regard either for the proper limits of its power or the constitutional rights of the citizenry, the Legislature has not only abdicated an essential element of legislative power, it has also abandoned the sacred trust with which it was entrusted. And sixth, that the Ordinance X of 1965 was originally enacted in 1965 and the amount specified in Section 2(8)(f) was raised five times whereas proviso to Section 20 was added in 1994 and it was only amended twice. This was because the responsibility to make these changes was retained by the Legislature and it only made the changes as and when social circumstances necessitated such a change. Now, with this key legislative function having been unceremoniously outsourced to an Executive, four drastic revisions to the wage rates have been brought about in the span of a few years. If one looks at the revision of wage limits, it is startling how quickly and how high the wage limits have jumped under the Executive control. It is a trite fact that no grave social or financial change has occurred in

the country between 2013 to 2017 to justify such wildly exorbitant revisions. The Executive has deprived the citizenry of legal certainty to plan their businesses because employers now live in perpetual fear of arbitrary and unexpected increases in demands for contribution that will translate into unforeseeable financial liabilities that could potentially cripple their industries. Strong hammering of above grounds has been made with different precedents.[2]

7. There is undoubtedly an element of delegation implied in the provisions of Sections 2(8)(f), 20(1) and 71 of the Ordinance X of 1965 for the Legislature, in a sense, has authorized the Government to do something which it might do itself. But whether such delegation, in the light of above stated objections, appears to us to be unwarranted and unconstitutional. For determining this question, it is necessary to see as to what are the principles governing delegation of legislative power. On review of the precedents cited at the Bar and other case law on the subject, it seems to be consensus of opinion that primary duty of law making is of the Legislature and while doing so its aim is to project its mind or will or judgment as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of law. Since the power of delegation is a constituent element of legislative policy as a whole under Articles 141 and 142 of the Constitution and other relative Articles, the Legislature, for making the law wholesome and pragmatic so as to promote the Principles of Policy of the Constitution, at times adopts a generous degree of latitude and considers it convenient and necessary not to provide complete details by determining all factors or matters specifically for all cases and, therefore, legislation from earlier times, and particularly in modern times, has taken the form of delegated legislation leaving it to some authority to fill in the details or determine the factors or matters in which the law shall be applied; a Legislature, however, cannot certainly strip itself of its essential functions and vest the same with an extraneous authority. Exactly what constitutes "essential legislative function" is difficult to define in general terms, but this much is clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding rule of conduct. Thus, where the law passed by the Legislature, declares the legislative policy and lays down the standard or principle which is enacted into a rule of law, it can leave the ancillary or subsidiary task of the statute to the subordinate bodies, which must do it within the framework of the law which makes the delegation and cannot go beyond the limits of the policy and standard laid down in the law. In

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[2] **Muir Mills Co. Ltd. V Suti Mills Mazdoor Union, Kanpur (AIR 1955 SC 170), Pamadi Subbarama Chetty v Mirza Zewar Ali (AIR 1960 Mysore 14) Haji Ghulam Zamin and another v A.B. Khondkar and others (PLD 1965 Dacca 156), M/s. Devi Das Gopal Krishnan v State of Punjab and others (AIR 1967 SC 1895) Dacca Pictue Palace Ltd v Pakistan through Secretary, Ministry of Education and Information and others (PLD 1969 Dacca 1), Regional Director, Employees' State Insurance Corporation, Trichur v Ramanuja Match Industries (AIR 1985 SC 278), Haryana Unrecognised Schools Association v State of Haryana (AIR 1996 SC 2108), Messrs Gadoon Textile Mills and 814 others v WAPDA and others (1997 SCMR 641) Khawaja Ahmad Hassaan v Government of Punjab and others (2005 SCMR 186), Engineer Iqbal Zafar Jhagra and another v Federation of Pakistan and others (2013 SCMR 1337), Province of Sindh through Chief Secretary and others v M.Q.M through Deputy Convener and others (PLD 2014 SC 531), and Flying Cement Company v Federation of Pakistan and others (PLD 2016 Lahore 35.**

the wake of above, the principles of delegation of legislative power may be formulated as follows:

(i) that under the Constitution, the Legislature has plenary powers within its allotted field;

(ii) that essential legislative function cannot be delegated by the Legislature, that is, there can be no abdication of legislative function or authority by complete effacement, or even partially in respect of particular topic or matter entrusted by the Constitution to the Legislature; and,

(iii) that power to make subsidiary or ancillary legislation may, however, be entrusted by Legislature to another body of its choice, provided there is enunciation of policy, principles or standards either expressly or by implication for the guidance of the delegate in that behalf. Entrustment of power without guidance amounts to excessive delegation of legislative authority.

8. While applying the foregoing principles it is to be seen as to whether in the present case guidance was afforded to the delegate (the Government) in determining the wage limit for the purpose of levy of contribution as envisaged in Sections 2(8)(f) and 20(1) of the Ordinance X of 1965 by laying down principle in that behalf. In this respect, I first wish to observe that validity of the guidance cannot be tested by a rigid uniform rule. If we can find a reasonably clear statement of policy either in the provisions of the Ordinance X of 1965 or in its Preamble, then any part of the Ordinance X of 1965 cannot be attacked on the ground of delegated legislation by suggesting that the questions of policy have been left to the delegate. In the case on hands the legislative policy is apparent from the preamble to the Ordinance X of 1965. What it aims at, is to introduce a scheme of social security by collecting contribution from the employer, in respect of an employee, defined in Section 2(8), at such rate provided in Section 20 on so much of an employee's wages determined by the Government under Section 71 for extending benefits, envisaged in Chapter V, to the secured persons or their dependents in the event of sickness, maternity, employment injury or death, and for matters ancillary thereto with a view to obviate the chance of their exploitation by ensuring social justice to them so that they may lead their lives with dignity.

9. Here it may also be noticed that the Legislature besides stating its policy has also provided framework for the guidance of the delegate (the Government) to exercise the power for determination of wage limits for the purposes of clause (f) of subsection (8) of Section 2 and also Section 20(1) of the Ordinance X of 1965. The Ordinance X of 1965 through its Section 71 provides framework consisting of two steps procedure to exercise the delegated power. At first step the Government through the Governing Body of the Punjab Employees; Social Security Institution (PESSI) comprising (i) a person who is or has been a Judge of the High Court or a Senior Officer in the service of Pakistan not below the rank of Commissioner of a Division or Secretary to Government (ii) four

persons to represent Government, one of each respectively from the departments of Labour, Industry, Health and Finance (iii) three persons to represent the employers, including at least one woman (iv) three persons to represent the secured persons, including at least one woman; and (v) the Medical Advisor reviews in January each year, the wage limits specified in Section 2(8)(f) and the rates of contribution and benefits provided under the Ordinance X of 1965 in the light of any changes in wage levels or living costs. This initial review of wage limits is not unfettered. It is conspicuous: firstly, that in the process of first review, the Government captures all stakeholders, giving equal representation to the employers and secured persons in the Governing Body of the PESSI, for consultation so as to eliminate the element of oppression and exploitation of any party to the social security system; secondly, that power of review can only be exercised if there is any change in the wage levels or living costs and not otherwise; and, thirdly, that it is a time bound activity. Taking into consideration the employer's concerns including the expected increased cost of doing business, threats to profitability, etc. and to remove any element of uncertainty in the system of social security the review of wage limits and the rates of contribution and benefits is made once in January of each year. At second step the Government within its hierarchy and at the level of Cabinet again considers the wage limits specified in clause (f) of subsection (8) of Section 2 or the rates of contribution and benefits provided under the Ordinance X of 1965 in the light of three factors viz (i) wage levels, (ii) living costs, and (iii) the report of the Governing Body and upon examination thereof if feels satisfied, it may review or modify the same through a notification. An appraisal of this framework suggests that the power delegated upon the Government is not uncanalized and uncontrolled. It is rather confined within banks which keep it from overflowing. Besides above, we have to keep in mind, in the present case, delegation of power is on the Provincial Government which is the highest executive in the province of Punjab, and is responsible to the Provincial Assembly. In a parliamentary democracy every act of the Government is accountable to its people through Legislature which itself is an additional factor which keeps the Government under check not to act arbitrarily or unreasonably.

10. In fact the framework provided through the amended provisions of the Ordinance (X of 1965) is a device to determine the factor by maintaining proportionality between wage limit and living costs for calculating the amount of contribution payable by the employer during the course of year so as to provide quality benefits to the secured persons. Previously the Legislature itself had been making amendment in the Ordinance (X of 1965) and fixing wage limit, rate of contribution and benefits. It is a matter of record that since the promulgation of the Ordinance (X of 1965) the wage limit was modified for five times by the Legislature. This rigidity in the review of the wage limit could be due to the fact that the process of bringing amendment in the law was not swift or the Legislature on account of paucity of time could not know as to the detail of the fluctuating prices of the consumer goods and living costs during the year

and for that matter could not also be in a position to review or modify the wage limits. Since the procedure in bringing amendment in the law had become a stumbling block in enhancing benefits and, for that reason, was not found a cause of mirth for the system of social security, the Legislature in implementing the socio economic policy pursuant to the establishment of a welfare State as contemplated by the Constitution thought it prudent to delegate the power of review or modification of wage limits, rate of contribution and benefits to the Government. In this context the Ordinance (X of 1965) itself provided the framework and left it to the Government to exercise discretion in the manner laid down within the framework. It cannot, therefore, be regarded as an abdication of its function by the Legislature but by law a valid delegation of discretion to achieve purpose of law. The backdrop to the intention of the Legislature is best projected by the following words of English Writer, Samual Johanson:

> "---Where a great proportion of the people are suffered to languish in helpless misery, that country may be ill policed, and wretchedly governed; a decent provision for the poor is the true test of civilization"

Accordingly, the grounds canvassed before this Court sans merit and the wisdom of the Legislature cannot be held flawed on the plea of excessive delegation of legislative power and for that reason the notifications, under challenge cannot be declared void.

11. There is yet another good reason for which the objections raised in these petitions must fail. And that is that the Ordinance X of 1965 is undoubtedly a beneficent measure which seeks to promote the Principles of Policy as provided in Chapter 2, Part-II of the Constitution so as to improve the economic and social conditions of the labour class i.e. secured persons by delegating power to the Government for reviewing or modifying the wage limits specified in clause (f) of subsection (8) of Section 2 in the light of any changes in wage levels or living costs. It is now well settled that in such like legislation, a generous degree of latitude is permissible to the Legislature in the matter of delegation. Bearing in mind the preamble and the material provisions of the Ordinance X of 1965, as highlighted in the preceding paragraphs, it is held that the power delegated is within permissible limits. This view finds support from Vasantal Maganbhai's case.[3]

12. Next coming to the question whether the determination of wage limits by the Government in exercise of its delegated power through different notifications for the purpose of payment of social security contribution as envisaged in Sections 2 (8)(f) and 20(1) is arbitrary or excessive. Before going into this question it would not be out of place to state here that this batch of petitions calls into question four notifications which are of dated 18th October, 2012, 30th January, 2013, 12th August, 2014 and 15th June, 2017. The first three notifications were earlier challenged before this Court in Pioneer Cement

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[3] **Vasantal Maganbhai v State of Bombay(1961)SCR 341**

Limited's case[4] wherein notifications dated 18th October, 2012 and 30th January, 2013 were declared illegal whereas notification dated 12th August, 2014 was held valid. In these circumstances the petitioners through these petitions cannot be allowed to re-agitate the matter with regard to said notifications on the principle of res-judicata. The only notification which is now left for examination is of dated 15th June, 2017. Now, let us examine it.

13. In one of the connected writ petition i.e. W.P. No.180622 of 2018 a Miscellaneous Application bearing No. 03 of 2018 was filed with a prayer that record of the Governing Body, constituted under Section 5 of the Ordinance X of 1965 be requisitioned so as to establish the fact that wage limits were determined without taking into consideration the relevant material and the recommendations were made without assigning any reason. In response to notice of the said application the record of the Governing Body was presented before this Court; perusal whereof suggested that an agenda item was presented before the Members of the Governing Body who on its basis made recommendations to the Government to enhance the wage limits specified in clause (f) of subsection (8) of Section 2 of the Ordinance X of 1965. It was, thus, argued that determination of the wage limits by the Government through impugned notification was not only arbitrary but also unreasonable. It was, in fact, a plea that the impugned notification issued by the Government on the recommendations of the Governing Body hit by the principle of Wednesbury unreasonableness as enunciated in the Wednesbury Corporation's case.[5] This argument appeared to be convincing at first blush and thus, caused me to raise my eyebrows. Being faced with this situation the learned Addl. Advocate General submitted that since enclosures of the agenda items had been destroyed, it could not be presented before this Court and, thus, it would not be in the interest of justice to hold that relevant material was not available before the Governing Body. However, in order to overcome this imbroglio he suggested that the recommendations of the Governing Body of the PESSI to enhance the wage limits were based upon two factors, viz, (i) wage level, and (ii) living costs; which could be ascertained at any time from a public document, that is, Pakistan Economic Survey issued by the Finance Division, Government of Pakistan. He, thus, sought permission to submit a report detailing justification for review of wage limit. I found that this request had the backing of the cases of Abdul Majid Sardar's case[6] and Lahore Improvement Trust case[7] wherein it was held that acts performed and orders made by public authorities deserve due regard by Courts and every possible explanation for their validity should be explored and the whole field of powers in pursuance to which the public authorities act or perform their functions examined and only then if it is found

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[4] **Pioneer Cement Limited v The Government of the Punjab and others (2017 PLC 199)**

[5] **Associated Provincial Picture Houses v Wednesbury Corporation (1947) 1-K.B 233.**

[6] **The Chairman, East Pakistan Railway Board, Chittangong v Abdul Majid Sardar, Ticket Collector, Pakistan Eastern Railway, Laksam (PLD 1966 SC 725**

[7] **Lahore Improvement Trust, Lahore through its Chairman v TheCustodian Evacuee Property, West Pakistan Lahore and 4 others (PLD 1971 SC 811)**

that act done, order made or proceeding undertaken is without lawful authority the Courts should declare them to be of no legal effect. I accordingly allowed the respondents to place on record the material justifying the issuance of the impugned notification. Complying with the said direction the respondents on 1st October 2018 submitted report suggesting the basis to enhance the wage limits through the impugned notification. This report was not supported by the documents and, thus, vide order dated 3rd October, 2018 another opportunity was afforded to the respondents to place on record relevant notifications and extracts of the Pakistan Economic Survey. Complying with this order, the respondents through C.M. No.2 of 2018 in W.P. No.58700 of 2017 placed on record the relevant material. The report furnished by the respondents is comprehensive and covers all aspect of the matter, under discussion, and, thus, the relevant excerpts thereof are reproduced below:

1. Background of Determining Upper Wage Limits under section 71 of Ordinance:.

Historically the Upper Wage Limit was introduced through legislative amendments by revising section 2 (8) (f) of the Ordinance. These amendments in this particular provision continued till the year 2008.

The Provincial Assembly of the Punjab through Social Security (Amendment) Act, 2013 made the Ordinance as the provincial social security law in Punjab with effect from 7th October 2013. This amendment revised Section 2 (8)(f) and for the first time substituted fixed upper wage amount to criteria set under Section 71. Consequently, Section 71 that earlier was restricted by the wage values stated in Section 2 (8) (f) was no more bound by any values. This meant that the Government could now determine the wage limit from time to time as recommended by Governing Body in accordance with parameters laid down in Section 71.

Section 71 empowered the Governing Body of PESSI to review wage limits in light of any changes in wage levels or living costs and submit a report with its recommendations to Government.

It is pertinent to submit that Governing Body of PESSI has been considering wage levels and living costs for the purposes of various benefits enumerated in the Ordinance. The higher wage limits particularly help in extending coverage of social security to more employees. Therefore, to render compatible benefits to the secured persons with ever increasing living costs and inflation, etc. and keeping in view the changes in wage levels or living costs, the provisions of section 71 of the Ordinance require the Institution to review and modify the wage limits for contribution and benefits every year. It enables the beneficiaries to cope with the upcoming economic challenges. Moreover, the beneficiaries of the Institution are a unionized community, who time and again demand the review in wage limits to avail enhanced amount of cash benefits.

The detail of all the four notifications issued by Government on recommendations of Governing Body is provided below which also shows the percentage increase of upper wage limit:

TABLE 1 Wages Enhancement in Difference Phases

| Sr. | Notification No. and Date | Enhancement of wages | | Percentage Increased |
|---|---|---|---|---|
| | | From | To | |
| 1. | So (Dev-II) MW/2011/P-II dated 18-10-2012 | Rs.10,000 | Rs.12,500 | 25% |
| 2. | SO(Admn)7-17/2011, dated 30-01-2013 | Rs.12,500 | Rs.15,000 | 20% |
| 3. | SO(Dev-II)7-12/2014, dated 12-08-2014 | Rs.15,00 | Rs.18,000 | 20% |
| 4. | SO(D-II_07-12/2014, dated 15-06-2017 | Rs.18,00 | Rs.22,000 | 22% |

2. Review of Wage Limits under section 71 by Governing Body

The last fixed upper wage ceiling of Rs. 10,000 was provided in the law through Finance Act, 2008. The minimum wage at that time was fixed at Rs.6000/-. It is important to highlight that the minimum wage kept on rising for a long time while the upper wage limit remained static for about four (4) years. In the year, 2012 the minimum wage was raised to Rs.9000/- leaving behind a minor gap of Rs.1000/- only with the upper wage ceiling. This minor gap between the wage limits necessitated the review of upper wage limit.

The detailed Co-Relation of Minimum Wage to Upper Wage Limit is provided in the Table "2 " below, which clearly depicts that the gap fixed between lower and upper wage limits through Finance Act, 2008 was kept into consideration while deciding the revision of wage limits by the Governing Body.

3. Parameters Considered by Governing Body

A Wage Level:

The Government has been revising the minimum wage levels periodically. The following table provides a correlation between the minimum and upper wages

Table 2: Correlation of Minimum and Maximum Wage Limit

| Year | Minimum Wage Limit | Upper Wage Limit | % Age of Gap Between Min. |
|---|---|---|---|

| | | | and Upper Wage Limit |
|---|---|---|---|
| 2008 | Rs.6000/- | Rs.10,000/- | 66.66% |
| 2010 | Rs.7000/- | Rs.10,000- | 42.85% |
| Upto Oct.2012 | Rs.9000/- | Rs.10,000/- | 11.11% |
| Oct.2012 onward | Rs.9000/- | Rs.12.500/- | 38.88% |
| Upto June, 2012 | Rs.9000/- | Rs.15,000/- | 66.66% |
| July 2013 | Rs.10,000/- | Rs.15,000/- | 50% |
| July, 2014 | Rs.12,000/- | Rs.18,000/- | 50% |
| July, 2015 | Rs.13,000/- | Rs.18,000/- | 38.46% |
| July, 2016 | Rs.14,000/- | Rs.18,000/- | 28.57% |
| June, 2017 | Rs.15,000/- | Rs.22,000/- | 46.66% |

The table depicts that the upper wage limit was static for quite some time and the gap between minimum and upper wage limits was reduced to Rs.1000 only in 2012. This necessitated the immediate remedial steps to review the wage limits and huge number of employees were being deprived of the benefits. The table also vividly provides that the percentage gap between wage limits was maintained in accordance with the last amendment in the Ordinance through the Finance Act, 2008 and never exceeded that percentage in later years.

The upper wage limits were, as such, enhanced to the tune of Rs.12,000/- during the span of 6 years (from 2012 to 2018) which enabled 1,99,015 more workers to avail the benefits of this Institution, raising the percent strength of secured persons to 10,25,280 as compared to 8,26,265 secured workers in the year, 2011.

It may also be mentioned here that the budget of Rs.221.05 million meant for disbursement of cash benefits to the secured persons in the years, 2011-12 has now climbed to Rs.410.40 million in the year, 2017-18 with a rise of Rs.85.66%. Whereas during last decade the health care PESSI budget of Rs.1.88 billion in the year 2008-09 has now climbed to Rs.7.1 5 billion in the year, 2017-18 with 279.5% rise. The ever rising expenses of the Institution compel it explore new and more fund generation resources to run its manifold welfare activities and plans.

B. Living Costs:

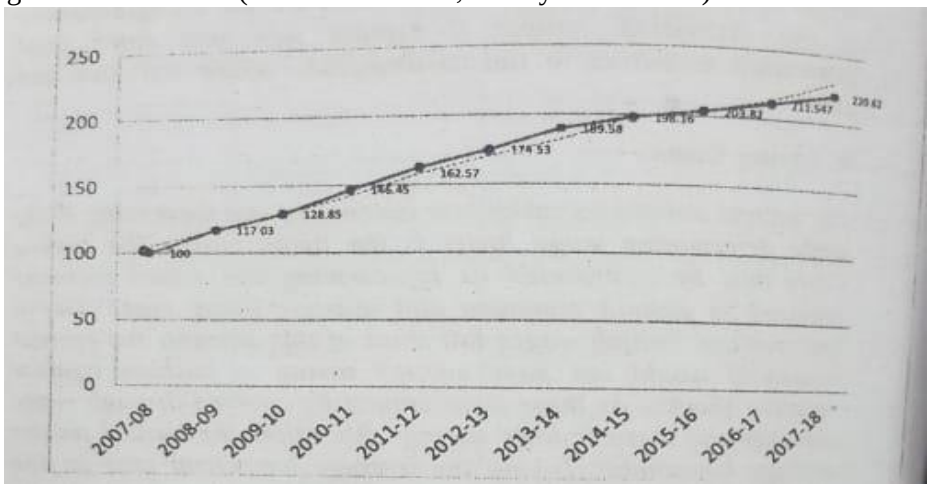
The second parameter taken into account by the Governing Body while determining wage limits is the living costs. The Living Costs may be interpreted as representing the actual incomes required to sustain minimum and average living costs. Given that average Punjab wages fall short of this amount, the typical household would not have enough saving to cushion against negative shocks. As these costs cannot be

covered through wage earnings and there is little saving, this raises the burden on the average household. Taking the average household cost as the upper ceiling ensures social protection for workers who are most vulnerable, i.e. earning between the minimum wage and what is costs to maintain existing consumption patterns. In this regard, the PESSI upper ceiling can be estimated as that required to meet existing household consumption expenditure. This provides a range of values that PESSI could use for an upper ceiling, i.e. the average living cost can be taken for either the average income household, or the household belonging to the bottom income group.

Another insight into revising upper ceilings can be obtained by benchmarking using several nationally collected wage and costs indicators. For this we index the ceiling of Rs.10,000 in 2008 with i) Consumer Price Inflation ii) Minimum wage iii) Average wage for Punjab and iv) Average urban wage for manufacturing in Punjab.

Since the last legislative wage rise in the year 2008, the living costs and Consumers Price Index (CPI) were also raised to the tune of over 25% by the year 2012-13 affecting the daily living of a common man. Therefore it was imperative to consider increasing the upper wage limit. The CPI that was used as a proxy for Inflation Rate is an important macroeconomic indicator and one of the key variables that guide the government and the Governing Body of PESSI to make rational decision for sustainable outcomes. The following graph indicates the year wise inflation during the decade in question i.e. 2008 to 2018:

Fig 1: Inflation Rate (Consumer Prices, Base year 2007-08)




(Source: Economic Survey of Pakistan (Various Issues))

The above cumulative increase in inflation indicates that the general price level has been increased from 100 to 220.62, which shows 121% increase in the general price level since 2007-08.

PRICE TRENDS OF ESSENTIAL ITEMS

The Table "3" below shows the growth of prices of essential items over a period of last 10 years. Almost all of the items showed over 100% increase in the general price level since 2008-09, (milk 243.33%; wheat 112.5%; Potatoes 143.42%; mutton 178.125%; beef 144.24%; vegetable ghee 78.77%). By giving similar weights to all essential items, the average growth rate of all items comes to over 121.76 percent and indicates more than double the price level. This directly affects the living cost of the consumers at a considerable and significant rate.

Table 3: Price Trends of Essential Items

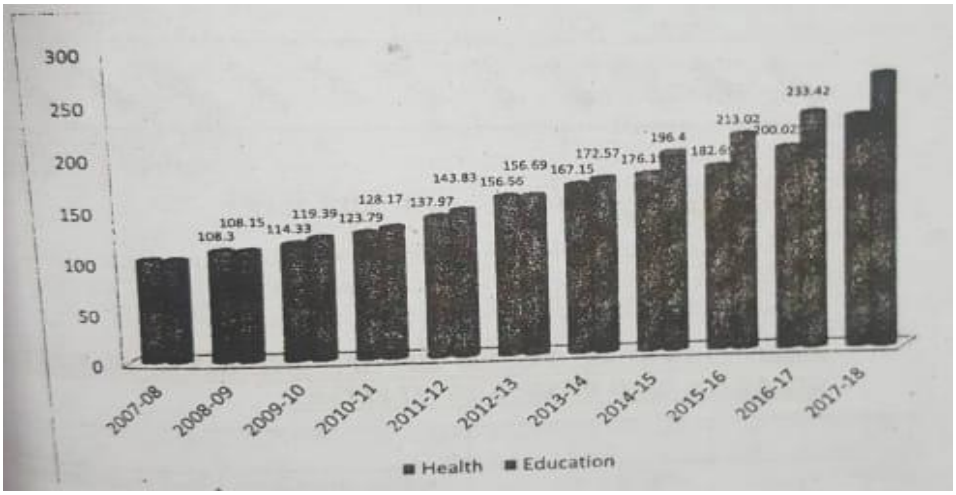
| Essential Commodities | (Years) Price | in PKR | Growth rate (%) |
|---|---|---|---|
| | 2008-09 | 2017-18 | |
| Wheat | 16 | 34 | 112.5 |
| Mutton | 320 | 890 | 178.125 |
| Beef | 165 | 403 | 144.24 |
| Mash Pulse | 62 | 163 | 162.91 |
| Masoor Pulse | 124 | 129 | 4.032 |
| Mong Pulse | 50 | 133 | 166 |
| Eggs | 53.07 | 96 | 78.77 |
| Sugar | 21 | 57 | 171.42 |
| Vegetable Ghee | 90 | 153 | 70 |
| Basmati Rice | 107.5 | 90 | -16.28 |
| Tea | 389.88 | 974 | 149.82 |
| Milk | 30 | 103 | 243.33 |
| Patatoes | 15.2 | 37 | 143.42 |
| Tomatoes | 28.52 | 56 | 96.35 |
| Average Growth in | Prices of | Essential Items | 121.76 |

Source: Ministry of Finance; Pakistan Economic Survey Various Issues (2008-2018)

GENERAL PRICE HIKE IN HEALTH AND EDUCATION

Apart from prices of essential items, we may look over the variations of price levels in health and education sector. Again a drastic increase can be observed in the prices during the last decade. The figures given in the following table show 116.26% increase in health sector while 159.12% increase in education sector. It must be kept in mind that PESSI spends huge amounts on providing comprehensive health facilities to its beneficiaries through its own hospitals, dispensaries etc. in the province of Punjab. Likewise its self-funded and autonomous status require PESSI to explore more funds generation resources to balance over rising expenses.

Fig 2: Trends of Prices in Health and Education

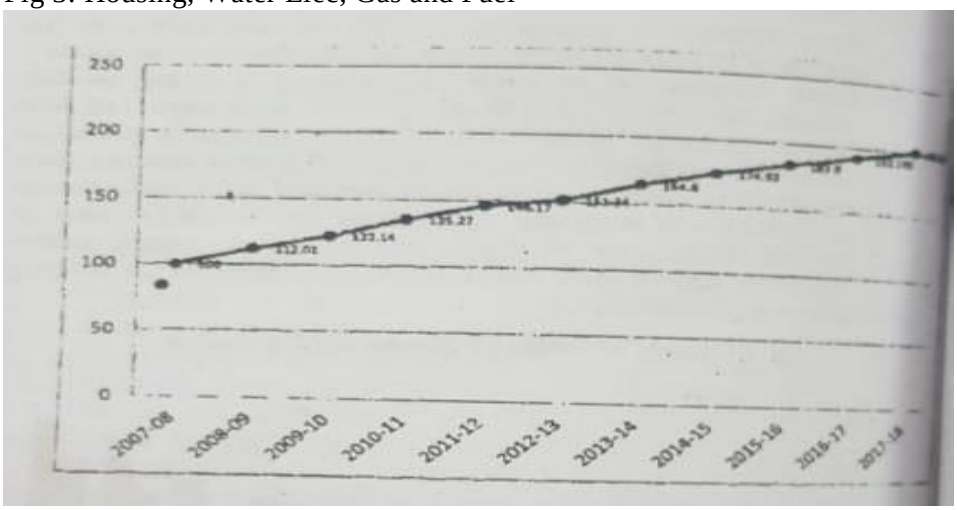



Source: Pakistan Economic Survey 2017-18

PRICES OF ENERGY SECTOR (Electricity, Gas, Water and Fuel)

Everyone is the consumer of electricity because it is an essential part of our life. Similarly Gas, Water and Fuel are non-food essential items not only widely used by the consumers but have also a significant importance in the production process. Price hike in any of the above mentioned energy items affect consumer and the entrepreneurs directly. PESSI and Governing Body cannot ignore these sectors while making the policies at large. So we present the cumulative price trends of energy sector in the following table 3, which indicates 100% increase during the last decade:

Fig 3: Housing, Water Elec, Gas and Fuel




Source: Ministry of Finance GOP 2017-2018

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Table 5: ANNUAL TREND OF CPI, INCREASE IN GOVT. SALARIES AND PESSI'S INITIATIVES

| (1) | (2) | (3) | (4) |
|---|---|---|---|
| Year | CPI(%) | Increase in Salaries and Pensions (%) | Periodical Increase by Institution (%) |
| 2008-09 | 20.29 | 20 | 100 |
| 2009-10 | 13.65 | 15 | 0 |
| 2010-11 | 13.88 | 15 | 0 |
| 2011-12 | 11.92 | 15 | 0 |
| 2012-13 | 9.69 | 20 | 25 |
| 2013-14 | 7.69 | 10 | 20 |
| 2014-15 | 7.19 | 10 | 20 |
| 2015-16 | 2.54 | 7.5 | 0 |
| 2016-17 | 3.75 | 10 | 22 |
| 2017-18 | 5.21 | 10 | 0 |
| Average Annual Increments | 9.6 | 13.25 | 8.7 |

It is an admitted fact that the productivity of a worker depends on real wage rate (the real wage rate is the adjusted monetary wage rate with the inflation rate), which shows the purchasing power of worker's pay packet. It is important to keep an eye on the growth of general price level and respective rates of real wages. The real wage rate and economic growth rate has an inherited relationship. We cannot separate the real wage rate from the productivity growth, whether it belongs to a single firm or it is presented through group of industries at macro level. The submissions for increments in the upper wages were rationally proposed by the institution over different periods of times as they are presented in the table. The table 5 above shows the periodical increments in the upper wage limit, which has been made by the institution in the last one decade. After setting up the upper wage at 10,000 in the financial year 2008-09, the institution did not increase the upper limit in consecutive 3 years. The first consecutive years presented in the table in blue shades. On the other hand, the inflation or the consumer price index was increased in double figures with high rates, this rising trend in general price level was expected to be increased in the coming years as well. So the institution comes up with the plan to enhance the upper wage limit for the coming three years in order to overcome the current hyper inflationary pressure on the general price level. So the institution yearly increased the upper wage limit with the

economic rationale for the period from 2011-12 to 2013-14, it can be seen in the table with red shades. Till 2013-14 the inflation was drastically increased with the cumulative figure of 89.58 percent which is far greater than the increase in upper wage limit. All the increments made by the institution were in line with the economic indicators prevalent in the country and their impact on the pocket of its beneficiaries.

Taking the average household cost as the upper ceiling ensures social protection for workers who are most vulnerable, i.e. earning between the minimum wage and what it costs to maintain basic consumption. This data for this calculation is readily available and can be calculated each year that the HIES is conducted.

Oil Price Hike and PKR Parity with US Dollar

The average fuel price rose by 100 percent from 2008 to 2013. Petrol prices registered an increase of Rs.40.50 per liter as in 2008 petrol was selling at Rs.62.80 per liter against an average of around Rs.100 per liter current price. High Speed Diesel witnessed an increase of Rs.7.71 per liter with the commodity selling at Rs.38.50 per liter in 2008 against current price of Rs.109.21 per liter (OGRA 2013). In 2018, the oil prices are persistently higher and remain Rs.95.24 to 100. On an average the oil prices doubled and shows approximately 100 percent increase in the prices.

Pakistani currency is under severe pressure due to tumbling foreign exchange reserves of the country. PKR has further weakened and Rs.128 to the US dollar in the inter-bank market on Monday 13-07-2018, the State Bank of Pakistan (SBP) said in a press statement that "Brace yourself for inflation as the rupee takes a hit". Since December 2017 when the currency was hovering around Rs.105.5 to the dollar, so cumulatively the rupee has lost over 21%. According to Schehzad's 2018 viewpoint 1% devaluation leads to 0.3% incremental in CPI (inflation), Products ranging from basic necessities to luxurious items have started to become expensive. This will mount inflationary pressure on the economy and convince authorities to increase the key interest rate sooner than later as a remedy and purchasing power will reduce. The current trend to inflation with the price hike of US dollar against rupee may put a great pressure on working class. So to overcome the inflationary pressure on them and to maintain the supply of money with the current price level it would be better to sustain the aggregate demand.

14. The above report was submitted in the office of this Court on 1st October 2018 and copy thereof was handed over to the petitioners vide order dated 18th October, 2018 for their examination but despite this fact none of them till the last date of hearing raised any objection to the facts and figures, qua the changes in wage levels and living costs, mentioned in the report. It means that they had no objection thereto. Notwithstanding this fact, I also examined the contents of

this report with the documents which were placed on record through C.M.No.02 of 2018 in W.P.No. 58700 of 2017 and found that recommendations made by the Governing Body to the Government for enhancing the wage limits from Rs.18,000/- to Rs.22,000/- per month and daily wage rate from Rs.750/- to Rs.1000/- for the purpose of levy of contribution as envisaged under Section 2 (8) (f) of the Ordinance X of 1965 through the notification dated 15th June, 2017 was neither arbitrary nor unreasonable. In fact the report furnished by the respondents, reproduced hereinabove, puts paid to the argument of unreasonableness advanced by the petitioners.

15. The second objection was to the effect that the notification suffered from procedural impropriety. In support of this contention it was argued with vehemence that the principle settled in the Mustafa Impex's case was not followed and thus the notification issued without the approval of the Provincial Cabinet could not be held valid. In this context it is pertinent to observe here that judgment rendered in the Mustafa Impex's case[8] was made on 24th May, 2016 and was declaratory in character thus, it could not be applied to any notification issued prior to that date. This view finds support from Fahad Malik's case[9] wherein it was held that judgment handed down in the Mustafa Impex's case would operate prospectively. So, the principle of Mustafa Impex's case was applicable to the notification dated 15th June, 2017. The learned Additional Advocate General submitted that while issuing this notification the principle of Mustafa Impex's case was strictly followed and the same was issued after due approval of the Cabinet. In this context he presented, during the course of hearing, the summary which was put up before the Cabinet for approval of proposed wage limits and for issuance of disputed notification. Since the notification dated 15th June, 2017 was issued after the approval of the Provincial Cabinet and in accordance with the provisions of Article 105 read with Article 129 of the Constitution, it cannot be held invalid.

16. In the result this petition along with all connected petitions fail and are accordingly dismissed but with no order as to costs.

| Appendix | | |
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| Sr.No. | Case No. | Title |
| 1 | W.P.No.58700/17 | Nestle Pakistan Limited through Syed Faisal Raza v. Director, PESSI |
| 2 | W.P.No.60100/17 | Shahzor Feeds through Muhammad Qamar Farooq v. Director PESSI |
| 3 | W.P.No.60519/17 | Nishat Chunian Limited through Baber Ali Khan v. Director, PESSI |
| 4 | W.P.No.61349/17 | Murree Brewery Company Limited through Syed Tanveer Hussain Kazmi v. G.O.P. Labour and |

[8] **Messrs Mustafa Impex and others v the Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2016 SC 808)**

[9] **Pakistan Medical and Dental Council through President and 3 others v Muhammad Fahad Malik (2018 SCMR 1956)**

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| | | Human Resource Department |
| 5 | W.P.No.61551/17 | Messrs Seatle Pvt. Limited through Anwar-ul-Haq v. P.O.P through Secretary Labour and Human Resources |
| 6 | W.P.No.61826/17 | Nisar Spinning Mills (Pvt.) Ltd. etc Through Tariq Nisar v. Director Punjab Employees Social Security etc |
| 7 | W.P.No.61843/17 | Service Industries Limited through Umer Saeed etc v. Director Punjab Emplyees Social Security etc |
| 8 | W.P.No.61773/17 | Messrs Riaz Textiles Mill (Private) Ltd. through Amir Najeeb Director v. Director Punjab Employees Social Security etc. |
| 9 | W.P.No.62306/17 | Superior Textile Mills Limited 32-N Gulberg II Through its Authorized Representative Iftikhar Ali v. Director, PESSI etc |
| 10 | W.P.No.62614/17 | Messrs Cool Point Industries Pvt Ltd through Fahad Javed v. POP etc |
| 11 | W.P.No.62619/17 | Messrs Revive Pharmakon Pvt Ltd through Harib Javed v. POP etc |
| 12 | W.P.No.62590/17 | Aruj Garments Accessories Ltd etc v. Government of Punjab and others |
| 13 | W.P.No.62607/17 | Messrs Maha Plastic Industries Pvt Ltd through Saud Javed Butt v. POP and others |
| 14 | W.P.No62603/17 | Messrs Cool Industries Pvt Ltd through Syed Tanveer Mohsin v. POP and others |
| 15 | W.P.No.62705/17 | Shamas Textile Mills through Farooq Javed and others v. Director PESSI and others |
| 16 | W.P.No.62728/17 | Alhamd Corporation Pvt Ltd through Bashir Ahmed v. GOP and others. |
| 17 | W.P.No.62897/17 | M/s Kohinoor Textile Mills Ltd. through Syed Mohsin Raza Naqvi and others v. Government of the Punjab Labour and Human Resource Department through Secretary and others. |
| 18 | W.P.No.63497/17 | Haleeb Foods Limited through Kashif Ijaz Shiekh v. GOP, Labour and Human Resource Department and others. |
| 19 | W.P.No.63217/17 | Messrs Master Offisys (Pvt) Ltd. through Muhammad Iftikhar Hussain v. Government of Punjab and others |
| 20 | W.P.No.63225/17 | Messrs Procon Engineering Pvt Ltd v. Government of the Punjab and others. |
| 21 | W.P.No.63228/17 | Messrs Master Synthetic (Pvt) Ltd. through |

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| | | Muhammad Iftikhar Hussain v. Government of the Punjab and others. |
| 22 | W.P.No.63231/17 | Messrs Master Textile Mills Ltd v. Government of Punjab and others. |
| 23 | W.P.No.27503/17 | Messrs Northern Toolings Pvt. Ltd v. The Secretary Labour and Human Resource Department |
| 24 | W.P.No.27644/17 | Messrs Rupafil Ltd. v. Punjab Employees Social Security and others. |
| 25 | W.P.No.546/15 | Nestle Pakistan Limited v. Director PESSI |
| 26 | W.P.No.33800/14 | Al-Nasr Textile Limited v. The Govt. of Punjab |
| 27 | W.P.No.33755/14 | Pak Kuwait Textiles Ltd. Through M. Nawaz Janjua v. GOP etc. |
| 28 | W.P.No.14920-15 | Messrs Emco Industries Ltd through its Factory Manager v. Director PESSI Lahore and others. |
| 29 | W.P.No.28332-14 | Kohinoor Mills Limited v. Punjab Employees Social Security and others. |
| 30 | W.P.No.21877-14 | Mandiali Paper Mills v. Director Punjab Employees Social Security and others. |
| 31 | W.P.No.18781-16 | Messrs Rupali Polyster Limited v. Punjab Employees Social Security and others. |
| 32 | W.P.No.63704/17 | Siddique Leather Works Pvt. Ltd. through Syed Zafar ud Din Bukhari and others v. Director Punjab Employees Social Security etc. |
| 33 | W.P.No.63824/17 | Messrs Mughal Iron and Steel Mills Industries Ltd through Parvaiz Iqbal v. Director PESSI and others. |
| 34 | W.P.No.63906/17 | Naubahar Bottling Company Pvt. Ltd. through D.M Administration Malik Dilshad Raza v. Director Punjab Employees Social Security etc. |
| 35 | W.P.No.63990/17 | North Star Textiles Ltd etc through Amir Sheikh v. Director Punjab Employees Social Security and others. |
| 36 | W.P. No.64720/17 | Messrs Crescent Bahuman Limited through its Factory Manager Shahid Mahmood v. The Director The Punjab Employees Social Security and others. |
| 37 | W.P.No.64965/17 | Messrs Shezan International Ltd. through Faisal Ahmad Nisar v. The G.O.P through Secretary Labour and Human Resource Department and others. |
| 38 | W.P.No.64961/17 | Messrs Fatima Fertilizer Company Ltd. through Majid Khan Lodhi v. The G.O.P through |

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| | | Secretary Labour and Human Resource Deptt. and others. |
| 39 | W.P.No.65958/17 | Malmo Sweets and Bakers v. Director Punjab Employees Social Security and others. |
| 40 | W.P.No.65724/17 | Messrs Lahore Metal Finishing Pvt. Ltd through Shahid Laal v. Director Punjab Employees Social Security Institution Gulberg and others. |
| 41 | W.P.No.66259/17 | Messrs Masood Textile Mills Pvt Ltd through Its Manager Muhammad Ihsan Ullah v. Commissioner Punjab Employees Social Security and others. |
| 42 | W.P.No.67366/17 | Nishat Chunian Power Ltd v. Government of Punjab and others. |
| 43 | W.P.No.67826/17 | Itthad Chemicals Limited v. Government of the Punjab and others. |
| 44 | W.P.No.69162/17 | Malmo Foods Pvt. Ltd. through Asstt. Manager HR Shafiq ur Rehman v. Director Punjab Employees Social Security and others. |
| 45 | W.P. No.69399/17 | Messrs Fatima Fertilizer (Pvt) Ltd through Arshad Mehmood v. Govt of Punjab through Secretary Labour and Human Resource Dept and others. |
| 46 | W.P.No.69833/17 | Messrs Comfort Knitwear Pvt Ltd v. Director Punjab Employees Social Security and others. |
| 47 | W.P.No.70897/17 | Honda Atlas cars Pakistan ltd Through Maqsood ur Rahman v. Punjab through Secretary Labour and Human Resource Dept etc. |
| 48 | W.P.No.70884/17 | Maple Leaf Cement Factory Ltd through Farooq Ahmad Hashmi v. Director Punjab Employees Social Security Institution and others. |
| 49 | W.P. No.70908/17 | Messrs Ejaz Textile Mills Limited and others v. Director Punjab Employees Social Security Institution and others. |
| 50 | W.P.No.71615/17 | Agritech Limited v. Province of Punjab etc |
| 51 | W.P. No.72550/17 | Messrs Yousaf Weaving Mills Ltd. through Khawaja Muhammad Nadeem v. GOP and others. |
| 52 | W.P.No.74493/17 | Qarshi Industries (Private) Limited through its Authorized Officer Khalid Mehmood v. Director Punjab Employees Social Security Lahore and others. |
| 53 | W.P. No.74445/17 | US Denim Mills Pvt Ltd through Ch. Abdul Rehman v. Government of Punjab through |

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| | | Secretary Labour and Human Resource Deptt. and others. |
| 54 | W.P.No.75006/17 | Shahbaz Garments v. Director Punjab Employees etc |
| 55 | W.P.No.75003/17 | Work Clothing v. Director Punjab Employees etc |
| 56 | W.P.No.74906/17 | Messrs Waheed Shahzad Plastic Works Pvt Ltd through its Director v. Director Punjab Employees Social Security Institution and others. |
| 57 | W.P.No.74914/17 | Messrs Popular Tape Pvt Ltd through its Director v. Director Punjab Employees Social Security Institution and others. |
| 58 | W.P.No.74910/17 | Messrs Al Rabi International Pvt Ltd through its Director v. Director Punjab Employees Social Security Institution and others. |
| 59 | W.P.No.75139/17 | Dynamic Sportswear Pvt Ltd through Rao Muhammad Shahbaz v. Government of Punjab Labour and Human Resource Department through Secretary and others. |
| 60 | W.P.No.76606/17 | Newage Cables Pvt Ltd through Amer Bakhat Azam v. Province of Punjab through Secretary Labor and Human Resource Deptt. and others. |
| 61 | W.P.No.77146/17 | Messrs Jaffer Brothers v. Province of Punjab, and others. |
| 62 | W.P.No.77141/17 | Messrs Murshid Builders Pvt Ltd v. Province of Punjab through Secretary Labor and Human Resource and others. |
| 63 | W.P.No.77131/17 | Messrs Bayer Pakistan Pvt Ltd v. Province of Punjab through Secretary Labor and Human Resource and others. |
| 64 | W.P.No.77149/17 | Messrs Sialkot Dry Port Trust through Muhammad Hanif Khan v. Province of Punjab through Secretary Labour and Human Resource and others. |
| 65 | W.P.No.77177/17 | Messrs Murshid Builders v. Province of Punjab and others. |
| 66 | W.P.No.77173/17 | Messrs Jaffer Business System Pvt Ltd through Khwaja Muhammad Qasim v. Province of Punjab through Secretary Labour and Human Resource and others. |
| 67 | W.P.No.77834/17 | Messrs Shezan International Ltd. through Faisal Ahmad Nisar v. GOP and others. |
| 68 | W.P.No.77747/17 | Quetta Textile Mills Limited through Lal Hussain Mughal and others v. Director Punjab Employees |

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| | | Social Security Institution and others. |
| 69 | W.P.No.77716/17 | Master Sanitary Fittings Industries Ltd through Director Shiekh Mahmood Iqbal v. Province of Punjab through Secretary Labour and Human Resource Deptt and others. |
| 70 | W.P.No.77715/17 | Messrs Nishter Tiles Ceramics v. Province of Punjab and others. |
| 71 | W.P.No.77712/17 | Master Sanitary Fittings Industries Ltd through Director Shiekh Mahmood Iqbal v. Province of Punjab through Secretary Labour and Human Resource Deptt and others. |
| 72 | W.P.No.78078/17 | Thal Industries Corporate through Dilshad Raza v. GOP Labour and Human Resource Department through Secretary Civil Secretariat. |
| 73 | W.P.No.78532/17 | Dawood Exports Pvt Ltd through General Manager Shehzad Ahmed Sheikh etc v. Government of Punjab Labour and Human Resource Deptt through Secretary and others |
| 74 | W.P.No.78783/17 | Messrs HRSG Outsourcing Pvt. Ltd. through Mr. Shahid Hussain v. P.O.P through Secretary Labour and Human Resource Deptt. Civil Sectt. G.O.P and others. |
| 75 | W.P.No.79062/17 | Messrs Dawakhana Hakim Ajmal Khan Pvt Ltd and others v. The Director PESSI and others. |
| 76 | W.P.No.79174/17 | Messrs Kamal Hosiery Mills through Ahsan Kamal and others v. Govt of Punjab through Labour and Human Resource Department and others. |
| 77 | W.P.No.79246/17 | Big Feed Private Limited through Ahsan ul Haq v. Secretary Labour and Human Resource Department Government of Punjab and others. |
| 78 | W.P.No.79269/17 | Big Bird Foods (Pvt) Limited through Muhammad Mustafa Kamal v. The Secretary Labour and Human Resource Department GOP. Lahore and others. |
| 79 | W.P.No.79243/17 | Grand Parent Poultry Private Limited through Haroon Samad v. Secretary Labour and Human Resources Department Government of Punjab and others. |
| 80 | W.P.No.79265/17 | Big Bird Poultry Breeders (Pvt) Limited through Abdul Basit v. The Secretary Labour and Human Resource Department GOP, Lahore and others. |
| 81 | W.P.No.79384/17 | Olympia Chemicals Limited through its CFO, |

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| | | Lahore v. Secretary GOP, Labour and Human Resource Department Lahore and others. |
| 82 | W.P.No.79623/17 | Imran Pipe Mills v. Government of the Punjab and others. |
| 83 | W.P.No.79626/17 | Rizwan Industrial Corporate Through Muneer Hussain v. GOP Labour and Human Resource Department and others. |
| 84 | W.P.No.80228/17 | Messrs Engro Food Limited through Awais Mehmood v. Government of Punjab through Secretary Labour and Human Resource Department and others. |
| 85 | W.P.No.80123/17 | Messrs Mehboob Tube Mills Through Imran Mehboob v. Director Punjab Employees Social Security and others. |
| 86 | W.P.No.80381/17 | Messrs United Foam (Pvt) Limited through Mohammad Nawaz Jadoon v. The Director Punjab Employees Social Security and others. |
| 87 | W.P.No.81811/17 | Messrs Pakarab Fertilizers Limited v. The Government of the Punjab through Secretary Labour and others. |
| 88 | W.P.No.82066/17 | Suraj Cotton Mills Ltd through Farooq Ahmad and others v. Government of Punjab through Secretary Labour and Human Resource Department and others. |
| 89 | W.P.No.82832/17 | Messrs Shakarganj Food Products Ltd through Muhammad Naguib Siagal v. Government of Punjab through Secretary Law and Parliamentary Affairs and others. |
| 90 | W.P.No.87133/17 | Jauharabad Sugar Mills Ltd. through Amjad Mehmood v. Government of Punjab Labour and Human Resources Department through Secretary and others. |
| 91 | W.P.No.87377/17 | Sefam Pvt. Limited through Mr. Hamid Zaman v. GOP, Labour and Human Resource Department Lahore and others. |
| 92 | W.P.No.87584/17 | Messrs Crescent Education Trust through Maj (R) Hameed Ullah Awan v. Government of Punjab through Secretary Law and Parliamentary Affairs and others. |
| 93 | W.P.No.87504/17 | Messrs Ghani Gases Limited through Farzand Ali v. Director Punjab Employees Social Security and others. |
| 94 | W.P.No.87528/17 | Messrs Ghani Global Glass Limited through its |

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| | | Director and Company Secretary Farzand v. Director Punjab Employees Social Security and others. |
| 95 | W.P.No.88192/17 | Messrs Pioneer Cement Limited through Mohammad Fayyaz Anwar v. GOP, Labour and Human Resource Department through its Secretary and others. |
| 96 | W.P.No.88903/17 | Messrs Allied Marketing Pvt. Ltd through Ahmad Hasnain v. GOP through Secretary Labour and Human Resource Department and others. |
| 97 | W.P.No.88942/17 | Tanveer Cotton Mills (Pvt) Ltd etc through Muhammad Asif Jameel v. Punjab Employees Social Security Institution and others. |
| 98 | W.P.No.88939/17 | Al-Moiz Industries Ltd Unit (II) etc. through Senior Manager Legal Usman Ehsan Bhalli v. Government of Punjab Labor and Human Resource Deptt through Secretary and others |
| 99 | W.P.No.88707/17 | Messrs Khaadi SMC Pvt Ltd through Shamoon Sultan v. Director Punjab Employees Social Security and others. |
| 100 | W.P.No.88906/17 | Nishat Hotel and Properties through Khalid Qadeer Qureshi v. Director Punjab Employees Social Security and others. |
| 101 | W.P.No.90472/17 | Sazgar Engineering Working Ltd through Asif Aziz v. GOP through Secretary Labour and Human Resource Department and others |
| 102 | W.P.No.90646/17 | Abdur Rahman Corporation Pvt Ltd through Gaffar Ahmad Qamar etc. v. Govt of Punjab Labour and Human Resources Department and others. |
| 103 | W.P.No.91616/17 | Messrs Resource Linked Pvt Ltd through Adeel Rasheed v. Director Punjab Employees Social Security and others. |
| 104 | W.P.No.91675/17 | Messrs Ehsan Chappal Store Pvt Ltd through Khurshid Ahmad v. Director Punjab Employees Social Security and others. |
| 105 | W.P.No.92617/17 | C.A.Textile Mills Pvt Limited through Muhammad Adnan v. Government of the Punjab, through Secretary Law and Parliamentary Affairs Lahore and others. |
| 106 | W.P.No.96023/17 | Messrs Hillerest Solutions Pvt Ltd v. Province of Punjab and others. |

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| 107 | W.P.No.96291/17 | Messrs Ask Development Pvt. Ltd. through Mr. Nadeem Jahangir v. P.O.P through Secretary L&HRD Civil Secretariat Punjab and others. |
| 108 | W.P.No.96911/17 | Messrs Al Nasr Taxtiles Ltd Through Tariq Mehmood and others v. Director Punjab Employees Social Security Institution and others. |
| 109 | W.P.No.98678/17 | Beacon Impex Pvt. Ltd. through Eshan Ullah and others v. G.O.P Labour and Human Resource Department through Secretary and others. |
| 110 | W.P.No.103658/17 | EMCO Industries Limited through Rana Masood Anwar v. Government of Punjab Labour and Human Resource and others. |
| 111 | W.P.No.104154/17 | Qarshi Foundation Trust through its Authorized Officer Khalid Mehmood v. Director Punjab Employees Social Security Lahore and others. |
| 112 | W.P.No.104153/17 | Qarshi University through its Authorized Officer Khalid Mehmood v. Director Punjab Employees Social Security Lahore and others. |
| 113 | W.P.No.104269/17 | Taiga Apparel Pvt Ltd through Rana Amir Ali Kashif etc v. Director Punjab Employees Social Security and others. |
| 114 | W.P.No.105913/17 | Kamal Industries and others v. Govt of the Punjab and others. |
| 115 | W.P.No.106780/17 | Diamond Fabrics Ltd through Amjad Ali and others v. Director Public Employees Social Security and others. |
| 116 | W.P.No.108087/17 | Ashraf Sugar Mills Limited and others v. Province of Punjab and others. |
| 117 | W.P.No.112934/17 | Mandiali Paper Mills Pvt. Ltd. through Mr. Sheikh Ali Abbas v. Govt of Punjab and others. |
| 118 | W.P.No.117077/17 | ICI Pakistan Ltd v. POP and others. |
| 119 | W.P.No.119850/17 | Messrs Hascol Petroleum Ltd v. Province of Punjab and others. |
| 120 | W.P.No.123466/17 | Shafi Pvt Ltd through Muhammad Imran and others v. Director Punjab Employees and others. |
| 121 | W.P.No.123532/17 | Pak Elektron Limited (PEL) through its G.M v. Director Punjab Employees Social Security Lahore and others. |
| 122 | W.P.No.130567/18 | Nabeel Industries Pvt Ltd through Lal Hussain Mughal v. Director Punjab Employees Social Security and others. |
| 123 | W.P.No.132450/18 | Suraj Cotton Mills Ltd through Sadaqat Ali Khan and otehrs v. Director Punjab Employees Social |

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| | | Security Lahore and others. |
| 124 | W.P.No.133810/18 | Nishat Linen Pvt Ltd through Badar Ul Hassan and others v. Director Punjab Employees Social Security Lahore and others. |
| 125 | W.P.No.134781/18 | Messrs Ghazi Fabrics International Ltd. through Authorized Representative v. Director Punjab Employees Social Security Institution and others. |
| 126 | W.P.No.135631/18 | Ellcot Spinning Mills Ltd through Tariq Zafar Bajwa and others v. Director General Employees Social Security Institution and others. |
| 127 | W.P.No.135666/18 | JWD Sugar Mills Limited and others v. Province of Punjab through Secretary Labour & Resource Department and others. |
| 128 | W.P.No.136261/18 | Messrs Crescent Fibers Ltd. through Humayun Maqbool v. Director Punjab Employees Social Security Institution and others |
| 129 | W.P.No.136351/18 | Messrs Habeeb Haseeb Spinning Mills Pvt Ltd Through Muhammad Haseeb v. Director Punjab Employees Social Security Institution and others. |
| 130 | W.P.No.136873/18 | Highnoon Laboratories Ltd through Ms. Azmeh Khan v. POP, Through its Secretary Labour and Human Resource and others. |
| 131 | W.P.No.151230/18 | M/S Combined Fabrics Ltd and others v. Director Punjab Employees Social Security and others. |
| 132 | W.P.No.151733/18 | M/s Phoenix Security Service Pvt Ltd through its Manager v. Punjab Employees Social Security Institution etc |
| 133 | W.P.No.152165/18 | Resham Textile Industries Ltd through Muhammad Arshad Saeed etc v. Director Punjab Employees Social Security Institution and others |
| 134 | W.P.No.152127/18 | H.A. Fibres Pvt Ltd through Syed Ashher Ali v. Director Punjab Employees Social Security etc |
| 135 | W.P.No.150140/18 | Messrs Maple Leaf Cement Fact v. Government of Punjab and others. |
| 136 | W.P.No.150165/18 | Siara Textile Mills Pvt. v. Govt. of The Punjab and others. |
| 137 | W.P.No.154198/18 | Messrs Colony Textile Mills Ltd v. Director Punjab Employees Social Security and others. |
| 138 | W.P.No.155498/18 | Messrs Ejaz Textile Mills Limited and others v. Director of Punjab Employees Social Security and others. |
| 139 | W.P.No.156095/18 | Naveena Industries Ltd v. Director Punjab Employees Social Security and others. |

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| 140 | W.P.No.156785/18 | Ittehad Private Ltd through Asim Maqsood and others v. Director of Punjab Employees Social Security and others. |
| 141 | W.P.No.160005/18 | Hira Textile Mills through Nadeem Ishtiaq and others v. Director of Punjab Employees Social Security and others. |
| 142 | W.P.No.159922/18 | The Crescent Textile Mills Ltd v. Director Punjab Employees Social Security Institution etc |
| 143 | W.P.No.160983/18 | Messrs Gharibwal Cement Ltd through Reza Awan v. Government of Punajb through Labour and Human Resource Department and others. |
| 144 | W.P.No.161770/18 | Messrs Ultra Pack Pvt. Ltd through Authorized Person v. Director Punjab Employees Social Security Institution and others. |
| 145 | W.P.No.162584/18 | Messrs Chakwal Textile Mills Ltd through Mohammad Amman etc v. Director Punjab Employees Social Security Institution and others. |
| 146 | W.P.No.162391/18 | Sapphire Fibres Limited and others v. Director of Punjab Employees Social Security and others. |
| 147 | W.P.No.163177/18 | Kamal Limited through Zafar Iqbal v. Director Punjab Employees Social Security Institution and others. |
| 148 | W.P.No.163405/18 | Nishat Chunian Power Ltd through Farrukh Afzal v. Government of Punjab through Secretary Labour and Human Resource Department and others. |
| 149 | W.P.No.163639/18 | Messrs Best Fibres Pvt Ltd through Mansoor Zafar v. Director Punjab Employees Social Security Institution and others. |
| 150 | W.P.No.163939/18 | Pak Kuwait Textiles Ltd Through Tariq Mehmood and others v. Director of Punjab Employees Social Security Institution and others. |
| 151 | W.P.No.164036/18 | Messrs S Fazalilahi and Sons Pvt Ltd through Muhammad Afzal Bajwa v. Province of Punjab and others. |
| 152 | W.P.No.164368/18 | Alam Cotton Mills (Pvt) Ltd through Hammad Shafiq Alam v. Director PESSI and others. |
| 153 | W.P.No.166947/18 | Nishat Hospitality Pvt Ltd through Badar Ul Hassan v. Director of Punjab Employees Social Security Institution and others. |
| 154 | W.P.No.167802/18 | Indus Lyallpur Limited v. Director of Punjab Employees Social Security Lahore and others. |
| 155 | W.P.No.167983/18 | Amtex Limited v. Province of Punjab and others. |

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| 156 | W.P.No.168535/18 | Messrs Crescent Bahuman Limited through its Factory Manager Shahid Mahmood v. Director Punjab Employees Social Security and others. |
| 157 | W.P.No.168378/18 | Nishat Dairy Pvt Ltd through Badar Ul Hassan v. Director Punjab Employees Social Security Institution and others. |
| 158 | W.P.No.169208/18 | Bulleh Shah Packaging and others v. GOP and others. |
| 159 | W.P.No.169518/18 | Messrs E-Sqaure Pvt Ltd through Zameer Uddin v. Province of Punjab etc |
| 160 | W.P.No.169778/18 | Messrs Active Apparel International Pvt Ltd v. The Secretary GOP, Labour and Human Resource Department Lahore and others. |
| 161 | W.P.No.169786/18 | Packages Limited through its Factory Manager v. Government of Punjab through Secretary Department of Labour and others. |
| 162 | W.P.No.170567/18 | Messrs Kohat Cement Company Limited through Aizaz Mansoor Sheikh v. Director Punjab Employees Social Security Institution and others. |
| 163 | W.P.No.170397/18 | The Professional Employers Ltd through Salman Saeed and others v. The Punjab Employees Social Security Institute and others. |
| 164 | W.P.No.170558/18 | Kamal Factory through Anjum Zafar and others v. Province of Punjab Labour and Human Resource Department through Secretary and others. |
| 165 | W.P.No.170752/18 | Style Textile Pvt. Ltd and others v. Director Punjab Employees Social Security and others. |
| 166 | W.P.No.171314/18 | Lahore Chemical and Pharmaceutical Works Pvt. Ltd and others v. Province of Punjab and others. |
| 167 | W.P.No.172136/18 | College of Tourism and Hotel Management through Shafiq Ahmed v. Director Punjab Employees Social Security Institution and others. |
| 168 | W.P.No.172880/18 | Ahmed Oriental Textile Mills Ltd through Athar Nisar v. Province of Punjab through Labour and Human Resource Department and others. |
| 169 | W.P.No.173111/18 | Messrs Masood Textile Mills Limited through Arslan Khalid and others v. Commissioner Punjab Employees Social Security Institution and others. |
| 170 | W.P.No.175247/18 | Azgard Nine Limited and others v. Director of Punjab Employees Social Security Lahore and others |

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| 171 | W.P.No.176567/18 | Aruj Garments Accessories Ltd Through Muhammad Farooq Azam v. Province of Punjab Labour and Human Resource and others |
| 172 | W.P.No.176684/18 | Messrs Sapphire Retail Ltd through Nabeel Abdullah v. Director Punjab Employees Social Security and others. |
| 173 | W.P.No.178268/18 | Messrs Pakistan Fruit Juice Company Pvt Ltd through Ikram Elahi v. Director Punjab Employees Social Security and others. |
| 174 | W.P.No.178278/18 | Khalid Shafique Spinning Mills Ltd and others v. POP and others. |
| 175 | W.P.No.180992/18 | Messrs Ismail Industries Limited v. POP and others. |
| 176 | W.P.No.180553/18 | Messrs Akram Cotton Mills Ltd through Mushtaq Ahmad v. Punjab Employees Social Security Institution and others. |
| 177 | W.P.No.180622/18 | Messrs Shezan International Ltd. through Faisal Ahmad Nisar v. Government of Punjab through Secretary Labour and Human Resource Department and others. |
| 178 | W.P.No.181924/18 | Messrs Hudabiya Engineering Co Pvt Ltd and others v. Director Punjab Employees Social Security Institution and others. |
| 179 | W.P.No.183166/18 | Messrs Cotton Web Ltd through Naeem Iqbal v. Director Punjab Employees Social Security Institution and others. |
| 180 | W.P.No.186034/18 | Eastern Spinning Mills Ltd etc. v. POP and others. |
| 181 | W.P.No.186156/18 | E-Vision Manufacturing Ltd etc v. Director Punjab Employees Social Security and others. |
| 182 | W.P.No.186292/18 | Escorts Advanced Textiles Pvt Ltd through Arshad Kamal v. Director Punjab Employees Social Security Institution and others. |
| 183 | W.P.No.186458/18 | Messrs Pakistan Fruit Juice Company Pvt Ltd through Ikram Elahi v. Director Punjab Employees Social Security Institution and others. |
| 184 | W.P.No.186677/18 | Messrs Crescent Textile Mills Ltd through Sadiq Saleem v. Province of Punjab through Secretary and others. |
| 185 | W.P.No.186713/18 | Messrs Mr. Fabrics Pvt Ltd through Shahzad Nazir v. Director Punjab Employees Social Security and others. |
| 186 | W.P.No.187450/18 | Ravi Autos Sundar Pvt Ltd through Ali Raza v. |

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| | | GOP through Secretary and others. |
| 187 | W.P.No.189471/18 | Kamal Textile Mills (Pvt) Limited through Zahid Saleem v. POP and others. |
| 188 | W.P.No.194374/18 | Messrs Muller and Phipps Pakistan Pvt Ltd through Mian Atif Iqbal v. Punjab Employees Social Security Institution and others. |
| 189 | W.P.No.198420/18 | Al Moiz Industries Limited Unit II and others v. GOP and others. |
| 190 | W.P.No.198423/18 | Thal Industries Corporation Limited v. GOP and others. |
| 191 | W.P.No.199722/18 | Sefam Pvt Limited through Amer Riaz v. Govt of Punjab and others. |
| 192 | W.P.No.199860/18 | Sarena Industries and Embroidery Mills Pvt Ltd etc v. Govt of Punjab and others. |
| 193 | W.P.No.205210/18 | Messrs J and P Coats Pakistan Pvt Ltd v. POP and others. |
| 194 | W.P.No.205207/18 | Messrs Fulcrum Pvt Ltd v. POP and others. |
| 195 | W.P.No.205843/18 | Arsam Pulp and Paper Board Industries Pvt Ltd v. GOP and others. |
| 196 | W.P.No.211602/18 | Messrs SRC Pvt Ltd v. The Director, Punjab Employees Social Security Institution and others. |
| 197 | W.P.No.213989/18 | Naubahar Bottling Company Pvt Ltd v. Director Punjab Employees Social Security and others. |
| 198 | W.P.No.214002/18 | Murree Brewery Company Ltd v. Govt of Punjab Labour and Human Resource Department and others. |
| 199 | W.P.No.214582/18 | Hi Tech Poultry and others v. Secretary GOP and others. |
| 200 | W.P.No.215395/18 | Messrs Tara Imperial Industries Pvt Ltd v. Director Punjab Employees Social Security Institution etc |
| 201 | W.P.No.215409/18 | Messr/s Coral Enterprises Pvt Ltd v. Director Punjab Employees Social Security Institution and others. |
| 202 | W.P.No.215692/18 | Kohinoor Factory (Newly Kamal Industries) v. POP and others. |
| 203 | W.P.No.216076/18 | Nafeesa Textiles Ltd through Salman Khalid v. POP and others. |
| 204 | W.P.No.217991/18 | Suraj Cotton Mills Pvt Ltd through Farooq Ahmad v. Director Punjab Employees Social Security and others. |
| 205 | W.P.No.221872/18 | Fazal Farms Private Limited v. Director Punjab Employees Social Security Institution and others. |

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| 206 | W.P.No.222400/18 | Shaheen Air International Limited through its Senior Manager Legal v. Government of Punjab through Secretary Labour and Human Resource and others. |
| 207 | W.P.No.222801/18 | Messrs Ethical Laboratories Pvt Ltd v. POP and others. |
| 208 | W.P.No.225057/18 | Shahtaj Sugar Mills Ltd v. Province of Punjab and others. |
| 209 | W.P.No.226376/18 | FICO Electric Pvt Ltd v. Director Punjab Employees Social Security Institution Gujranwala and others. |
| 210 | W.P.No.226378/18 | Messrs Climax Engineering Company Ltd v. Director Punjab Employees Social Security and others. |
| 211 | W.P.No.226377/18 | FICO Hi Tech Pvt Ltd v. Director Punjab Employees Social Security etc |
| 212 | W.P.No.227041/18 | Messrs Bless Engineering Company Pvt Ltd v. Director Punjab Employees Social Security Institution Gujranwala and others. |
| 213 | W.P.No.228329/18 | Messrs Tara Crops Science Pvt. Ltd. through Director v. The Director Punjab Employees Social Security Institution Gulberg Office and others. |
| 214 | W.P.No.228885/18 | Ambition Apparel through Imran Amjad v. Director Punjab Employees and others. |
| 215 | W.P.No.240403/18 | Abu Bakar Textile Mills Ltd and others v. Director Punjab Employees Social Security Institution and others. |
| 216 | W.P.No.254378/18 | Hamza Sugar Mills Limited v. Government of the Punjab and others. |
| 217 | W.P.No.254380/18 | Madina Sugar Mills Limited v. Government of the Punjab and others. |
| 218 | W.P.No.254462/18 | Tayyab Textile Mills Limited and others v. Government of the Punjab and others. |
| 219 | W.P.No.256479/18 | AA Spinning Mills Limited v. Punjab Employees Social Security Institution and others. |
| 220 | W.P.No.243836/18 | Packages Construction Ltd v. GOP and others. |
| 221 | W.P.No.246063/18 | Messrs Jubilant Food Pvt Ltd and others v. Director Punjab Employees Social Security Institution and others. |
| 222 | W.P.No.250860/18 | Sheikh Soap Factory v. Province of Punjab Labour and Human Resources and others. |
| 223 | W.P.No.713/19 | Sadaqat Limited and others v. Punjab Employees |

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| | | Social Security Institution and others. |
| 224 | W.P.No.6735/19 | Messrs Kohinoor Spinning Mills Ltd through Muhammad Naveed v. Govt of the Punjab and others. |
| 225 | W.P.No.7955/19 | Popular Sugar Mills Limited through Ehsan ul Haq and others v. Province of Punjab and others. |
| 226 | W.P.No.11122/19 | Messrs Security General Insurance Company Limited through Farrukh Aleem v. Government of the Punjab and others. |
| 227 | W.P.No.13312/19 | Kohinoor Mills Ltd Through Muhammad Ejaz Virk v. Punjab Employees Social Security Institution and others. |
| 228 | W.P.No. 14587/19 | Diamond Pain Industries Pvt. Ltd. Through Mr. Farooq Ahmad v. Government of The Punjab and others. |
| 229 | W.P.No.17779/19 | Messrs Butt Sweets and Bakers v. Ministry of Labour and Human Resources and others. |
| 230 | W.P.No.187952/18 | Messrs Faisal Hospital through Muhammad Munir Zafar v PESSI and others. |
| 231 | W.P.No.23764/19 | Interwood Mobile Pvt Ltd through G.M. Abdul Latif v. Govt. of Punjab and others. |
| 232 | W.P.No.229003/18 | Seatle Pvt Ltd v. POP and others. |
| 233 | W.P.No.234768/18 | Paramount Distributor v. Government of the Punjab and others. |
| 234 | W.P.No.180695/18 | Fauji Fertilizer Company Ltd. v. PESSI, and others. |
| 235 | W.P.No.14589/19 | Honda Township Pvt Ltd through Mr. Adnan Ahmad v. Director, PESSI |
| 236 | W.P.No.257989/18 | Messrs Lahore Carpet Manufacturing Co. v. Director, PESSI |
| 237 | W.P.No.23760/19 | Interwood Mobel Pvt Ltd. through G.M. Abdul Latif Malik v. Government of Punjab, and others. |
| 238 | W.P.No.150141/18 | Messrs Wisal Kamal Fabrics v. Director, PESSI |
| 239 | W.P.No.193846/18 | Sohail Textiles Mills Ltd v Director, PESSI |
| 240 | W.P.No.27151/19 | Messrs Shafi Spinning Mills Ltd v. Director, PESSI and others. |

KMZ/N-19/L Petitions dismissed.

**PLJ 2019 Lahore 268**
***Present:*** **SHAHID WAHEED, J.**
**MUHAMMAD MASOOD-UL-HASSAN--Applicant**
**versus**
***Maulana*** **MASROOR NAWAZ JHANGVI, etc.--Respondents**

C.M. No. 2 of 2019, decided on 4.2.2019.

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

----S. 76-A--Bye-elections--Successful candidate--Concealment of assets--Challenge to--Issuance of notice--Expiry of tenure--Transfer of application--If the; instant application is ultimately allowed on trial as respondent is not continuing as Member of Punjab Assembly on basis of Bye-Election held in December, 2016--In fact relief for setting aside election has been rendered infructuous by lapse of time--If an issue is purely academic in that its decision one way or other would have no impact on position of parties, it would be waste of public time to engage itself in deciding it--Application disposed of. [P. 269] A & B

2014 SCMR 860 and (2005) 12 SCC 211 *ref.*

*Mr. Yousaf Naseem Chandio,* Advocate for Applicant.
*Mr. Muhammad Khalid Pervaiz Sipra,* Advocate for Respondent No. 1.
Nemo for Respondents No. 2 to 25.
Date of hearing: 4.2.2019.

**ORDER**

The election of Respondent No. 1, *Maulana* Masroor Nawaz Jhangvi, as a Member of the Punjab Assembly from constituency PP-78, Jhang-II (old PP-77, Jhang-V) in Bye Election, 2016 has been challenged through this application under Section 76-A of the Representation of the People Act, 1976 on the ground of concealment of assets.

2. The Election Tribunal, comprising Mr. Shahid Rafique, issued notice to Respondent No. 1, who appeared before it and contested the allegation. During pendency of instant application the tenure of the Assembly stood expired. Subsequently, the Election Commission of Pakistan, Islamabad *vide* Letter No. F-14(3)/2012-Estt-II dated 30th October, 2018 transferred the present application to this Court for decision. Complying with the said letter the Provincial Election Commissioner, Punjab through Letter No. F-17(1)/2018-Law dated 1st November, 2018 directed the Deputy Registrar of the Election Tribunal (GE-2013) to submit complete record of this application in the office of this Court. Pursuant to the direction of the Provincial Election Commissioner, office of this Court received the

record of the present case through Letter No. F.1(1)/2018-ETL (GE) dated 6th November, 2018.

3. The term of the election under challenge had expired by efflux of time in 2018; thereafter another General Election was held on 25th July 2018 and another Assembly constituted. Since the term of the Assembly constituted under the impugned election is over, the election of Respondent No. 1 cannot be set aside in the present proceedings even if the instant application is ultimately allowed on trial as the Respondent No. 1 is not continuing as Member of the Punjab Assembly on the basis of Bye-Election held in December, 2016. In fact the relief for setting aside the election has been rendered infructuous by lapse of time. In this view ground raised in the present application for setting aside the election of Respondent No. 1 has been rendered academic. This Court cannot undertake to decide an issue unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time to engage itself in deciding it. Lord Viscount Simon in his speech in the *House of Lords in Sun Life Assurance Co. of Canda v. Jervis* (1944 AC 111) observed:

> "I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties to a matter in actual controversy which the House undertakes to decide as a living issue."

4. In the case of *Munawar Iqbal Gondal v Mrs. Nasira Iqbal and other* (2014 SCMR 860) election to the office of President, Lahore High Court Bar Association was challenged. During pendency of the petition the term of office of the President, Lahore High Court Bar Association elected in terms of election held on 11th July, 2009 expired in February, 2010; and thereafter periodical election of the said office was held. In these circumstances, Hon'ble Supreme Court of Pakistan disposed of the matter with the observation that issue had become academic. Exactly on the same lines is the ratio of the cases of *Kashi Nath Mishra v Vikramaditya Pandey and others* (1998) 8.S.C. C. 735) and *Mundrika Singh Yadav v Shiv Bachan Yadav and others* (2005) 12 S.C. C. 211).

5. Under these circumstances, this application having become infructuous is disposed of.

(Y.A.) Application disposed of

**PLJ 2019 Lahore 481**

***Present*: MAMOON RASHID SHEIKH AND SHAHID WAHEED, JJ.**

**SECRETARY, HEALTH DEPARTMENT--Appellant**

**Versus**

**DR. MUHAMMAD KHALID MASOOD and others--Respondents**

I.C.A. No.1032 of 2016, decided on 22.01.2019.

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

----S. 79--Constitution of Pakistan, 1973, Art. 174--Filling of appeal by unauthorized person--Competency for authorization--Official capacity--Aggrieved person--Maintainability--Present appellant could not sue or prefer this appeal with reference to his designation for his official acts, unless he was "Corporation Sole", whereas he in fact is not--Fact of matter is that it is only Provincial Government which is concerned with matters pertaining to its affairs--No officer in his official capacity or otherwise can be said to be aggrieved person in relation to a judicial order regarding affairs of a Government--Admittedly, Government of Punjab was a party in constitutional petition and it could have preferred appeal if it felt so aggrieved by order passed in constitutional petition--In such view of matter, Secretary, Health Department, Government of Punjab cannot be said to be an aggrieved person and appeal by him is not maintainable--Nothing has been brought on record to indicate that Secretary, Health Department, Government of Punjab was legally competent to authorize Section Officer to sign and present instant memorandum of appeal before this Court--Even otherwise Addl. Advocate General has not appended any document with this appeal establishing fact that Section Officer was authorized by Secretary, Health Department, Government of Punjab to sign and present memorandum of appeal--This omission suggests that this appeal has been presented by an unauthorized person and thus is not competent--Appeal by Secretary, Health Department, Government of Punjab through Section Officer is not competent, it will not, therefore, be necessary to examine other points urged in appeal.--Appeal was dismissed. [P. 483] A, B and C PLD 1971 Kar. 625 and 1996 MLD 1510, *ref. Mr. Asif Mehmood Cheema,* Addl. Advocate General

for Appellant. *Mr. Anees Sherwani,* Advocate for Respondent. Date of hearing : 22.1.2019

**ORDER**

This Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972 calls into question the direction, to consider the case of Respondents No.1 to 3 for regularization of their period under contract with the King Edward Medical University, issued by the learned Single Judge in Chamber through order dated 12.05.2016 in a petition brought by the said espondents under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, that is, writ petition No.7243 of 2013.

2. Before commencing hearing on the merits of the instant appeal, we noticed that Respondents No.1 to 3 in their constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 had impleaded: (i) Government of the Punjab through Secretary, Health Department, Civil Secretariat Lahore; (ii) Special Secretary, Health Department, Government of the Punjab, Civil Secretariat Lahore (Mr. Babar Hayuat Tarar); (iii) King Edward Medical University, Lahore through its Principal/Head, Nila Gumbad, Lahore; and (iv) Syndicate, King Edward Medical University, Lahore, through Vice-Chancellor whereas the present appeal was preferred by the Secretary, Health Department, Government of the Punjab through Section Officer (AMI), Government of the Punjab, Specialized Healthcare and Medical Education Department, Lahore. This is a clear violation of Section 79, CPC read with Article 174 of the Constitution of the Islamic Republic of Pakistan, 1973 and, therefore, we asked learned Addl. Advocate General as to how the Secretary, Health Department, Government of the Punjab through Section Officer is aggrieved and can prefer an appeal against the order dated 12.05.2016 passed by learned Single Judge in Chamber in Writ Petition No.7243 of 2013. Responding to this question, learned Addl. Advocate General has

made an oral request at the Bar for permission to amend the appeal now and, as we understood him, he wants to make the Provincial Government as party at this stage. We are not inclined to accept this oral request as the claim, at this time, has become barred by time against the Government.

3. According to Section 79, CPC read with Article 174 of the Constitution of the Islamic Republic of Pakistan, 1973, the present appellant could not sue or prefer this appeal with reference to his designation for his official acts, unless he was "Corporation Sole", whereas he in fact is not. The fact of the matter is that it is only the Provincial Government which is concerned with the matters pertaining to its affairs. No officer in his official capacity or otherwise can be said to be aggrieved person in relation to a judicial order regarding the affairs of a Government. Admittedly, Government of the Punjab was a party in the constitutional petition and it could have preferred appeal if it felt so aggrieved by the order passed in the constitutional petition. In such view of the matter, the Secretary, Health Department, Government of the Punjab cannot be said to be an aggrieved person and the appeal by him is not maintainable. This view finds support from the case of *"Secretary, B. and R., Government of West Pakistan and 4 others v. Fazal Ali Khan"* (PLD 1971 Karachi 625) and *"Manthar and another v. Province of Sindh through Deputy Commissioner, Sanghar and 4 others"* (1996 MLD 1510)

4. There is yet another irregularity which cannot be ignored. The appeal in hands is by the Secretary, Health Department, Government of the Punjab through Section Officer (AMI), Government of the Punjab Specialized Healthcare and Medical Education Department, Lahore. Nothing has been brought on record to indicate that the Secretary, Health Department, Government of the Punjab was legally competent to authorize Section Officer to sign and present the instant memorandum of appeal before this Court. Even otherwise the Addl. Advocate General has not appended any document with this appeal establishing the fact that the Section Officer was authorized by the Secretary, Health Department, Government of the Punjab to sign and present the memorandum of appeal. This omission suggests that this appeal has been presented by an unauthorized person and thus is not competent.

5. Since we have come to the conclusion that the appeal by the Secretary, Health Department, Government of the Punjab through Section Officer is not competent, it will not, therefore, be necessary to examine the other points urged in the appeal.

6. The result of the above discussion is that this appeal is incompetent and, therefore, the same is dismissed.

(MMR) Appeal dismissed

**P L D 2020 Lahore 38**
**Before Shahid Waheed and Shahid Mubeen, JJ**
**SIKANDAR HAMEED---Appellant**
**Versus**
**MUHAMMAD ASLAM KAMBOH and others---Respondents**

I.C.A. No.63824 of 2019, heard on 29th October, 2019.

**Constitution of Pakistan---**

----Arts. 204, 19, 10 & 9---Contempt of Court Ordinance (IV of 2003) S. 3---Contempt of Court---Nature of contempt proceedings---Exercise of discretion by the Court---Scope---Jurisdiction to punish for contempt touched upon two Fundamental Rights of citizens, namely, "right to personal liberty" and "right to freedom of expression"; and therefore contempt of court law must be jealously and carefully applied and such power was to be prudently exercised with greatest reluctance --Court, if found that there existed contempt of Court beyond condonable limits, then strong arm of law must be used in name of public interest---Before a person may be held in contempt for disobeying a Court's order, such order must spell out the details of compliance in clear, specific, and unambiguous terms, so that such person would readily know exactly what duties or obligations were imposed upon him---Where there was indefiniteness and uncertainty in a judgment/order or where prima facie two views were possible to be drawn then unless it was specifically held that a party not only was bound by the terms issued in a judgment/order but also had defied such direction deliberately; such party could not be punished for contempt---Punishment for contempt of court could only rest on a clear, intentional violation of a specific, narrowly drawn order and specificity was essential pre-requisite of contempt proceedings---Contempt was a matter between Court and alleged contemnor and no one could demand as of right initiation of proceedings for contempt---Jurisdiction in contempt proceedings was to be exercised on a clear case having been made out and was not the personal glorification of a Judge in his office but an anxiety to maintain the efficacy of administration of justice which dictated the conscience of a Judge to move or not to move in contempt jurisdiction---Litigant may invite attention of a Court to such facts that may persuade a Court in initiating proceedings for contempt, however such person filing an application or petition before a Court did not become a complainant or petitioner in such proceedings and was mere informer or relator---Duty of such person ended with facts being brought to the notice of Court and thereafter it was for Court to act on such information---Court may at its discretion allow a litigant

continue to render its assistance during the course of proceedings---Contempt of Court Ordinance, 2003 could not be used for the implementation or execution of an order and such process of contempt could not be invoked in aid of a remedy where some other method of achieving desired result was available.
P.A. Tomas & Co. and others v. Mould and others [1969] 1 All ER 963; Muhammad Abu Zafar v. Secretary to Government of West Pakistan, Agriculture Department and others 1969 SCMR 298; Qadeer Ahmad v. Punjab Labour Appellante Tribunal, Lahore and another PLD 1990 SC 787; R v City of London Magistrate's Court and another, ex parte Green Green v. Staples and others [1997] 3 All ER 551; Shahid Orakazai v. Pakistan Muslim League (Nawaz Group) and 8 others 2000 SCMR 1969; Om Prakash Jaiswal v. D.K.Mittal and another AIR 2000 SC 1136; Syed Masood Alam Rizvi and others v. Dr. Muhammad Saeed 2009 SCMR 477; Khalid Rashid v. Kamran Lashari, Chairman, C.D.A., Islamabad and others 2010 SCMR 594; Muhammad Shehzad Malik v. Muhammad Suhail and another 2010 SCMR 1825; Sree Gour Nitai Saha v. Additional Deputy Commissioner (Revenue), Bakerganj and 5 others 1970 SCMR 887; West Pakistan Water and Power Development Authority through its Chairman v. Chairman, National Industrial Relations Commission PLD 1979 SC 912; Shah Alam Khan v. Vice-Chancellor, Agriculture University, Peshawar PLD 1993 SC 297; Rafique Ahmad Awan v. Additional District Judge, Sialkot and another PLD 2016 Lah. 282; Adam Phones Ltd. v. Goldschmidt and others [1999] 4 All ER 486; Mehdi Hassan, Additional Secretary, Food and Forests Department, Government of West Pakistan and another v. Zulfiqar Ali, Conservator of Forests, Development Circle, Lahore PLD 1960 Lah. 751 and Dr. Nazeer Saeed v. Muhammad Javed PLD 2014 Lah. 660 rel.

Ms. Ayesha Hamid for Appellant.
Gohar Nawaz Sindhu, Assistant Advocate General for Respondents.
Date of hearing: 29th October, 2019.

## JUDGMENT

**SHAHID WAHEED, J.---**The bedrock of the prayer made in this appeal is the principle which contemplates that the rules embodied in the law of contempt of Court are intended to uphold and ensure the effective administration of justice and that if the orders of the Courts are disobeyed with impunity by those who owe an obligation to the society to preserve the rule of law, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute. This supplication is reminiscent of Act 2, scene 1 of William

Shakespeare's drama, Measure for Measure, which opens with Angelo stating: "we must not make a scarecrow of the law, setting it up to fear birds of prey, and let it keep one shape, till custom make it their perch and not their terror". These lines create a wonderful emblematic expression of law, its purpose, implementation, and effect. This creates a profound picture of the law as a deterrence and people as birds of prey. What is drawn out of this picture is how Angelo views the purpose of law and human nature. If the scarecrow never moves, that is, the law is never enforced, the birds of prey (humans) will convert it into a comfortable perch and the law will no longer be a viable means by which social order is maintained. Yes, this discipline of law must be followed but at the same time it must be kept in mind that the jurisdiction to punish for contempt touches upon two important fundamental rights of the citizens, namely, the right to personal liberty and the right to freedom of expression. This is the cause for which it is said that contempt law should be most jealously and carefully applied and the power is to be prudently exercised with the greatest reluctance and if, after taking into account all the circumstances the Court finds contempt of Court beyond condonable limits, then strong arm of the law must be used in the name of the public interest and public justice. Now let us examine whether respondents can be held in contempt for alleged disobedience to the Court's order.

2. This Intra Court Appeal arises from a petition brought by the appellant before the learned Single Judge under Sections 3, 4 and 5 of the Contempt of Court Ordinance, 2003 read with Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 i.e. Crl .Org. No.47167-W of 2017 with twofold prayer. The first prayer was that the respondents be punished for violating the order dated 31st May, 2017 passed in W. P.No.1630 of 2015. The second prayer was to the effect that a direction be issued to the respondents to implement and comply with the said order.

3. The facts and circumstances which led the appellant to make the above-stated prayer through a contempt petition may briefly be stated. Land measuring 2 kanals 12 marlas situated at Chak No.439/E.B., Burewala, District Vehari, belonging to the appellant and others was taken over for construction of Stadium Road by the Municipal Committee, Burewala. On 24th June, 2013 the appellant submitted an application before the District Collector, Vehari for the payment of compensation of his above stated land or allotment of alternate land in lieu thereof on the ground that Stadium Road, Burewala was constructed without his consent and without payment of compensation. The request for alternate allotment was not acceded to, however, the District Collector, Vehari determined compensation of Rs.75,400,000/- and through Letter No.189-190/NTO dated 4th January, 2014 sent the matter to the Secretary, Local Government and Community Development (LG&CD) Department, Government of the Punjab for his perusal and further necessary action but on the contrary it

was shelved on the office racks. This indifference to the matter caused the appellant to move this Court through W.P. No.29493 of 2014, which was disposed of vide order dated 7th November, 2014 with a direction to the Secretary, LG and CD Department to decide the matter through a speaking order within one month. Pursuant to this order, the Secretary, LG and CD Department, on consideration of the matter, came to the conclusion that the appellant and others were not lawful owners of the land at the time when the road was constructed and thus, they were not entitled to any compensation. On the basis of this conclusion, the representation/application of the appellant was rejected vide order dated 4th December, 2014. The appellant, feeling aggrieved, again approached this Court through a constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 i.e. W.P. No.1630 of 2015 that was allowed vide order dated 31st May, 2017, penultimate paragraph thereof reads as under:--

> "12. In the circumstances, this writ petition is allowed, and order dated 04.12.2014 passed by the Secretary Local Government and Community Development/respondent No.2 is declared to be of without lawful authority and of no legal effect. In the result, the respondents are directed to forthwith pay compensation to the petitioner in lieu of the land (2 Kanal 12 Marla falling in Khasra No.32/3, situated in Chak No.439/E.D. Burewala District Vehari) illegally taken over for construction of a road."

This is the order that according to the appellant, was violated by the respondents and thus, they were liable to be prosecuted and punished under the Contempt Law.

4. Although for the disposal of instant appeal the narration of facts leading up to the order dated 31 st May, 2017 is sufficient, we still consider that the events following the said order should also be mentioned so that there is no confusion. On 20th June, 2017 the appellant moved an application before the Secretary, LG and CD Department for payment of compensation of Rs.75,400,000/-. This application was not responded and thus, on 30th June, 2017 the appellant brought a contempt petition, that is, Crl.Org.No.47167-W of 2017, giving rise to present appeal, against the respondents for having violated the order dated 31st May, 2017. It appears that the Secretary, LG and CD Department after having received notices of the contempt petition challenged the order dated 31st May, 2017 through an Intra Court Appeal bearing No.64805 of 2017, which was dismissed in limine vide order dated 13th November, 2017. The respondents thereupon filed a petition for leave to appeal (C. P. No.67-L of 2018), which came up for hearing before the Hon'ble Supreme Court of Pakistan on 27th February, 2018 and the following order was passed:--

"States that he has no objection with regard to the payment of compensation as admittedly the property in question belongs to the respondents Nos.1 to 4 (respondents), which has been acquired by the petitioner or any other agency and usufruct of such property as a road without the compensation undoubtedly is against the fundamental right under Article 23 of the Constitution of the Islamic Republic of Pakistan. However, the learned Courts below have granted exorbitant compensation without enabling the petitioner to prove that the amount is unreasonably on the higher side and even without recording tentative evidence to assess the correct market value thereof. The petitioner is prepared to pay the compensation provided that the same is determined fairly and according to the market value of the land acquired. Issue notice to the respondents. Subject to deposit of Rs.10,000,000/- (Rupees ten million) within one month with the Trial Court, the operation of impugned judgment is suspended. However, if the deposit is not made, this injunctive order shall be deemed to have been withdrawn."

In compliance with the said order the amount of Rs.10,000,000/-, through Pay Order No.567977 dated 26th March, 2018 drawn at Bank of Punjab, Burewala were tendered before the Deputy Registrar (Judicial) of this Court who vide Challan No.159755 dated 27th March, 2018 deposited the same in the MCB Bank, Lahore. In the meantime the Municipal Committee, Burewala vide letter No.149- 51 /MCB dated 27th January, 2018 requested the District Price Assessment Committee, Vehari to determine the sale price of the land. The District Price Assessment Committee accordingly in its meeting held on 10th March, 2018 determined the rate of Rs.4,000/- per marla as sale price of the land. It appears that the said determination of compensation was presented before the Hon'ble Supreme Court in C.P.No.67-L of 2018 on 4th April, 2018 when following order was passed:-

"Learned counsel for the petitioner states that the amount directed to be deposited by it vide our order dated 27.02.2018 has been so deposited; however, learned counsel for the respondents has relied upon a notification issued by the Deputy Commissioner under the Stamp Act, 1899, to establish that the price of the property in question is Rs.50 lacs per marla. The learned counsel for the petitioner wants time to examine the said document and also to place on the record as to what is the true market value of the property at the time when it was taken over by the petitioner. With regard to the deposit of Rs.1 crore by the petitioner, the

respondents shall be entitled to withdraw such amount subject to furnishing a solemn surety."

Pursuant to the said order the appellant along with other co-owners withdrew Rs.10,000,000/- from the Deputy Registrar (Judicial) of this Court after furnishing solemn surety. Subsequently, on consideration of the matter, the Hon'ble Supreme Court of Pakistan dismissed C.P. No.67-L of 2018 through order dated 18th September, 2018, which reads as under: --

"Admittedly the property in question belongs to the respondents, which was never acquired by the Government or the Municipal Committee Burewala. Obviously in such circumstances, whatever compensation had been determined and awarded to the respondent is appropriate and valid in law. Therefore, we do not find any merit in this petition which is accordingly dismissed."

5. It is an admitted fact that as long as the proceedings in the Hon'ble Supreme Court continued, the proceedings in the contempt petition i.e. Crl .Org. No.47167-W of 2017 also continued. Consequent upon the dismissal of C.P. No.67-L of 2018 the appellant appeared before the learned Single Judge in Crl .Org. No.47167-W of 2017 and contended that as per mandate/tenor of order dated 31st May, 2017 passed in W. P. No.1630 of 2015, it was clear and unambiguous that the respondents were bound to pay due compensation to the appellant in lieu of his property. After taking into account the above-stated facts and circumstances of the case, learned Single Judge held that through order dated 31st May, 2017 passed in W.P. No.1630 of 2015, the quantum of compensation payable to the appellant was not determined, hence, contempt petition was not maintainable. Accordingly, contempt petition i.e. Criminal Original No.47167-W of 2017 was dismissed vide order dated 10th June, 2019. So, this appeal.

6. Impeaching the order dated 10th June, 2019 passed by the learned Single Judge in Criminal Original No.47167-W of 2017 the appellant's counsel says that by order dated 31 st May, 2017 issued in W.P. No.1630 of 2015, order dated 4th December, 2014 of the Secretary, LG and CD Department, Government of the Punjab was set aside and consequently, order dated 4th February, 2014 of the District Collector, Vehari assessing compensation payable to the appellant i.e. Rs.75,400,000/- stood revived and thus, there was no question whatsoever for re-determining the compensation by the District Price Assessment Committee, which was illegally constituted with mala fide intent so as to frustrate the effect of order dated 31 st May, 2017.

7. The argument canvassed at the Bar suggests that though in the order dated 31st May, 2017 passed in W.P. No.1630 of 2015 the quantum of compensation was not determined yet the implication of the said order was that the respondents were to pay that compensation which was determined by the District Collector, Vehari . This brings us to the consideration of the question whether the respondents could be held in contempt for disobeying or violating the order which was inferential, deductive and implied. To see what principles we can use to find the answer to this question, it is essential that we review the case-law wherein such type of question was arisen.

8. In P.A. Thomas & Co.'s case[1] the plaintiffs, a company specializing in the field of finance, brought an action claiming that during the course of their employment with the plaintiffs, the defendants had learnt the "know-how" of four alleged novel financial schemes which were the brain child of the plaintiffs. An interim injunction was granted in the terms asked for by the plaintiffs restraining the defendants from disclosing, divulging, or making use of any confidential information acquired by them during their employment by the plaintiffs relating to (a) schemes for the sale of income, (b) scheme providing for splitting an endowment; (c) scheme concerned with death in service. In preparing their defence to the allegation that the material which the defendants were using was confidential the defendants, after the injunction was granted, wrote to the firms competing with the plaintiffs, in an endeavour to discover whether the plaintiffs' schemes were novel and therefore confidential; these letters, so it was alleged, disclosed confidential material. On motion to commit the defendants for breach of the interim injunction the plaintiffs contended that the proper inference was that the defendants, in communicating their understanding of the plaintiffs' scheme, must have appreciated that they were at risk of disclosing confidential information in breach of the injunction. The plaintiffs lost their action on the ground that when enforcement of an injunction to protect confidential "know-how" was sought, it was essential to make clear what it was that was to be protected.

9. In Muhammad Abu Zafar's case[2] , challenge was thrown to the order whereby services of the employee were terminated. The Court while setting aside the order terminating the services issued a direction that the employee should be treated as continuing in service and being entitled to the rights, benefits and privileges. Subsequently, the employee brought a petition for contempt proceedings with the contention that the employer did not pay arrears of his salary and deliberately flouted the order. Having regard to the order made in the writ petition, it was held that it could not be said that a mandamus of an absolute nature was issued as regards salary of the employee and thus, request to take action against the respondents for contempt of Court was refused.

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[1] **P. A. Thomas & Co. and others v. Mould and others [1968] 1 All E.R. 963**
[2] **Muhammad Abu Zafar v. Secretary to Government of West Pakistan, Agriculture Department and others (1969 SCMR 298)**

10. In Qadeer Ahmad's case[3] , the services of the employee were terminated by the Company. This order was set aside by the Court. It was, however, clarified that employer was not precluded from taking fresh action against the employee in accordance with law. The employer instead of reinstating the employee issued him an inquiry notice. The employee brought an application before the Court with the prayer that employer be directed to reinstate him with back benefits and also to initiate proceedings against the employer under the Contempt of Court Act for deliberately avoiding compliance of the order. It was held that in order to make out a case for contempt it was necessary to establish a specific direction and its breach by the party; since no express order was passed for payment of back benefits, no breach would be said to have taken place for which the employer could be held in contempt. It was further held that proceedings for contempt could not be taken where the violation related to an order which was inferential, deductive, implied and which was open to debate and arguments.

11. In the case of R v. City of London Magistrates' Court[4] , officers of the Serious Fraud Office (the SFO) on 6th December raided the applicant's offices to execute a search warrant in relation to an investigation concerning another individual. Six computers were seized and subsequently, sent to a Company for the information covered by the warrant to be downloaded. While the search was still proceeding, the applicant obtained an ex-parte injunction which provided that no further downloading should take place and that any computers which had already been downloaded should be returned by 11 a.m. on 9th December. The officers conducting the search were duly notified at around 5:30 p.m. and a fax was sent to the Company instructing them to cease all work on the remaining computer equipment. However, the process of transferring information, which was completed at around midnight, was by that time taking place automatically and the fax was not seen until the morning of 9th December, when the director of the SFO also learnt of the injunction for the first time. On 10th December the applicant was granted a further interim order providing for the return of the computers once the downloading was complete. The applicant applied to commit the director and other officers of the SFO to prison for contempt of court for failing to comply with the orders contending, inter alia, that the downloading process had been completed by midnight on 6th December once the information had been transferred. The respondents contended that they were not in breach of the order because the process of downloading included not only the imaging process but also the writing of the image to disc for the purposes of securing it. It was held that the respondents were not guilty of contempt, since

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[3] **Qadeer Ahmad v. Punjab Labour Appellate Tribunal, Lahore and another (PLD 1990 SC 787)**

[4] **R v City of London Magistrates' Court and another, ex parte Green Green v Staples and others [1997] 3 All E.R. 551**

the orders had not been directed to them either collectively or individually, their terms were ambiguous both as to what was to be done and by whom, and they had not been served on them personally.

12. A close look at the above cited case-law is enough to deduce a principle that before a person may be held in contempt for disobeying Court's order, the order must spell out the details of compliance in clear, specific, and in an unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him. Indefiniteness and uncertainty in a judgment/order or where prima facie two views are possible to be drawn and unless it is specifically held that the party not only was bound by the terms issued in the judgment/order but also had defied the direction willfully and deliberately, such party cannot be punished for contempt. In other words punishment for contempt can only rest on a clear, intentional violation of a specific, narrowly drawn order; specificity is essential pre-requisite of a contempt proceedings.

13. Applying the above stated principles to the facts of the present case, it is to be seen as to what kind of direction was given to the respondents for compliance in the order dated 31 st May, 2017 passed in W.P. No.1630 of 2015. According to the appellant, implication of the said order was that the respondents were bound to pay compensation to the appellant at the rate which was determined by the District Collector. Clarifying this plea it was submitted that the moment order dated 4th December, 2014 issued by the Secretary, LG and CD Department, Government of the Punjab was set aside by this Court, order dated 4th February, 2014 of the District Collector was automatically revived, wherein the appellant and others were held entitled to get compensation of Rs.75,400,000/-. On the other hand, the Chief Officer, Municipal Committee, Burewala in his compliance report furnished in Crl .Org. No.47167-W of 2017, stated that since the compensation determined by the District Price Assessment Committee was approved by the Hon'ble Supreme Court of Pakistan through order dated 18th September, 2018 passed in C.P.No.67-L of 2018 the appellant was not entitled to get compensation which was fixed by the District Collector. There was yet another interpretation which was made by the learned Single

Judge in the impugned order and that was that through order dated 31st May, 2017 no compensation was determined by this Court and thus, the contempt petition was not maintainable. Conjoint reading of the said three interpretations made us to conclude that there was a lurking ambiguity in the order dated 31st May, 2017 as it was open to debate and arguments. It was not specific with regard to quantum of compensation to be payable by the respondents to the present appellant. Merely on the basis of inferences the proceedings in contempt could not be initiated and thus, the order dated 10th June, 2019 passed by the learned Single Judge in Crl.Org. No.47167-W of 2017 warrants no interference.

14. Apart from the reason stated above, there are two other grounds, which we consider sufficient to hold that there should be no contempt of court proceedings in this case. Firstly, it is now well settled that the contempt is a matter between the Court and the alleged contemnor. No one can compel or demand as of right initiation of proceedings for contempt. A jurisdiction in contempt is exercised on a clear case having been made out. It is not personal glorification of a Judge in his office but an anxiety to maintain the efficacy of administration of justice which dictates the conscience of a Judge to move or not to move in contempt jurisdiction. A litigant may invite the attention of the Court to such facts that may persuade the Court in initiating proceedings for contempt. However, such person filing an application or petition before the Court does not become a complainant or petitioner in the proceedings. He is just an informer or relator. His duty ends with the facts being brought to the notice of the Court. It is thereafter for the Court to act on such information or not to act though the litigant moving the Court may at the discretion of the Court continue to render its assistance during the course of proceedings[5] . In the present case, incidentally the learned Single Judge who passed the order dated 31st May,

[5] **Shahid Orakzai v. Pakistan Muslim League (Nawaz Group) and 8 others 2000 SCMR 1969, Om Prakash Jaiswal v. D. K. Mittal and another (AIR 2000 Supreme Court 1136), Syed Masood Alam Rizvi and others v. Dr. Muhammad Saeed (2009 SCMR 477), Khalid Rashid v. Kamran Lashari, Chairman, C.D.A., Islamabad and others (2010 SCMR 594) & Muhammad Shehzad Malik v. Muhammad Suhail and another (2010 SCMR 1825)**

2017 in W.P.No. 1630 of 2015, had the occasion to examine the said order in contempt petition (Criminal Original No.47167-W of 2017) brought by the appellant and held that no case for contempt was made out. Taking cue from Sree Gour Nitai Saha's case[6] and Wapda's case[7] we are of the view that when the learned Single Judge himself found that it was not a contempt, the interference at the appellate stage is not called for. Secondly, like any other organ of the State the judiciary is also manned by human beings, but the function of the judiciary is distinctly different from other organs of the State, in the sense its function is divine. Forgiveness is one of the attributes of Almighty Allah. Thus, even if it is assumed that the Court order was disobeyed, which is not, our inclination would still be towards mercy and we would exercising divine attribute forgive the respondents because, in our opinion, record does not suggest that they had any intention to do so and it was an act under some misunderstanding[8] .

15. It is now fully settled that no contempt proceedings could be founded on the order dated 31st May, 2017 passed in W.P.No.1630 of 2015, so let us now see if this Court can use the Contempt of Court Ordinance, 2003 for the implementation or execution of said order or in other words grant the second prayer made in the contempt petition. We do not think such an order can be made in the proceedings under the Contempt of Court Ordinance, 2003 or Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 for that while exercising jurisdiction under contempt law the Court can either find the person proceeded against guilty or discharge him and nothing else. And the other reason for declining the second prayer is that the process of contempt cannot be invoked in aid of a remedy where some other method of achieving desired result is available[9] . In other words when an order passed by this Court in the exercise of extraordinary constitutional jurisdiction is not complied with, the person aggrieved may apply to this Court for further directions when there can be a bona fide dispute as to what is the effect of the order. On consideration

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[6] **Sree Gour Nitai Saha v. Additional Deputy Commissioner (Revenue), Bakerganj and 5 others (1970 SCMR 887)**

[7] **West Pakistan Water and Power Development Authority through its Chairman v. Chairman, National Industrial Relations Commission (PLD 1979 Supreme Court 912)**

[8] **Shah Alam Khan v. Vice-Chancellor, Agriculture University, Peshawar (PLD 1993 SC 297) & Rafique Ahmad Awan v. Additional District Judge, Sialkot and another (PLD 2016 Lahore 282)**

[9] **Adam Phones Ltd v Goldschmidt and others [1999] 4 All ER 486**

of such application the Court may after determining the effect of its order give further directions for its enforcement; it would be like a Court executing a decree.[10] .

16. In these circumstances, we see no ground for finding any of the respondents in contempt of Court and to interfere with the impugned order. The appeal is, therefore, dismissed.

KMZ/S-90/L Appeal dismissed.

[10] **Mehdi Hassan, Additional Secretary, Food and Forests Department, Government of West Pakistan and another v. Zulfiqar Ali, Conservator of Forests, Development Circle, Lahore (PLD 1960 Lahore 751) and Dr. Nazeer Saeed v. Muhammad Javed (PLD 2014 Lahore 660)**

**2020 C L D 60**
**[Lahore]**
**Before Shahid Waheed, J**
**Messrs RMC CONSTRUCTION COMPANY---Petitioner**
**Versus**
**GUJRANWALA DEVELOPMENT AUTHORITY and others---Respondents**

Writ Petition No. 47688 of 2019, heard on 23rd September, 2019.

**(a) Contract---**

----"Mobilization Advance"---Meaning and concept in context of commercial contract---In civil construction projects, an advance was given to a contractor which was known as "Mobilization Advance" and basic purpose of such "Mobilization Advance" was to extend financial assistance within the terms of a contract to the contractor to mobilize the men and material resources for timely and smooth take off of a project.

**(b) Arbitration Act (X of 1940)---**

----Ss. 20 & 41---Civil Procedure Code (V of 1908) O. XXXIX, Rr. 1 & 2---Contract--- Commercial contract--- Construction project---Mobilization advance issued to contractor against Bank guarantee in favour of Development Authority---Arbitration---Referring dispute to arbitrator---Stay/restraining of encashing of Bank guarantees provided by contractor to Development Authority against mobilization advance---Scope---Petitioner/contractor sought quashing of orders of Arbitrator as well as restraining operation of letters issued by Development Authority whereby it sought to encash Bank guarantees provided by petitioner---Validity---Although court was vested with the powers to grant interim relief, but such discretion must be exercised sparingly and only in appropriate cases---Such discretion ought to be exercised in the exceptional cases when there was adequate material on record, leading to a definite conclusion that Development Authority was likely to render entire arbitration proceedings infructuous, by frittering away the properties or funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of arbitration award to its execution---Demand of encashing of bank guarantee through impugned letter was to be deemed to be a conclusive evidence regarding failure of the petitioner to comply with contractual terms and thus, Bank was bound to honour commitment made in the guarantee---Such encashment of Bank guarantee could not be put off until the culmination of proceedings of S. 20 of the Arbitration Act, 1940 before Trial Court or the announcement of award to be made by the arbitrators merely on the ground that a dispute existed between the parties to the contract and therefore

injunction sought by petitioner/contractor could not be allowed---Constitutional petition was dismissed, in circumstances.

Messrs Jamia Industries Ltd. v. Messrs Pakistan Refinery Ltd., Karachi PLD 1976 Kar. 644; Project Director, Balochistan Minor Irrigation and Agricultural Development Project, Quetta Cantt. v. Messrs Murad Ali and Company 1999 SCMR 121 and Standard Construction Company (Pvt.) Limited v. Pakistan through Secretary M/o Communications and others 2010 SCMR 524 ref.

Pakistan Engineering Consultants v. Pakistan International Airlines Corporation and another 1989 SCMR 379; Messrs National Construction Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 SC 311; District Council, Gujrat v. Iftikhar Ahmad 1988 MLD 1461 and B.S.M. Contractors Pvt. Ltd. v. Rajasthan State Bridge and Construction Corporation Ltd. and another AIR 1999 Delhi 117 rel.

**(c) Contract---**

----Commercial Contract---Bank Guarantee---Encashment of Bank guarantee---Principles---Commercial transactions must go on the solemn Bank guarantee irrespective of any dispute between contracting parties regarding whether or not the work carried out at a construction site was up to the contractual standard---Banks could not be absolved of their responsibility to meet such obligations---Employer/developer extended facility of Mobilization Advance to a contractor against a Bank guarantee under the assurance that nothing would prevent it from getting it back if contractor committed default in fulfilling its obligations arising out of a contract---Bank guarantee, therefore, constituted an agreement between a Bank and a developer/employer under which there was an absolute obligation on the Bank to make the payment to the employer merely on demand---Banks were prohibited under a Bank guarantee from raising any objections to such payment---Only exceptions were cases where there was established fraud (based on material events and not on bald pleadings in the application for stay) of egregious nature of which Bank had knowledge and where allowing encashment would result in irretrievable injustice to one of the parties concerned, and in such cases Court may interdict encashment of a bank guarantee.

Riaz Karim Qureshi for Petitioner.

Muhammad Arif Raja, Additional Advocate-General with Ch. Muhammad Idrees, Director Engineering and Ali Ahmad, Deputy Director, GDA for Respondents Nos. 1 to 3.

Date of hearing: 23rd September, 2019.

## JUDGMENT

**SHAHID WAHEED, J.---**Undaunted by the failure in the Courts below the petitioner has moved this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 seeking an order in the nature of writ of certiorari for quashing the impugned orders and the grant of temporary injunction as prayed for in the application under section 41 read with Schedule-II to the Arbitration Act, 1940, which was filed along with application under section 20 of the said Act.

2. The petitioner through its application before Civil Judge, Gujranwala under Section 41 read with Schedule II to the Arbitration Act, 1940 made twofold prayer. First, that operation of the letters dated 3rd July, 2018 and 4th July, 2018 be suspended and second, that the respondents be restrained from allowing the other agencies to enter at the site without getting the joint measurement of the work done by it.

3. The first prayer relates to two letters, that is, letter No.GDA/DDE/196 dated 3rd July, 2018 and letter No. GDA/DDE/198 dated 4th July, 2018. The backdrop of these two letters is that on 27th December, 2017 the petitioner was awarded a contract for the rehabilitation/construction of Katcha Khayali Road from Karwan Chowk to Sheikhupura Road and Zainab Hospital Road from Sheikhupura Road to Jinnah Road including allied branches, Gujranwala. The contract was awarded in the sum of Rs.206,461,948/- and the work was to be completed within twenty four months and for that matter the petitioner upon furnishing bank guarantee bearing No. LG#BOK/LHR/ 0023/02/2018 dated 1st February, 2018 obtained Mobilization Advance. After the lapse of six months, the work at the site was not found significant and this was construed as failure of the petitioner to discharge its obligation for which Mobilization Advance was granted. The respondent No.3 thus, through letter No. GDA/DDE/196 dated 3rd July, 2018 requested the Manager of the Bank of Khyber, MM Alam Road Branch, Gulberg-III, Lahore that an amount of Rs.20,646,195/- be transferred and deposited into the account of the Gujranwala Development Authority. On the following day, the respondent No.3 vide letter No.GDA/DDE/198 dated 4th July, 2018 informed the petitioner that in pursuance of the approval of the Competent Authority, the contract had been rescinded and the earnest money amounting to Rs.4,200,000/- had been forfeited, which was given in the shape of CDR bearing No. 00987184 dated 26th December, 2017. It was, at this stage, that the petitioner on 7th July, 2018 filed application under section 20 of the Arbitration Act, 1940 for appointment of an arbitrator since the contract between the parties provided for arbitration. The petitioner also filed application seeking interim injunction, which was declined through the impugned orders.

4. The first question for consideration is whether, in the given facts and circumstances of the case, operation of the said two letters could be suspended during the proceedings under section 20 of the Arbitration Act, 1940 before the Trial Court. As regards letter No. GDA/DDE/196 dated 3rd July, 2018 for the encashment of Mobilization Advance Guarantee, it is contended that invocation of the Guarantee was fraudulent and the subordinate courts misdirected themselves while paying no attention to the principle settled in Jamia Industries' case[1] , Murad Ali & Co.'s case[2] and Standard Construction Company's case[3] and thus, were wrong when they applied the general principles of injunction to decline the interim relief relating to that guarantee. Responding to the above argument, Mr. Muhammad Arif Raja, Additional Advocate General, in his usual eloquence submitted that the bank guarantee furnished being unconditional, the Gujranwala Development Authority, the beneficiary, was entitled to invoke and realize the same irrespective of any pending dispute for otherwise the purpose of giving bank guarantee would be defeated and the present being neither a case of fraud nor of irretrievable loss, the application for grant of injunction was misconceived.

5. Before proceeding further it is apposite to state here that the matter directly and substantially in issue relates to the encashment of Mobilization Advance Guarantee. On the contrary, the precedents cited by the petitioner's counsel deal with other kinds of bank guarantee and thus, on this short ground it would be inapt to dilate upon the principle settled therein.

6. In civil construction projects advance is given to the contractor which is known as Mobilization Advance. The basic purpose of Mobilization Advance is to extend financial assistance within the terms of the contract to the contractor to mobilize the men and material resources for timely and smooth take off of the project. It is for this reason the Standard Bidding Document containing general conditions of contract, approved by Government of the Punjab, Finance Department vide Notification No.RO(Tech) FD 18-44/2006 dated 7th December, 2007 provides the procedure in extending the facility of Mobilization Advance. And that is that where tendered amount as mentioned in the letter of acceptance exceeds rupees ten million, the competent authority may, on the request of the contractor, sanction a mobilization advance upto fifteen percent of the said tendered amount in the manner and subject to the following conditions:

i. Initially, a sum equal to ten percent of the tendered amount and thereafter a further sum equal to five percent of the tendered amount may be sanctioned on the furnishing of a certificate by the engineer incharge of

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[1] **"Messrs Jamia Industries Ltd. v. Messrs Pakistan Refinery Ltd., Karachi" (PLD 1976 Karachi 644)**

[2] **"Project Director, Balochistan Minor Irrigation and Agricultural Development Project, Quetta Cantt. v. Messrs Murad Ali & Company" (1999 SCMR 121)**

[3] **"Standard Construction Company (Pvt.) Limited v. Pakistan through Secretary M/o Communications and others" (2010 SCMR 524)**

the work to the effect that mobilization by the contractor is complete in all respect necessary for the due commencement of work;

ii. the contractor shall furnish a guarantee in the shape of Form DFR (PW) 28-A in favour of the Government from any bank declared to be a Scheduled Bank by the State Bank of Pakistan;

iii. the authority accepting the tender shall personally verify the bank guarantee;

iv. no interest shall be charged on a mobilization advance;

v. the recovery of mobilization advance shall commence after lapse of 20% contract period or after the execution of the 20% of the work (financial terms) whichever is earlier. The rate of recovery shall be 25% of the value of work done in each interim pay certificate (running bill); and

vi. in case the contractor fails to execute the work in accordance with the terms of the contract, the security offered in respect of the mobilization advance shall be forfeited to the credit of the Government.

7. The Punjab Departmental Finance Rules (Financial Hand Book No.3), framed under Article 119 of the Constitution of the Islamic Republic of Pakistan, 1973, through Rule 7.36 prescribe the Form of Guarantee (that is, Form D.F.R. (P.W.) 28-A), which reads as under: -

"WHEREAS a contract for work has been awarded by the Governor of the Punjab acting through _____ the Government of the Punjab _____ Department (hereinafter called the Government) to M/S _____ (hereinafter called the contractor);

AND WHEREAS under the terms of the said contract the Government has agreed to advance a sum of Rs. _____ to the contractor for execution of the said work. The said amount shall be recovered after lapse of 20% contract period or after the execution of the 20% of the work (financial terms), whichever is earlier. The rate of recovery shall be 25% of the value of work done in each interim pay certificate (running bill);

AND WHEREAS the Government has required the contractor to furnish a bank guarantee from any scheduled bank for securing the payment of the sum advanced thereon:-

It is agreed as follows: -

1. I_____ acting on behalf of _____ hereinafter called guarantor) hold and firmly bind to the Government in the sum of Rs._____ (Rupees _____) payable on the same sum given as mobilization advance to the contractor.

2. The guarantor hereby undertakes to pay the said amount payable to the Government of the Punjab on demand in case the contractor makes a default in the payment of said amount under the terms and conditions of the contract.

3. The guarantee shall be irrevocable and shall remain in force till the sum advanced payable thereon has been repaid in full by the contractor.

4. The liability of the guarantor shall in no case exceed the aggregate amount of Rs._____ (Rupees_____) payable thereon for the payment of which the guarantor hereby undertakes to bind itself and promises to pay the whole or any portion of this amount to the Government without making a reference to the contractor.

IN WITNESS whereof we the said guarantor have set out hands to this deed of guarantee this _____ day of _____ 20.
Guarantor (Scheduled Bank)"

8. In terms of the contract, the petitioner was required to furnish and it did furnish, a Bank Guarantee (on the prescribed Form D.F.R. (P.W.) 28-A) bearing No.LG#BOK/LHR/1023/02/2018 dated 1st February, 2018 against Mobilization Advance of Rs.20,646,195/-. The petitioner has not placed on record any document to refute the contents of letter No. GDA/DDE/19 dated 7th June, 2018, which suggests that Rs.20,646,195/- were paid to the petitioner as Mobilization Advance. Such advance being for mobilization of work was returnable. The petitioner has not pleaded anywhere that the Mobilization Advance was got adjusted till termination of contract or approaching this Court. Here comes the issue as to whether by suspending the operation of letter No.GDA/DDE/196 dated 3rd July, 2018 the respondents could be restrained to encash the Mobilization Advance Guarantee. In my view, though the Court is vested with the powers to grant interim relief, but such discretion must be exercised by the Court sparingly and only in appropriate cases. The Court should be extremely cautious in granting interim relief in cases of this nature. The Court's discretion ought to be exercised in the exceptional cases when there is adequate material on record, leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties or funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of award to its execution. In those cases, the Court would be justified in granting

interim relief. I am afraid the present case is not the one which may be treated as an exceptional case.

9. The principles upon which the bank guarantees could be invoked or restrained are well settled. The principle is that commercial transaction must go on the solemn bank guarantee or irrespective of any dispute between contracting parties whether or not the work carried out at the site was up to the contract. The banks cannot be absolved of their responsibility to meet the obligations. The employer extends the facility of Mobilization Advance to a contractor against a bank guarantee under the assurance that nothing would prevent it from getting it back if contractor commits default in fulfilling its obligations arising out of the contract. The bank guarantee, therefore, constitutes an agreement between the bank and the employer under which there is an absolute obligation of the bank to make the payment to the employer merely on demand from the employer. The bank is prohibited under the guarantee from raising any objection. There may be disputes between the contractor and the employer about the amount claimed by way of loss or damage caused to or would be caused to or suffered by the employer by reason of any breach by the contractor of any of the terms and conditions contained in the contract or by reason of the contractor's failure to perform the contract but so far as the bank is concerned, it has to make payment on demand without any demur. It is only in exceptional cases like: (i) a case of established fraud (based on material events and not on bald pleadings in the application for stay) of egregious nature of which the bank has the knowledge and (ii) allowing encashment would result in irretrievable injustice to one of the parties concerned, the Court may interdict the encashment of the bank guarantee. In all other cases, the bank, giving such a guarantee, is bound to honour it as per its terms.

10. Coming to the case on hands, the bank (i.e. the Bank of Khyber, M. M. Alam Road Branch, Gulberg-III, Lahore) in its Guarantee No.LG # BOK/LHR/0023/02/2018 dated 1st February, 2018 has stipulated the following condition for the payment of Rs.20,646,195/- which was given to the petitioner as Mobilization Advance:

> "The Guarantor hereby undertakes to pay the said amount payable to the Deputy Director Engg. GDA, Gujranwala in case the contractor makes a default in the payment of said amount under the terms and conditions of the contract and his guarantee."

This condition clearly postulates that in case the contractor (or the petitioner) makes a default in the payment of Mobilization Advance, the Bank would pay the amount under the Guarantee to the Gujranwala Development Authority (respondents). It is in these circumstance that the aforesaid clause would operate

and the whole of the amount covered by the Mobilization Advance would become payable on demand. It is not the case of the petitioner that there was any fraud in connection with the bank guarantee or that it had got adjusted the amount given to it as Mobilization Advance before or at the time of termination of the contract. This fact alludes that it is not only a case of default in the payment of Mobilization Advance but also constitutes misappropriation of public funds, which was illegal that could not be ignored and needed an immediate action so that state treasury could be protected from injury. It appears that the respondents being conscious of their public duty took prompt action for the protection of public fund and wrote letter No.GDA/DDE/196 dated 3rd July, 2018 to the Bank for getting the amount of Rs.20,646,195/- transferred in the account of the Gujranwala Development Authority. The demand of respondent No.3 through this letter was deemed to be a conclusive evidence regarding the failure of the petitioner to have not complied with or fulfilled the terms and conditions of the contract and thus, the Bank was bound to honour its commitments made in the guarantee. In this perspective the demand raised through letter No. GDA/DDE/196 dated 3rd July, 2018, according to the principle settled in Pakistan Engineering Consultant's case[4] and National Construction Ltd.'s case[5] , could not be put off until the culmination of proceedings of section 20 of the Arbitration Act, 1940 before the Trial Court or the announcement of award to be made by the arbitrators merely on the ground that a dispute exists between the parties to the contract, resultantly injunction sought for could not be allowed.

11. The second part of the first prayer relates to letter No. GDA/ DDE/198 dated 4th July, 2018 whereby the contract was rescinded. This letter during pendency of application under section 20 of the Arbitration Act, 1940 cannot be suspended for three reasons: First, if the prayer for suspension of letter No. GDA/DDE/198

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[4] **"Pakistan Engineering Consultants v. Pakistan International Airlines Corporation and another" (1989 SCMR 379)**
[5] **"Messrs National Construction Ltd v. Aiwan-e-Iqbal Authority" (PLD 1994 SC 311)**

dated 4th July, 2018 is granted it would have the effect of reviving the contract, which is not permissible particularly when it had been cancelled on the ground of its violation. If there is a breach of such a contract, the appropriate remedy is to compensate the party damnified in damages. Second, the contract in question falls in the category of contracts as contemplated by clause (b) of section 21 of the Specific Relief Act, 1877, which are not specifically enforceable, because contract runs into such minute or numerous details and its nature is such that the Court cannot enforce performance of its material terms. It is now well settled that interim injunction with regard to such type of contract cannot be granted. And third, the employer (GDA)/respondents cannot be compelled through interim injunction to allow the contractor/petitioner to continue the work under the contract, which was, rightly or wrongly, terminated[6] . That apart, the granting of an injunction in favour of the petitioner will further delay the construction work considered very urgent by the respondents. Thus, the balance of convenience also swings against the grant of injunction sought by the petitioner.

12. Now, I address the second prayer, which is to the effect that the respondents be restrained from allowing the other agencies to enter at the site without getting the joint measurement of the work done by the petitioner. The relevant provision of the contract governing this prayer is clause 61, which provides that in case the contract is rescinded and in the opinion of the Engineer-in-charge such work should be done at the risk and expense of the contractor; the Engineer-in-charge on behalf of the Gujranwala Development Authority, after giving fourteen days notice in writing to the contractor shall measure up the work of the contractor and give it to another contractor for completion. It appears that after rescinding the contract the respondents in terms of clause 61 of the Contract measured up the work of the petitioner. This fact stands established from letter No. GDA/DDE/216-A dated 19th July, 2018, which indicates that joint measurements of the work done at the site were carried out on 18th July, 2018 by the Field Engineering Staff, Gujranwala Development Authority in the presence of petitioner's representatives, that is, Adnan Mehmood and Muhammad Yasin Sajid. It is to be noted that this letter was presented by the respondents before the Additional District Judge, Gujranwala and for that

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**[6] "District Council, Gujrat v. Iftikhar Ahmad" (1988 MLD 1461), and "B.S.M. Contractors Pvt. Ltd. v. Rajasthan State Bridge and Construction Corporation Ltd. and another (AIR 1999 Delhi 117)**

reason, it was also directed vide order dated 21st August, 2019 to be placed on the file of instant petition. It was accordingly presented and through order dated 27th August, 2019 made part of the file. Despite having knowledge of the said letter, the petitioner made no effort to bring on record any evidence or document to rebut the fact that joint measurement of the work done at the site was carried out and that amounted to acceptance of the stance of the respondents, which stood corroborated from the actual measurement (of the work done at the site) presented before this Court during the course of hearing by the Director Engineering, Gujranwala Development Authority (Ch. Muhammad Idrees). In this view of the matter, this prayer has become redundant and thus, there is no need to further dilate upon it.

13. Before I part with the order, I would like to make it clear that nothing stated hereinabove shall be taken into consideration, when the disputes between the parties on merits are decided in any future proceedings.

14. In view of the reasons as stated hereinbefore this Court does not feel inclined to interfere with the discretion exercised by the Courts below in passing the impugned orders. Accordingly, the orders, under challenge do not require intervention by this Court. This petition, accordingly, stands dismissed on contest. The Trial Court may try to expedite the proceedings.

KMZ/R-18/L Petition dismissed.

**2020 C L C 68**
**[Lahore]**
**Before Shahid Waheed, J**
**FAISALABAD ELECTRIC SUPPLY COMPANY LIMITED----Petitioner**
**Versus**
**MUNIR AHMAD RANJHA and others----Respondents**

Writ Petition No.18935 of 2016, heard on 30th October, 2019.

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

----O.VI, R.17---Pleadings----Amendment in pleadings---Allowing amendment to a plaint in a suit---Exercise of discretion by the court under O.VI, R.17, C.P.C.---Principles and scope---Power under O.VI, R.17, C.P.C. was discretionary and be used judicially on consideration of special circumstances of each case and necessary conditions for the same were firstly that amendments do not cause injustice to other side; and secondly that such amendment was necessary for determination of real question in controversy---No party could be allowed to introduce a new cause of action by way of amendment and a court ordinarily should allow an amendment unless it was found that the applicant was acting mala fide or injustice or injury was likely to cause to the opposite party which could not be compensated by cost---Where due to subsequent events original relief sought became inappropriate for deciding a controversy, amendments could be allowed to shorten litigation---Court could allow to cure defective pleadings so as to constitute a cause of action where there was none, provided necessary conditions such as payment of additional court fee or costs of other side were complied with except when there was lapse of time or new cause of action was created---Where Court lacked inherent jurisdiction over a subject-matter, then it could not allow an amendment in pleadings to bring a suit within its jurisdiction and introduction of inconsistent or contradictory allegations could not be allowed---Delay by itself, could not be adequate reason for refusing an amendment under O. VI, R. 17, CPC.

The Land Acquisition Collector, Pak-Arab Refinery Limited and other v. Khan (deceased) and others 2019 MLD 968; Muhammad Ramzan and others v. Liaqat Ali and others 2001 SCMR 1984; Muhammad Hussain v. Fazal Haq and another PLD 1974 Lah. 208; Masood Ali v. Ali Haibat Khan and 2 others PLD 1958 Lah. 340; Ghulam Yasin and others v. Ajab Gul 2013 SCMR 23 and Abaid Ullah Malik v. Additional District Judge, Mianwali and others PLD 2013 SC 239 ref.

Sakhi Muhammad through L.Rs. and 9 others v. Ashraf Ali and 3 others 2012 CLC 1581 rel.

Akhtar Ali Monga for Petitioner.

Respondent No.1 in person.

Date of hearing: 30th October, 2019.

## JUDGMENT

**SHAHID WAHEED, J**.---The petitioner through this constitutional petition seeks an order in the nature of writ of certiorari for quashing the order dated 28.04.2016 of the Additional District Judge, Sargodah and order dated 08.02.2016 of the Senior Civil Judge, Sargodha whereby application seeking amendment in the application under section 12(2), C.P.C. was partly allowed.

2. Brief facts giving rise to this petition are that vide Notification dated 03.04.1995 land measuring 18 kanals 14 marlas was acquired for construction of WAPDA Colony at Kot Momin. The Land Acquisition Collector on 29.04.1997 announced the award. Respondent No.1 claimed that he being dissatisfied with the award had made an application to the Land Acquisition Collector requiring him that the matter be referred to the Court for determination of his objections to the amount of the compensation, which had not received any response and thus, he moved this Court through Writ Petition No.9183 of 1999 seeking direction to the Land Acquisition Collector to send reference under Section 18 of the Land Acquisition Act to the Senior Civil Judge, Sargodha. In this petition reply of the Land Acquisition Collector was that the reference could not be sent because application filed by respondent No.1 objecting to the rate of compensation was time barred. Writ Petition No.9183 of 1999 was, however, dismissed in default vide order dated 29.09.1999. Subsequently, on 05.11.2001 respondent No.1 instead of getting Writ Petition No.9183 of 1999 restored, instituted a suit for mandatory injunction and enhancement of compensation of suit land with a prayer that the Land Acquisition Collector be directed to send reference to the Court for correct determination of price of the acquired land; and, that compensation of the acquired land be enhanced and fixed at Rs.60,000/- per marla. The Senior Civil Judge, Sargodha vide judgment dated 25.04.2011 decreed the suit and enhanced compensation of the suit land from Rs.5000/- per marla to Rs.57,000/- per marla with 25% compulsory acquisition charges and 8% compound interest. Afterwards execution proceedings were taken out by respondent No.1. During the course of execution proceedings, the present petitioner filed an application under section 12(2), C.P.C., for setting aside the decree dated 25.04.2011. This application was dismissed vide order dated 20.02.2013. The petitioner thereupon filed an application under section 115, C.P.C., before the Additional District Judge seeking revision of the order dated 20.02.2013. This revisional application was also dismissed vide judgment dated 09.09.2013. The said orders of the subordinate courts were challenged

before this Court through W.P.No.27961 of 2013. On consideration of the matter, this Court vide judgment dated 07.07.2015 came to the following conclusion: -

"13. The resume of afore-stated facts and arguments canvassed by the learned counsel for the parties give rise to the intricate questions of law and facts. The questions as to whether: (i) the petitioners were necessary party to be impleaded in proceedings arising out of acquisition of land under the Land Acquisition Act, 1894; (ii) the learned Trial Court had the jurisdiction to entertain and decide the suit of respondent No.1; (iii) the respondent No.1 after dismissal of W.P.No.9183 of 1999 and receiving compensation as determined by the Land Acquisition Collector was estopped to challenge the validity of the award dated 29.4.1997 before the learned Trial Court; (iv) respondent No.1 had obtained judgment and decree dated 25.4.2011 through misrepresentation or fraud; and (v) the accounts of the present petitioners could be attached for satisfaction of the decree dated 25.4.2011. The said questions required detailed investigation. In the present case the learned Trial Court after hearing preliminary arguments adjourned the case to 20.2.2013 for arguments and order in respect of application under section 12(2), C.P.C. Perusal of the record unfolds that on 20.2.2013 none appeared on behalf of the parties before the learned Trial Court as the Bar was on strike. Instead of adjourning the case for final arguments the learned Senior Civil Judge, Sargodha, on the basis of preliminary arguments, which were heard on previous date, dismissed the application under section 12(2) C.P.C. This procedure, in my view, was not valid. Learned Senior Civil Judge was required to afford opportunity of advancing final arguments to the parties and thereafter to decide the case in accordance with law. Non giving of opportunity for submitting final arguments was not only a violation of the principle of natural justice but also Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, which guarantees fair trial for determination of rights of the parties. Besides above, the learned Trial Court, in view of the controversy involved in the present case was required to frame issues and to provide opportunity to lead evidence to the parties. This exercise was not done in the present case and, therefore, the said procedural irregularities vitiate the final order dated 20.2.2013 of the learned Trial Court. This fact was also not considered by the learned Revisional Court while passing the impugned judgment dated 9.9.2013.

Thus, revisional judgment being perverse and infirm in law is not sustainable."

On the basis of above said conclusion, constitutional petition, that is, W.P.No.27961 of 2013 was allowed and order dated 20.02.2013 of the Senior Civil Judge, Sargodha as well as judgment dated 09.09.2013 of the Additional District Judge, Sargodha were set aside and declared to have been passed without lawful authority and of no legal effect and consequently, Senior Civil Judge, Sargodha was directed to decide the application under section 12(2), C.P.C. afresh after framing issues and providing adequate opportunities to the parties to lead evidence in support of their respective claims.

3. In post remand proceedings the Trial Court vide order dated 07.12.2015 framed following issues:-

1. Whether the impugned judgment and decree dated 25.04.2011 is result of fraud, forgery and liable to be set aside on the grounds mentioned in the petition? OPA

2. Whether the petition is not maintainable in its present form? OPR

3. Whether the petitioner has not come to the court with clean hands? OPR

4. Whether the petition is time barred? OPR

5. Whether the petitioner has no cause of action and locus standi to file this petition? OPR

6. Whether the petition is filed just to harass the respondent and the respondent is entitled to special costs under section 35-A, C.P.C.? OPR

7. Relief.

4. After settlement of above referred issues, the petitioner on 04.01.2016 moved an application before the Senior Civil Judge, Sargodha seeking permission to make following amendments in the application under section 12(2), C.P.C.: -

III۔ یہ کہ عدالت دیوانی کو اختیار سماعت بابت "دعویٰ حکم امتناعی تاکیدی" متدائرہ مسئول الیہ بعنوان "منیر احمد رانجھا بنام صوبہ پنجاب وغیرہ" حاصل نہ تھا۔ بدیں وجہ فیصلہ وڈگری متدعویہ بلا اختیار صادر شدہ ہے۔ قابل منسوخی ہے۔

IV۔ یہ کہ فیصلہ وڈگری متدعویہ بربنائے فراڈ، دھوکہ دہی اور Misrepresentation کا نتیجہ ہے۔ مثل مقدمہ "منیر احمد رانجھا بنام صوبہ پنجاب وغیرہ" کی گمشدگی کی وجہ سے سائلان مقدمہ ہذا کی پیروی نہ کر سکے تھے۔ اس بات کا ثبوت صفحہ مثل پر موجود ہے۔ جو کہ بعد ازاں عرصہ تقریباً 6 ماہ گزرنے کے بعد مثل عدالت میں پیش ہوئی۔ لیکن کوئی نوٹس پیروی سائلان کو موصول نہ ہوا۔ مورخہ 08-03-18 کو بجائے کونسل سائلان کسی دیگر کونسل کی حاضری منجانب سائلان لگائی گئی اور بعد ازاں سائلان کے خلاف حکم کاروائی یک طرفہ صادر فرمایا گیا۔ اور فیصلہ وڈگری متدعویہ صادر فرمائی گئی اس طرح مسئول الیہ نے دھوکہ دہی اور فراڈ سے کام لیا اور Misrepresentation تلبیس شخصی کرتے ہوئے فیصلہ وڈگری متدعویہ حاصل کی۔ جو کہ فیصلہ وڈگری متدعویہ بدیں وجہ قابل منسوخی ہے۔

V۔ یہ کہ عنوان درخواست (2)12 ض۔ د ہذا میں سائلان درخواست زیر آرڈر 9 رول 13 زیر دفعہ 151 ض۔ د کا تحریر کرنا چاہتے ہیں۔

VI۔ یہ کہ مسئول الیہ / مدعی تحت ایوارڈ لینڈ ایکوزیشن کلکٹر اپنا تمام معاوضہ وصول کر چکا ہے۔ لیکن اس بات کو بھی مسئول الیہ / مدعی نے دعویٰ حکم امتناعی میں چھپایا۔ اس طرح مسئول الیہ / مدعی نے عدالت حضور میں دھوکہ دہی سے کام لیا۔ بدیں وجہ حکم وڈگری قابل منسوخی ہے۔

VII۔ یہ کہ مسئول الیہ/ مدعی نے مورخہ 99-5-21 کو عدالت عالیہ لاہور میں رٹ پٹیشن نمبر 9183/99 دائر کی جس میں مسئول الیہ/مدعی نے استدعا کی تھی کہ لینڈ ایکوزیشن کلکٹر کو لینڈ ایکوزیشن ایکٹ 1984 کی دفعہ 18 کے تحت ریفرنس بھیجنے کی ڈائریکشن دی جائے۔ جو کہ رٹ پٹیشن 99-9-29 کو بعدم پیروی خارج ہوئی۔ بعدازاں رٹ مذکور کی بحالی کی بابت درخواست C.M بھی خارج ہوئی۔ یہاں یہ امر قابل ذکر ہے کہ درخواست C.M مذکور دوران کاروائی مقدمہ حکم امتناعی تاکیدی دائر ہوئی اور خارج ہوئی۔ اس طرح مسئول الیہ/مدعی نے اس امر کو بھی اپنے دعویٰ حکم امتناعی تاکیدی میں چھپایا۔ رٹ پٹیشن خارج ہونے کے بعد دعویٰ حکم امتناعی تاکیدی قانوناً Maintainable نہ تھا۔

VIII۔ یہ کہ مسئول الیہ مدعی نے مورخہ 97-06-05 کو لینڈ ایکوزیشن کلکٹر کو درخواست دی کہ معاوضہ میں اضافہ کے لئے ریفرنس بعدالت جناب سینئر سول جج صاحب کو ارسال کیا جائے جو کہ درخواست مذکور مورخہ 99-06-12 کو بوجہ زائد المعیاد خارج ہوئی۔ ریفرنس بھیجنے کا اختیار مطابق قانون لینڈ ایکوزیشن ایکٹ زیر دفعہ 18 صرف اور صرف لینڈ ایکوزیشن کلکٹر کو حاصل ہے۔ علاوہ ازیں لوازمات زیر دفعہ 19 لینڈ ایکوزیشن ایکٹ کو بھی پورا کیا جانا قانوناً ضروری، Mandatory ہے۔ اس امر کا بھی مسئول الیہ/مدعی نے کہیں ذکر نہ کیا ہے۔ اور دھوکہ دہی فراڈ اور غلط بیانی سے کام لیتے ہوئے ڈگری متدعویہ حاصل کی۔ جو کہ ہر لحاظ سے قابل منسوخی ہے۔ قابل بحالی نہ ہے۔

5. On consideration of the matter, the Senior Civil Judge, Sargodha vide order dated 08.02.2016 partly accepted the application to the extent of paragraphs Nos.V and VI. The petitioner as well as respondent No.1 challenged the said order through two separate revisional applications before the Additional District Judge, Sargodha. Through consolidated judgment dated 28.04.2016 the Additional District Judge, Sargodha dismissed the revisional application of the present petitioner whereas, civil revision filed by respondent No.1 was partly accepted and the amendment proposed in paragraph No.VI was allowed to be incorporated in the application under section 12(2), C.P.C. So, this petition.

6. The argument of the petitioner's counsel is that if respondent No.1 was aggrieved on account of the Collector either refusing or omitting to make a reference under Section 18 of the Land Acquisition Act, 1894, he, as per principle settled by a Division Bench of this Court in Pak-Arab Refinery's case,[1] had no remedy before the Civil Court and thus, the decree dated 25.04.2011 was without jurisdiction and for that reason through order dated 07.07.2015 passed in Writ Petition No.279617 of 2013 the Trial Court was directed to decide the application under section 12(2), C.P.C. afresh after farming, inter-alia, the issue of jurisdiction. He submits that in the light of order dated 07.07.2005 the petitioner moved an application for amendment of application under section 12(2), C.P.C., which were actually amplification of the plea of fraud, misrepresentation and lack of jurisdiction already made in the application under section 12(2), C.P.C., therefore, the same could not be construed as an attempt to set up a case different from the case already laid and framed; but this fact was not properly appreciated by the Courts below and thus, they fell into error while passing the impugned orders. In support of this argument, reliance is placed on Muhammad Ramzan's case[2] .

7. Arguments canvassed by the petitioner's counsel apparently had weight, so I asked respondent No.1, who is incidentally a practicing Advocate and appearing in person before this Court, to explain his objections as to why the proposed amendments could not be allowed. He replied that the Trial Court could not on remand allow the petitioner to amend the application under section 12(2), C.P.C. in such a way that would reopen the settled questions/issues. In support of this objection he made reference to Muhammad Hussain's case[3] . This objection does not fit in the facts of the present case. Had it been a remanded case to consider a particular question or issue, this objection would have been valid. On the contrary, it is admitted on all hands that through judgment dated 07.07.2015 passed by this Court in W.P.No.27961 of 2013, the Trial Court was directed to decide the application under section 12(2), C.P.C. afresh after framing issues and providing adequate opportunities to the parties to lead evidence in support

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[1] **"The Land Acquisition Collector, Pak-Arab Refinery Limited and other v. Khan (deceased) and others" (2019 MLD 968)**
[2] **"Muhammad Ramzan and others v. Liaqat Ali and others" (2001 SCMR 1984)**
[3] **"Muhammad Hussain v. Fazal Haq and another" (PLD 1974 Lahore 208)**

of their respective claims, meaning thereby, this was not a remand on a particular or specific issue, rather remand was made for the consideration of the entire case. It was thus, open to the Trial Court to allow the proposed amendments within the parameters prescribed under Order VI, Rule 17, C.P.C. as held in Masood Ali's case[4] , which was even followed in Muhammad Hussain's case (supra).

8. The second objection of respondent No.1 is based on Ghulam Yasin's case[5] . It is submitted that all those facts that were omitted to be mentioned in the application under Section 12(2), C.P.C. could not be allowed to be incorporated through amendment for that would open room for additions, after-thoughts and improvements. This objection sans merit. In the above-referred Ghualam Yasin's case amendment was sought in the plaint of suit for possession through pre-emption. As the right of pre-emption is strictissimi juris, the Hon'ble Supreme Court in that case held that a plaint in a pre-emption case was more like an FIR of a criminal case, therefore, no omission howsoever, fatal could be allowed to be supplied by means of an amendment. This principle cannot be applied to the present case for the Trial Court in a suit for mandatory injunction, exercising the powers under Section 18 of the Land Acquisition Act, 1894 had enhanced compensation of the acquired land. Here the petitioner maintained that since the decree dated 25.04.2011 was obtained through fraud and misrepresentation from the Court which had no jurisdiction, the proposed amendments being amplification of the grounds already mentioned in the application under section 12(2), C.P.C. could be allowed at any stage of the proceedings. This plea could not be repelled on the ground that it was an after-thought to improve the case or to supply the omissions. In fact this plea was required to be examined in the light of remand order dated 07.07.2015 and on the basis of settled principles for allowing or declining amendments in the pleadings of the civil suits other than suit for possession through pre-emption.

9. Lastly, respondent No.1 relying upon Abaid Ullah Malik's case[6] submitted that amendments in the application under section 12(2), C.P.C. were not sought with bona fide intentions and thus, could not be allowed. This objection is also misconceived. Reference to the judgment rendered in Abaid Ullah Malik's case is inapt as the same was handed down in a pre-emption case. In the present case the Trial Court besides other questions as pointed out by this Court in paragraph No.13 of the remand order dated 07.07.2015 made in W.P.No.27961 of 2013 (reproduced hereinabove in paragraph No.2 of this judgment) is to determine the question of jurisdiction, which is of vital importance and cannot be allowed to be ignored on the basis of defective pleadings and thus, any attempt to cure the defect by giving details of fact pointing lack of jurisdiction of the Trial Court

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[4] **"Masood Ali v. Ali Haibat Khan and two others" (PLD 1958 Lahore 340)**
[5] **"Ghulam Yasin and others v. Ajab Gul" (2013 SCMR 23)**
[6] **"Abaid Ullah Malik v. Additional District Judge, Mianwali and others" (PLD 2013 Supreme Court 239)**

while passing decree dated 25.04.2011 cannot be allowed to be stigmatized or held mala fide.

10. Now, I address the question as to whether the proposed amendments could be allowed to be incorporated in the application under section 12(2), C.P.C. Law relating to this question is provided in Order VI Rule 17, C.P.C., which has been subject matter of different cases before superior courts. All those precedents for allowing or declining amendments in the pleadings were examined by this Court in Sakhi Muhammad's case[7] and it was held that: -

(i) The power under Order VI, Rule 17 is discretionary and should be used judicially on consideration of special circumstances of each case and the necessary conditions are (a) if the amendments do not cause injustice to other side; (b) amendment is necessary for determination of real question in controversy;

(ii) No party can be allowed to introduce new cause of action by way of amendment;

(iii) The Court ordinarily should allow the amendment unless it is found that the applicant was acting mala fide or injustice or injury was likely to cause to the opposite party which could not be compensated by cost;

(iv) Where due to subsequent events original relief sought became inappropriate for deciding the controversy, the amendment can be allowed to shorten the litigation;

(v) The Court can allow to cure defective pleadings so as to constitute a cause of action where there was none, provided necessary conditions such as payment of additional court-fee or costs of other side are complied with except when there is lapse of time or new cause of action is created;

(vi) Where the Court is lacking inherent jurisdiction over the subject matter, it cannot allow amendment to bring the suit within its jurisdiction;

(vii) Introduction of inconsistent or contradictory allegations cannot be allowed;

(viii) Delay for itself, cannot be adequate reason for refusing amendment.

The Courts below were required to appraise the proposed amendments in the light of above stated principles. Perusal of record indicates that the Trial Court through its order dated 08.02.2016 allowed amendments proposed in paragraphs No.V and VI and declined others whereas the Revisional Court only allowed

[7] **"Sakhi Muhammad through L.Rs. and 9 others v. Ashraf Ali and 3 others" (2012 CLC 1581)**

amendment proposed in paragraph No.VI. The reason for disallowing amendment proposed in paragraph No.V was that it would change the nature and complexion of the proceedings. This reason is valid and thus, sustained. However, it is not clear from either of the orders of the lower courts as to what was the reason for allowing amendment proposed in paragraph No.VI and declining others? This was not proper. I am thus, obliged to examine the proposed amendments. After appraising contents of the application filed by the petitioner under Order VI, Rule 17, C.P.C. I find that the amendments proposed through paragraphs Nos.III, IV, VI, VII and VIII are necessary for determination of all those questions which were indicated in paragraph No.13 of the remand order dated 07.07.2015 made by this Court in W.P. No.27961 of 2013 and that the same neither cause injustice to respondent No.1 nor introduce new cause of action. In fact the petitioner through these amendments wants to cure defective pleadings by giving details of the plea of fraud, misrepresentation and lack of jurisdiction. The proposed amendments are consistent with the case already set up by the petitioner and thus the same may be allowed so that respondent No.1 may also have opportunity of meeting the allegations and lead evidenced in order to do complete justice.

11. For the foregoing reasons, this constitutional petition is allowed and resultantly by setting aside order dated 28.04.2016 of the Additional District Judge, Sargodha and order dated 08.02.2016 of the Trial Court, the application of the petitioner seeking amendment in the application under section 12(2), C.P.C. to the extent of Paragraphs Nos. (III), (IV), (VI), (VII) and (VIII) is allowed. The Trial Court shall fix a date for filing the amended application under section 12(2), C.P.C. and after obtaining reply it shall proceed to decide the same in accordance with law as expeditiously as possible preferably within a period of six months.

ZC/F-27/L Petition allowed.

**2020 C L D 249**
**[Lahore]**
**Before Shahid Waheed and Masud Abid Naqvi, JJ**
**STATE LIFE INSURANCE CORPORATION OF PAKISTAN through Zonal Head/Attorney and another---Appellants**
**Versus**
**Mst. NASREEN BEGUM---Respondent**

Insurance Appeal/R.F.A. No. 77885 of 2019, decided on 23rd December, 2019.

**Insurance Ordinance (XXXIX of 2000)---**

----Ss. 124 & 121---Limitation Act (IX of 1908), S. 5---Appeal to Insurance Tribunal--- Limitation--- Condonation of delay--- Scope---Insurance Ordinance, 2000 was a special law and Insurance Tribunal had been constituted under S. 121 of the same---Provisions of S. 5 of the Limitation Act, 1908 had been specifically excluded from its application on matters being governed by special laws---Where a period of limitation was prescribed under specific provisions of a special or local law, then general principles of law of limitation were not applicable and therefore, provisions of S. 5 of the Limitation Act, 1908 could not be invoked for seeking condonation of delay in filing of appeal under S. 124 of the Insurance Ordinance, 2000.

General Manager v. Mst. Sakina Bibi and others 2012 CLD 1112 and Jubilee General Insurance Co. Ltd. v. Ravi Steel Company 2016 S C M R 1979 rel.

Sh. Shahzad Ahmed for Appellants.

Liaqat Ali Butt for Respondent.

**ORDER**

Main Case C.M. No. 1 of 2019

Aggrieved by the judgment dated 09.102019 passed by the learned Insurance Tribunal, Faisalabad, whereby petition for recovery of policy proceeds along with liquidated damages was accepted and respondent/nominee was granted policy proceeds of Rs.1,95,120/- along with liquidated damages from the date when the policy became due, the appellants have filed this appeal along with an application under section 5, Limitation Act, 1908 and challenged the same.

2. We have heard the learned counsel for the appellants on the point of limitation and perused the record.

3. The appellants have filed the instant appeal before this Court on 21.12.2019, after two months and twelve days of the impugned judgment. The special law regulates the preferring of the instant appeal and prescribes a period of 30 days

for the purpose as per section 124(2) of Insurance Ordinance 2000. Section 29 of the Limitation Act, 1908 specifically gives protection to the period of limitation prescribed by any special or local law. The Insurance Ordinance (No.XXXIX) of .2000 is a special law legislated on the subject of insurance and regulates the enforcement of the insurance claim and the impugned judgment was passed by the Tribunal constituted under section 121 of the Insurance Ordinance (No.XXXIX) of 2000. Hence, the provisions of section 5 of the Limitation Act, 1908 have also been specifically excluded from its application to the matters being governed and regulated by any special or local law. While interpreting the provisions of section 115 of C.P.C. it has been laid down by the Hon'ble Superior Courts that where a period of limitation is prescribed under a specific provisions of special or local law then the general principles of law of Limitation Act are not applicable. It is also laid down by the honorable Courts of Pakistan that the provisions of section 5 of the Limitation Act, 1908 cannot be in such like cases invoked for seeking condonation of delay. Reference is made to the cases reported as General Manager v. Mst. Sakina Bibi and others (2012 CLD 1112 (Lahore) and Jubilee General Insurance Co. Ltd v. Ravi Steel Company (2016 SCMR 1979).

4. In view of the foregoing discussion, the learned counsel for the appellants has failed to convince this Court that appellants are entitled for condonation of delay because the appellants filed a hopelessly time barred appeal before the Court. Hence, the appellants application for condonation of delay is dismissed and resultantly the appeal is also dismissed as time barred.

KMZ/S-2/L Appeal dismissed.

**P L D 2020 Lahore 423**
**Before Shahid Waheed and Faisal Zaman Khan, JJ**
**KHALID HUSSAIN---Appellant**
**Versus**
**PSIC EMPLOYEES CO-OPERATIVE HOUSING SOCIETY and others-Respondents**

I.-C.A. No.78078 of 2019, decided on 3rd February, 2020.

**(a) Civil Procedure Code (V of 1908)---**
----S. 12(2)---Constitution of Pakistan, Art. 199---Constitutional jurisdiction of High Court---Application of C.P.C. to proceedings undertaken in exercise of Constitutional jurisdiction of High Court in civil matters---Scope---Question before High Court was whether an order passed under its Constitutional jurisdiction, could be set aside on ground of fraud, misrepresentation or want of jurisdiction under S.12(2) C.P.C.---Held, that Constitutional jurisdiction under Art.199 of Constitution pertained to civil as well as other matters---Proceedings undertaken for enforcement of civil right(s) were civil proceedings, whatever may be source of High Court's jurisdiction invoked for enforcement of such a right---Provisions of C.P.C., except where specially excepted, would apply in exercise of High Court's jurisdiction in civil matter(s)---Power to set aside order on ground of fraud, misrepresentation or want of jurisdiction under S.12(2) C.P.C. was therefore available against an order passed under Constitutional jurisdiction of High Court in a civil matter.
Mumtaz Khan v. Chief Settlement and Rehabilitation Commissioner and Mst. Khurshid Begum PLD 1966 SC 276; Ahmad Khan v. The Chief Justice and the Judges of the High Court, West Pakistan, through the Registrar, High Court of West and others PLD 1968 SC 171; Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543; Bradlaugh v. Clarke (8 AC 354); Mt. Sahitiri Thakurain v. Savi and another AIR 1921 PC 80 and Hussain Bakhsh v. Settlement Commissioner, Rawalpindi and others PLD 1970 SC 1 rel.

**(b) Law Reforms Ordinance (XII of 1972)---**
----S. 3---Civil Procedure Code (V of 1908) Ss.12(2) & 2(2)---Constitution of Pakistan, Art. 199---Constitutional jurisdiction of High Court---Intra-court appeal---Appeal to High Court in certain cases---Exercise of its original civil jurisdiction by High Court---Nature of remedy available under S. 3 of Law Reforms Ordinance, 1972---Scope---Question before High Court was whether an order passed by Single Judge of High Court upon an application under S.12(2) C.P.C., could be assailed by intra-court appeal under S.3 of the Law Reforms Ordinance, 1972---Held, that appeal under S.3 of Law Reforms Ordinance, 1972 could either lie against a decree passed or final order of Single Judge of High Court in exercise of original civil jurisdiction---Although an application under S.12(2) C.P.C. was a civil proceeding yet it could not be regarded as a suit as every suit was commenced by a plaint, and where there was no suit, there could be no decree---Mere fact of a matter coming

directly before High Court, under law, would not suffice the same to be within ordinary meaning of original civil jurisdiction---Remedy of making application under S.12(2) C.P.C. would arise only if there was a judgment or order of a Court meaning thereby it was contemplated as a sort of reconsideration or reopening or in a way review of a decided matter on limited ground of fraud misrepresentation or want of jurisdiction---Such type of rethinking of matter relating to enforcement of civil right brought before the Constitutional jurisdiction could not possibly be claimed to be exercise of original jurisdiction---High Court held that order under S.12(2) C.P.C. made in a petition before Single Judge of High Court under Art.199 of the Constitution could not be challenged by way of intra-court appeal under S.3(1) of Law Reforms Ordinance, 1972---Intra-court appeal, being not maintainable, was dismissed, in circumstances.

Ram Kirpal Shukul v. Mussumat Rup Kuari (1883) 11 Ind. App 37 (PC) and Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543; Minakshi Naidu v. Subramanya Sastri (1888) ILR 11 Mad. 26 (PC); Syed Arif Raza Rizvi v. Messrs Pakistan International Airlines through Chairman, M.D., Karachi PLD 2001 SC 182; Saif-Ur-Rehman Toor and another v. Registrar, Cooperative Society, Punjab, Lahore and 11 others 2002 YLR 3343 and Secretary Agriculture, Government of the Punjab and another v. Muhammad Akram and another 2005 MLD 915 rel.

**(c) Jurisdiction---**
----"Original jurisdiction", meaning of---Original jurisdiction was jurisdiction to consider a case in the first instance and jurisdiction of a court to take cognizance of a cause at its inception and try and pass judgment upon law and facts; and the same was distinguished from "appellate jurisdiction".
Ms. Saba Saeed Sheikh for Appellant.
Gohar Nawaz Sindhu, Assistant Advocate General, Punjab for Respondents.
Date of hearing: 3rd February, 2020.

## JUDGMENT

**SHAHID WAHEED, J.---**Challenge in this Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972 is to the order dated 9th October, 2019 whereby the application brought by the appellant under Section 12(2) C.P.C. (that is, C.M.No.1 of 2019) for setting aside the order dated 22nd November, 2018 passed by the learned Single Judge in a petition, to wit, W.P.No.732 of 2017 filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 was dismissed.

2. The facts of this case are set out in detail in the order under appeal made by the learned Single Judge and need not be recapitulated here in extenso. Suffice is to mention here for the purpose of this appeal that the PSIC Employees Co-operative

Housing Society (respondent No.1) moved the learned Single Judge of this Court through a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") with a prayer that Zaeem Hussain Qadri (respondent No.2) be directed to hand over possession of developed land in the shape of 48 plots by retaining 33% of developed land (16 plots) in consonance with the general principle of exemption and also deposit necessary development charges as per judgment of the Hon'ble Supreme Court of Pakistan and to declare subsequent sale executed by the said respondent null and void. On 22nd November, 2018 Zaeem Hussain Qadri appeared before the learned Single Judge and gave a statement that he had no objection to the implementation of the judgment delivered by the Hon'ble Supreme Court of Pakistan. On the basis of said statement the constitutional petition (that is, W.P.No.732 of 2017) was disposed of vide order dated 22nd November, 2018 with the direction to the PSIC Employees Co-operative Housing Society (respondent No.1) and the Deputy Commissioner, Lahore to implement the judgment of the Hon'ble Supreme Court of Pakistan by following due process.

3. The appellant was not made party in the constitutional petition brought by the PSIC Employees Co-operative Housing Society. His claim was that the PSIC Employees Co-operative Housing Society wanted to recover his land under the garb of the judgment of the Hon'ble Supreme Court of Pakistan. He was thus, aggrieved and wanted to challenge the order dated 22nd November, 2018 made in W.P.No.732 of 2017 on the ground of fraud, misrepresentation and want of jurisdiction. It is to be noted that the power to set aside a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction is available in the Code of Civil Procedure, 1908 ("C.P.C."). The question then arose as to whether the appellant could avail the remedy provided under Section 12(2) C.P.C. To answer this question it is essential to examine the nature of the jurisdiction of this Court and how it is exercised. Here, we are only concerned with the High Court's jurisdiction under the Constitution. The nature of this jurisdiction was considered by the Hon'ble Supreme Court in Mumtaz Khan's case[1] , Ahmad Khan's case[2] and Ilyas Miraj's case[3]. In the first case, it was held that an order passed by a Single Judge in writ jurisdiction amounts to exercise of original jurisdiction. In the second case the jurisdiction was held to be a constitutional jurisdiction of an original kind. In the third case the exercise of what is commonly termed as the writ jurisdiction, was considered to be a special original jurisdiction of the High Court and not ordinary original civil jurisdiction. Obviously, the jurisdiction under Article 199 of the Constitution pertains to civil as well as other matters. A proceeding taken for the enforcement of a civil right is a civil proceeding, whatever may be the source of the Court's jurisdiction invoked for enforcement of such a right[4]. It is an admitted fact

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1. **1 Mumtaz Khan v. Chief Settlement and Rehabilitation Commissioner and Mst. Khurshid Begum PLD 1996 SC 276**
2. **Ahmad Khan v. The Chief Justice and the Judges of the Lahore High Court, West Pakistan, through the Registrar, High Court of West and others PLD 1968 SC 171.**
3. **Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543.**
4. **Bradlaugh v. Clake (8 AC 354).**

that in the case in hands the petition made before the learned Single Judge under Article 199 of the Constitution was for the enforcement of a civil right and thus, it was a civil proceeding, although the High Court's jurisdiction in such a proceeding was constitutional jurisdiction of an original kind. The law which regulated civil proceedings was provided in the C.P.C.. The Privy Council in Sabitri Thakurani's case[5] observed: "the Code is framed on the scheme of providing generally the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of original civil jurisdiction to which the Code is not to apply". Relying upon the words "whatever it may be" used in the above stated observation the Hon'ble Supreme Court in Hussain Bakhsh's case[6] held that the provisions of the Code, other than the specially excepted ones, shall apply in the exercise of the High Court's jurisdiction in a civil matter, whatever may be the nature of that jurisdiction. In this perspective, the power to set aside the order on the ground of fraud, misrepresentation or want of jurisdiction under Section 12(2) C.P.C. was available and could be availed by the appellant. It appears that the appellant being acquainted with this background of law had filed application under Section 12(2), C.P.C., that is, C.M.No.01 of 2019. This application was resisted by the present respondents. On consideration of the matter, the learned Single Judge found that no case under Section 12(2) C.P.C. was made out and thus, dismissed the application through order dated 9th October, 2019. So, this appeal against the order dated 9th October, 2019.

4. In the circumstances described above, a substantial preliminary question arises which must be decided first because if its answer comes in the positive then we can examine the other questions involved in this appeal. The question is whether the appellant could be allowed to maintain this appeal to challenge the order dated 9th October, 2019 made by the learned Single Judge on his application under Section 12(2) C.P.C.

5. The law governing the preliminary question, under consideration, is provided in Section 3 of the Law Reforms Ordinance, 1972. This Section consists of two parts. The first part is subsection (1) of Section 3 which lays down that an appeal shall lie to a Bench of two or more Judges of a High Court from a decree passed or final order made by a Single Judge of that Court in the exercise of its original civil jurisdiction. Since we are faced with the order that the learned Single Judge has made under Section 12(2) C.P.C., we have to determine whether we consider the impugned order as "decree" or construe it as an "order passed in original civil jurisdiction". The term "decree" is defined in Section 2(2) C.P.C. as meaning "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the

**5 Mt. Sabitiri Thakurain v. Savi and another AIR 1921 PC 80.**
**6 Hussain Bakhsh v. Settlement Commissioner, Rawalpindi and others PLD 1970 SC 1.**

matters in controversy in the suit ... ." To constitute a decree, the decision must fulfill the following conditions:

a) The decision must be arrived at in a suit;

b) The decision must have been expressed on the rights of the parties with regard to all or any of the matters in controversy in the suit;

c) The decision must be one which conclusively determines those rights; and,

d) There must have been a formal expression of an adjudication.
If in a case of a particular decision all the above-stated elements co-exist then it is a decree, unless it is expressly excepted by the C.P.C. If, however, any of the afore-said ingredients is absent, the decision cannot be taken to be a decree. Although an application under Section 12(2) C.P.C. is a civil proceeding yet it cannot be regarded as a suit. Every suit is commenced by a plaint[7] . Where there is no civil suit there is no decree[8]. So, order made on an application under Section 12(2) C.P.C. cannot be treated as a decree because afore-mentioned elements are wanting here.

5(sic). Now, we turn to another facet of the matter and examine whether an order made on the application under Section 12(2) C.P.C. filed in a constitutional petition or writ petition can be considered as an "order passed in original civil jurisdiction". In Arif Raza Rizvi's case[9] it was held that the mere fact of a matter coming directly before the High Court under a law would not, however, suffice to bring it within the ordinary original civil jurisdiction. The term "Original Jurisdiction" according to Black's Law Dictionary, Sixth Edition, means "Jurisdiction to consider a case in the first instance. Jurisdiction of Court to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts. Distinguished from appellate jurisdiction". Viewing the matter in hand in the light of above definition, we find that the remedy of making an application under Section 12(2) C.P.C. would arise only if there was a judgment, decree or order of a Court, meaning thereby that it was contemplated as a sort of reconsideration or reopening or in a way review of a decided matter though on the limited ground of fraud, misrepresentation or want of jurisdiction; such type of a rethinking of the matter, relating to enforcement of civil right, brought before the Single Judge in his constitutional jurisdiction could not possibly be claimed to be an exercise of original jurisdiction. As a consequence, we hold that order under Section 12(2) C.P.C. made in a petition brought before a Single Judge of this Court under Article 199 of the Constitution could not be challenged by invoking Section 3(1) of the Law Reforms Ordinance, 1972. Even

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**7** **Ram Kirpal Shukul v. Mussumat Rup Kuari (1883) 11 Ind. App 37 (PC) and Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others (PLD 1996 SC 543).**

**8** **Minakshi Naidu v. Subramanya Sastri (1888) ILR 11 Mad 26 (PC)**

**9** **Syed Arif Raza Rizvi v. Messrs Pakistan International Airlines through Chairman/M.D., Karachi (PLD 2001 SC 182)**

otherwise, an order under Section 12(2) C.P.C. is not one of those orders which are appealable under Section 104 C.P.C. or Order XLIII, Rule 1, C.P.C. There is no other law for the time being in force which makes the order under Section 12(2) C.P.C. appealable.

6. This brings us to subsection (2) of Section 3 of the Law Reforms Ordinance, 1972. Under this subsection an appeal shall lie to a Bench of two or more Judges of a High Court from an order made by a Single Judge of that Court under clause (1) of Article 199 of the Constitution but not being an order made under the sub-paragraph (i) of paragraph (b) of that clause. But this is subject to and controlled by the proviso which postulates that the appeal shall not be available or competent if the petition brought before the High Court under Article 199 of the Constitution arises out of any proceeding in which the law applicable provides for at least one appeal or one revision or one review to any Court, Tribunal or Authority against the original order. It has already been stated that the appellant through his application under Section 12(2) C.P.C. had challenged the order dated 22nd November, 2018 made by the learned Single Judge in a petition brought by respondent No.1 under Article 199 of the Constitution (i.e. W.P.No.732 of 2017) on the ground of fraud, misrepresentation and want of jurisdiction. This application was dismissed vide order dated 9th October, 2019. It could be said without any doubt or reservation that the order on the application under Section 12(2) C.P.C. could not be equated to the order of the High Court which it issued under clause (1) of Article 199 of the Constitution. Such order had its own distinct status and, therefore, it could not be held to be an appealable order under Section 3(2) of the Law Reforms Ordinance, 1972. In this regard support can be had from Saif-Ur-Rehman Toor's case[10] and Muhammad Akram's case[11].

7. Upshot of the above discourse leads to the conclusion that answer to the preliminary question is in the negative and as a consequence, this appeal is found to be not maintainable. In this view of the matter there is no need to dilate upon other questions involved in this appeal.

8. Dismissed.

KMZ/K-2/L ICA dismissed.

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**10** **Saif-Ur-Rehman Toor and another v. Registrar, Cooperative Society, Punjab, Lahore and 11 others (2002 YLR 3343)**

**11** **Secretary Agriculture, Government of the Punjab and another v. Muhammad Akram and another (2005 MLD 915)**

**2020 Y L R Note 89**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD RAFI---Petitioner**
**Versus**
**ADDITIONAL DISTRICT JUDGE and others---Respondents**

Writ Petition No. 68356 of 2019, decided on 14th November, 2019.

**Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction---Interim order---Maintainability---Scope---Petitioner assailed order passed by Revisional Court whereby Court while issuing pre-admission notice had not granted interim relief---Validity---Constitutional Petition against interim order was not competent---Appropriate course for the petitioner was to appear before Revisional Court---Constitutional petition, being misconceived, was dismissed with costs.
Abdul Rauf for Petitioner.

**ORDER**

**SHAHID WAHEED, J.**---This constitutional petition arises from a suit instituted by respondent No.3 (plaintiff) seeking a decree against respondent No.4 (defendant) for possession through partition of the suit property under the Punjab Partition of Immovable Property Act, 2012. During trial of the said suit the petitioner moved an application under Order I, Rule 10, C.P.C. for his impleadment as defendant on the ground that he was owner of the suit property on the basis of gift deed dated 2.02.2019. On consideration of the matter, the Trial Court came to the conclusion that the petitioner was not co-owner in the suit property and thus could not be impleaded as defendant in the suit. On the basis of said conclusion, the application under Order I, Rule 10, C.P.C. was dismissed by the Trial Court vide order dated, 23.10.2019. The petitioner thereupon filed a revision petition before the Additional District Judge, Depalpur. The said revision petition came up for peremptory hearing before the Additional District Judge on 31.10.2019 and the following order was passed.

| | |
|---|---|
| 31.10.2019 | This civil revision is fresh. Be registered. |
| PRESENT | Abdur Rauf Advocate, learned counsel for petitioner<br>Preliminary arguments heard. |

The contention of the petitioner is that impugned order dated 23.10.2019 is against law and facts and learned trial court has not applied its judicial mind while passing the impugned order. Therefore, the impugned order is liable to be set-aside.

The contention raised by the petitioner may not be appreciated without issuing the pre-admission notices to the respondents. Hence, pre-admission notices be issued to the respondents for 11.11.2019.

Announced. Muhammad
31.10.2019 Mohsin Additional
District Judge,
Depalpur

2. The petitioner through this constitutional petition has challenged the validity of order dated 31.10.2019.

3. At the outset of hearing, I asked petitioner's counsel as to how the instant petition is maintainable against the interlocutory order of the Revisional Court. He replied that the Revisional Court while issuing pre-admission notice had not granted interim relief, which is a material irregularity and thus, the order dated 31.10.2019 is liable to be set aside. I am afraid this reply is not satisfactory. It is now well settled that constitutional petition against interim order is not competent and thus, appropriate course for the petitioner to adopt is to appear before Revisional Court, advance arguments and thereafter to invite its decision. Prior to that stage, interference in such type of interlocutory order is not desirable. This petition is misconceived and accordingly dismissed with costs of Rs.1000/-.

SA/M-37/L Petition dismissed.

**2020 P L C (C.S.) 925**
**[Lahore High Court]**
**Before Shahid Waheed, J**
**MUHAMMAD SAFDAR**
**Versus**
**GOVERNMENT OF THE PUNJAB through Secretary Higher Education and 2 others**

W.P. No.4137 of 2019, decided on 18th February, 2020.

**Civil service---**

----Appointment---Petitioner was aggrieved of appointment of respondent as lecturer on the recommendation of Punjab Public Service Commission--- Contention of petitioner was that respondent concealed the fact of his service and did not provide 'No Objection Certificate' from the Ministry concerned while applying for the post in question--- Validity--- Respondent applied for the post on 9-7-2017, whereas he was appointed on contract basis in a project of Ministry of Law on 16-8-2017--- At the time of submitting online application for the post in question, respondent was not in service--- Condition of furnishing 'No Objection Certificate' from the Ministry concerned could not be imposed upon respondent and he could not be held guilty of any concealment of fact--- Advice rendered by Regulation / O & M Wing of S&GA Department, Government of Punjab was valid---Allegation made in complaint of petitioner was not well founded---High Court declined to interfere in the matter as Punjab Public Service Commission had rightly rejected complaint of the petitioner--- Constitutional petition was dismissed in circumstances.

Zameer-ul-Hassan for Petitioner.

Muhammad Arif Raja, Additional Advocate General, Punjab with Imdad Ali, Superintendent (Legal), PPSC.

**ORDER**

**SHAHID WAHEED, J.**----The petitioner and respondent No.3 ventured their applications before the Punjab Public Service Commission ("the Commission") for appointment to the post of Lecturer Social Work (BS-17). The Commission after conducting written test and interview recommended the name of respondent No.3 along with three others for the said post to the Higher Education Department, Government of the Punjab vide Letter No.PSC-RB-I/2017/267 dated 08th September, 2017. The petitioner thereupon made a complaint before the Commission with the allegation that respondent No.3 had concealed the fact that he was working as Social Case Worker in the Ministry of Law, Justice and Human Rights and also had not furnished the NOC of his employer, which he was obliged to do. The Commission forwarded the complaint to the Higher Education Department, Government of the Punjab for further necessary action.

2. The documents appended with this petition open out that pursuant to the reference made by the Commission, the Secretary, Higher Education Department, Government of the Punjab initiated inquiry and served a notice

upon respondent No.3 for affording him personal hearing. On consideration of the matter, the Secretary, Higher Education Department through order dated 17th April, 2018 found the allegations made against respondent No.3 valid and thus, made observation that the recommendation for his appointment for the said post was liable to be withdrawn.

3. Sequel to the order dated 17th April, 2018, the Commission initiated proceedings against respondent No.3 in accordance with Policy Decision No.6.2(a). Respondent No.3 appeared before the Commission and stated that he did not conceal any fact from the Commission as he was not in Government service at the time of submitting online application for the post of Lecturer Social Work. He further submitted that he joined the service as a Social Case Worker on 16th August, 2017 in the Ministry of Law, Justice and Human Rights while the closing date for the said post was 10th July, 2017. The Commission got the statement of respondent No.3 confirmed from the Ministry of Law and found it correct. On the basis of above facts, the Commission sought opinion/advice from the Regulations/O&M Wing of S&GAD, Government of the Punjab. The opinion/advice of the Regulation Wing was to the following effect: -

"i. Mr. Muhammad Javed Amjad applied for the post of Lecturer Social Work on 09.07.2017.

ii. He was appointed as Social Case Worker on contract basis in a project of Ministry of Human Rights on 16.08.2017.

iii. He resigned from the said post in the Ministry of Human Rights on 30.11.2017.

S&GAD has also advised in the said reference that the above said candidate was not in Government Service at the time of submitting his application for the post of Lecturer, Social Worker (Male)(BS-17) and he did not need to submit NOC/Departmental Permission Certificate."

Relying upon the above cited advice/opinion, the Commission rejected the complaint of the present petitioner. So, this constitutional petition.

4. Petitioner's sole ground to challenge the appointment of respondent No.3 is that he did not obtain NOC from the Ministry of Law while applying for the post of Lecturer Social Work (BS-17). It is not disputed that respondent No.3 applied for the said post on 9th July, 2017 whereas he was appointed as Social Case Worker on contract basis in a project of Ministry of Law on 16th August, 2017. It means that at the time of submitting online application for the post of Lecturer Social Work, respondent No.3 was not in service. If that was so, the condition of furnishing NOC from the Ministry of Law could not be imposed upon respondent No.3 and thus, he could not be held guilty of any concealment of fact. The advice rendered by the Regulations/O&M Wing of S&GAD, Government of the Punjab was valid and the conclusion is that the allegation made in the complaint of the present petitioner was not well founded. The Commission, therefore, rightly rejected the complaint of the present petitioner and resultantly, interference in the impugned order is uncalled for.

5. Dismissed. MH/M-57/L Petition dismissed.

**2020 C L C 1950**
**[Lahore]**
**Before Shahid Waheed, J**
**Mst. BALQEES BEGUM----Petitioner**
**Versus**
**ADDITIONAL DISTRICT JUDGE and others----Respondent**

W.P. No.32414 of 2015, decided on 24th September, 2020.

**(a) Administration of justice---**

----Law and equity did not assist carelessness and therefore law must take its course, and where a party did not appear for a long period of time, same must be proceeded against ex parte.

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

----Art.76(c)---Primary and secondary evidence---Production of documents---Cases in which secondary evidence relating to document may be given---Nature and scope of Art. 76(c) of Qanun-e-Shahadat, 1984---Original document, if it existed and was available, then same being the best evidence, must be produced ---- Such document, if it could not be produced due its loss, then secondary evidence was admissible --- Rationale of such principle was when a person loses the higher proof, then such person may offer the next best proof in his / her power---So long as higher or superior evidence was within possession of a person, or may be reached by such person, then no inferior proof in relation to the same may be given---Article 76(c) of the Qanun-e-Shahadat, 1984 was designed only for protection of person who in spite of his / her best efforts was unable from circumstances beyond his / her control able to place before the court primary evidence as required by law---Article 76(c) of Qanun-e-Shahadat, 1984 was not intended to be used for benefit of person who deliberately or with sinister motives refused to produce document which was in his / her possession, power or control---Party tendering secondary evidence must prove existence and execution of such document directly if possible or presumptively where not and then establish its loss either by admission of the adversary or by proof that it could not be found after diligent search---Sufficiency of search necessary to let in secondary evidence was preliminary question for a court which would vary according to nature of document itself, the custody it was in, and all surrounding circumstances of particular matter before a court---However, it was not necessary for party to show or prove exact mode and time of such loss.

Hira Lal v. Ram Prasad and others AIR (36) 1949 Allah. 677; R V. Haworth (1830 ) 4C & P 254; Hukam Chand v. Shahab Din and others AIR 1924 Lah. 40; Chuha Mal and another v. Haji Rahim Bakhsh AIR 1924 Lah. 303; Mst.

Khurshid Begum and 6 others v. Chiragh Muhammad 1995 SCMR 1237; Mehmooda Begum and others v. Additional District Judge (Ch. Muhammad Sarwar Sidhu), Sialkot and others 2004 YLR 1113; Safdar Ali v. Naveed Sadiq and others PLD 2006 Lah. 217; Jagmail Singh and others v. Karamjit Singh and others AIR 2020 SC 2319; Gathercole v. Miall 15 M&W 319; Manavikraman v. Nilambur Thacharakavil Manavikraman AIR 1916 Madras 928 (2); Mukhtar Ahmad through Legal Heirs v. Muhammad Yunnus and 4 others 2001 CLC 1796 and Sardar Bakhsh v. Maqsood Bibi and others 2003 SCMR 1194 rel.

Muhammad Yousaf Lurka for Petitioner.
Nemo. for Respondent.

Date of hearing: 24th September, 2020.

## JUDGMENT

**SHAHID WAHEED, J.----**This petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is of the plaintiff, and arises from her suit seeking decree for possession of the land belonging to the defendants, respondents Nos. 3 to 8 herein, who allegedly executed an agreement, dated 21st June, 1993, to sell it in favour of the plaintiff for a sum of Rs.136,688/- against a down payment of Rs.85,500/- vide receipt of even date. Claim of the plaintiff for possession of the land through specific performance of the said agreement was traversed by the defendants. The rival stances canvassed by the parties to the suit led the Trial Court to frame issues and invite evidence thereon. At the trial, the plaintiff filed an application under Article 76 of the Qanun-e-Shahadat, 1984 seeking permission to produce secondary evidence in respect of agreement to sell dated 21st June, 1993 and receipt of payment of Rs.85,500/- on the plea that they had been lost; which was resisted by the defendants. This application did not find favour with the Trial Court and was dismissed vide order dated 22nd July, 2013 on the ground that she had failed to prove as to how and when the documents were misplaced and what efforts were made to trace out the same. The plaintiff thereupon filed an application under Section 115, C.P.C. before the Addl. District Judge, Jaranwala and sought revision of the order dated 22nd July, 2013 of the Trial Court. The Revisional Court concurring with the reasoning of the Trial Court declined the leave to produce secondary evidence through order dated 19th September, 2015.

2. Impeaching the orders of the courts below, it is contended on behalf of the plaintiff that refusal to grant permission for producing secondary evidence in relation to agreement to sell and receipt dated 21st June, 1993 was not only contrary to the provisions of Article 76 of the Qanun-e-Shahadat, 1984 and the principle settled by the superior Courts but was also result of mis-reading of the contents of the application filed by the plaintiff. Elaborating this argument, it was submitted that since the plaintiff had stated in her application that the original of the agreement to sell and receipt were in the possession of her predecessor, namely, Haji Noor Muhammad who died on 12th September, 2006 and after that the same were misplaced/lost and could not be found despite much effort, the burden was on her to prove this assertion. The Trial Court was, therefore, required to grant opportunity to the plaintiff to produce evidence in respect of loss of original documents, which was not given, so, the courts below could not conclude that the plaintiff had failed to prove that the original documents were lost and they misdirected themselves by declining the permission to produce secondary evidence.

3. On the other hand, name of the defendants' counsel is printed in the cause list and despite this fact neither the defendants nor their counsel has turned up to oppose this petition. It is to be noted that this Court did not stay the proceedings of the suit but the Trial Court nevertheless without any cause adjourned the case sine die. In these circumstances particularly as this petition has been pending for the last more than five years, adjournment to procure attendance of the dormant and carefree defendants would not serve interest of justice. Since equity does not assist carelessness, the law must take its course. The defendants are, therefore, proceeded against ex-parte.

4. After the hearing, I find that the grouse made by the plaintiff is well founded, arguments canvassed on her behalf have weight and thus am persuaded to approve them. This is the case where the plaintiff wants to produce secondary evidence in respect of agreement to sell dated 21st June, 1993 and receipt of payment of Rs.85,500/- of even date with the plea that original of the said

documents was in possession of her predecessor, namely, Haji Noor Ahmad who died on 12th September, 2006 and after that the same were lost and could not be traced despite hectic efforts made by her. It is to be noted that defendants Nos.1 to 3, 5 and 6 have admitted the execution of documents whereas the defendant No.4 has denied them. Now the question which falls for determination is as to how in the given circumstances the plaintiff could be allowed to give secondary evidence of the lost documents. The principle is that so long as the original document exists and is available, it being the best evidence, must be produced. If it cannot be had on account of its loss, secondary evidence is admissible. The rationale of this principle is that when a person losses the higher proof, it may offer the next best in its power. It does not mean that person's rights are to be sacrificed because it cannot guard against events beyond its control. It only means that, so long as the higher or superior evidence is within possession of a person or may be reached by it, it shall give no inferior proof in relation to that.

5. Clause (c) of Article 76 of the Qanun-e-Shahadat, 1984 provides for permitting the parties to adduce secondary evidence of the existence, condition or contents of a document when the original has been lost. However, such a course is subject to certain limitations as it is not intended to be utilized for the benefit of a person who deliberately or with sinister motives refuses to produce in Court a document which is in its possession, power or control. It is designed only for the protection of a person who, in spite of best efforts, is unable from circumstances beyond its control to place before the Court primary evidence as required by law[1] . Thus the party tendering secondary evidence must prove the existence and execution of the document directly, if possible, or presumptively, where not and then establish its loss, either by the admission of the adversary or by proof that it cannot be found after diligent search[2] . Needless to mention here that the sufficiency of the search necessary to let in secondary evidence is a preliminary question for the Court, which will vary according to the nature of the document itself, the custody it is in, and indeed all the surrounding

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[1] **Hira Lal v. Ram Prasad and others (AIR(36) 1949 Allahabad 677)**

[2] **R V. Haworth (1830 ) 4C & P 254 Hukam Chand v. Shahab Din and others (AIR 1924 Lahore 40) Chuha Mal and another v. Haji Rahim Bakhsh (AIR 1924 Lahore 303) Mst. Khurshid Begum and 6 others v. Chiragh Muhammad (1995 SCMR 1237) Mehmooda Begum etc. v. Additional District Judge (Ch. Muhammad Sarwar Sidhu), Sialkot, etc. (NLR 2004 Civil 608) Safdar Ali v. Naveed Sadiq, etc. (NLR 2006 Civil 536) Jagmail Singh and Ors v. Karamjit Singh and Ors (AIR 2020 SC 2319)**

circumstances of the particular matter before the Court[3] . However, it is not necessary for the party to show or prove the exact mode and time of the loss[4] .

6. In the present case, it appears that both the Courts below were conscious of the fact that the plaintiff per above stated position of law had to prove as to how and when the original documents were lost and what efforts were made by her to find them. It is astonishing to note that the Trial Court, on the one hand, in its judgment referred the case of Mukhtar Ahmad[5] which stated that proof of loss of document is condition precedent to permission to lead secondary evidence and if the loss is not proved secondary evidence would become valueless whereas, on the other hand, without giving opportunity to the plaintiff to prove the loss of document by leading evidence, declined her request to produce secondary evidence with the observation that she had failed to prove as to how and when the documents were lost. This was not proper approach and thus, resulted into miscarriage of justice. The Trial Court ought to have granted opportunity to the plaintiff to lead some positive evidence so as to satisfy the preconditions for giving secondary evidence relating to the agreement to sell dated 21st June, 1993 and the receipt of even date and then exercised its discretion in such a way so that it could be inferred that justice had been done. Now, in the attending circumstances, the appropriate course of action is to follow the modus operandi adopted in the case of Sardar Bakhsh[6] wherein the Hon'ble Supreme Court of Pakistan examining somewhat similar facts approved the direction given by the High Court whereby Trial Court was asked to treat the application for production of secondary evidence as pending; to record evidence of the parties thereon; and, to decide the same on the basis of evidence.

7. In the result this petition is accepted and it is hereby declared that orders of the courts below have been passed without lawful authority and are of no legal effect and thus the same are set aside. As a consequence, the application of the plaintiff under Article 76 of the Qanun-e-Shahadat, 1984 shall be deemed to

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[3] **Gathercole v. Miall 15 M&W 319**
[4] **Manavikraman v. Nilambur Thacharakavil Manavikraman [AIR 1916 Madras 928 (2)]**
[5] **Mukhtar Ahmad through Legal Heirs v. Muhammad Yunnus and 4 others (2001 CLC 1796)**
[6] **Sardar Bakhsh v. Maqsood Bibi and others (2003 SCMR 1194)**

be pending before the Trial Court which shall decide the same afresh after allowing the plaintiff to produce evidence thereon.

KMZ/B-8/L Petition allowed.

**PLJ 2020 Lahore 223**
***Present:*** **SHAHID WAHEED, J.**
**SHAHID SARWAR--Petitioner**
**versus**
**GOVERNMENT OF PAKISTAN HOME DEPARTMENT MINISTRY OF INTERIOR, ISLAMABAD through SECRETARY and 7 others--Respondents**

W.P. No. 8426 of 2020, decided on 13.2.2020.

**Constitution of Pakistan, 1973--**

----Art. 199--Constitutional petition--Deletion of name from exist control list--Existance of any legal right--Aggrieved person--Maintainability--I am afraid this foundation does not exist here--Documents appended with this petition suggest that respondents have placed name of Zahid Sarwar, on ECL and other related files/orders--It means that a legal right, if any, exists in Zahid Sarwar and petitioner or his authorization could file this petition--Since petitioner has not placed on record any document conferring/ constituting petitioner as attorney of Zahid Sarwar, petitioner cannot be treated as aggrieved person to maintain this petition--I asked petitioner's counsel as to whether prior to filing of this petition any request was made before respondents for redress of grievance voiced in this petition--He replied in negative--In these circumstances prayer made in this petition cannot be allowed--Petition was dismissed. [P. 225] A & B

PLD 1963 SC 203 and PLD 1961 SC 178 *ref.*

*Mr. Muhammad Asif Mehmood,* Advocate.
Date of hearing: 13.2.2020.

**ORDER**

The petitioner has brought this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 seeking a direction to the respondents to delete the name of his brother, Zahid Sarwar, from the Exist Control List and other related files/standing orders.

2. The prayer made in this constitutional petition cannot be granted for two reasons: Firstly, the instant petition has been filed under clause (1)(a)(i) of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 seeking order in the nature of writ of mandamus. In the case of *Masudul Hassan v Khadim Hussain and another* (PLD 1963 SC 203) the principles applicable to issue of a writ of mandamus have been stated as follows:

*(i) "an applicant for an order of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought;*

*(ii) in order that a mandamus may issue to compel something to be done under a statute, it must be shown that the statute imposed a legal duty;*

*(iii) it is only in respect of a legal right that mandamus will issue;*

*(iv) the legal right to enforce the performance of a duty must be in the applicant himself. The Court, will therefore only enforce the performance of statutory duty by public bodies on the application of a person who can show that he has himself a legal right to insist on such performance".*

In the light of above stated principle it is to be seen as to whether a legal right in respect of the prayer made in this petition exists in the present petitioner seeking a direction to the respondents to perform duty qua that right. I am afraid this foundation does not exist here. The documents appended with this petition suggest that the respondents have placed the name of Zahid Sarwar, on the ECL and other related files/orders. It means that a legal right, if any, exists in Zahid Sarwar and the petitioner or his authorization could file this petition. Since the petitioner has not placed on record any document conferring/ constituting the petitioner as attorney of Zahid Sarwar, the petitioner cannot be treated as aggrieved person to maintain this petition.

3. The other ground upon which this petition must fail is that the Hon'ble Supreme Court in the case of *District Magistrate, Lahore etc and Syed Raza Kazim* (PLD 1961 SC 178) has held that the accepted conditions for grant of a writ of mandamus are that it must be preceded by a demand of justice and the refusal thereof and that there should be no other equally expeditious, in expensive and efficacious remedy available to the person seeking this extraordinary remedy. Being aware of this principle, I asked petitioner's counsel as to whether prior to filing of this petition any request was made before the respondents for redress of grievance voiced in this petition. He replied in the negative. In these circumstances prayer made in this petition cannot be allowed.

4. Dismissed.

(M.M.R.) Petition dismissed

**PLJ 2020 Lahore (Note) 178**
***Present*: SHAHID WAHEED, J.**
**AMJAD IQBAL--Petitioner**
**versus**
**Haji M. AFZAL, etc.--Respondents**

C.R. No. 3149 of 2014, decided on 26.11.2014.

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

----S. 115, O.XIV & XLI, Rr. 5 & 25--Suit for specific performance--Decreed--Application for framing of additional issue for recording of evidence to Pendency of appeal--Application was accepted to extent of framing of additional issue--Direction to--Petitioner filed an application under Order XIV Rule 5 read with Order XLI Rule 25, CPC which contained three prayers, that is, (i) to frame additional issue; (ii) to record evidence on additional issue; and (iii) to remand the case to the Trial Court for a fresh decision--Appellate Court has allowed the petitioner's application to extent of framing of additional. issue but has not passed any order with regard to the other two prayers made in the application--Direction to Appellate Court to decide remaining prayers of the petitioner which were made in his application under Order XIV, Rule 5 read with Order XLI Rule 25. C.P.C within a period of four week from receipt of certified copy of this order--Revision petition was allowed. [Para 4] A & B

*Mr. Muhammad Amin Ashraf Khan*, Advocate for Petitioner.
*Ch. Imran Raza Chadhar*, Advocate Respondent No. 1.
*Ch. Javed Akhtar Jajja*, Advocate for Respondents No. 2 & 4.
Date of hearing: 26.11.2014.

**JUDGMENT**

Briefly the facts of the case are that the Respondent No. 1 filed a suit against the petitioner and Respondents No. 2 to 4 for specific performance of oral agreement to sell. This suit was contested by the petitioner-Defendant No. 4. On divergent pleadings, issues were framed and evidence was led. After recording evidence, the learned Trial Court decreed the suit *vide* judgment and decree dated 5.3.2013. The petitioner assailed the above said judgment and decree through an appeal before the learned Addl. District Judge, Ferozewala. During pendency of appeal the petitioner filed an application under Order XIV Rule 5, CPC read with Order XLI Rule 25 CPC for framing of additional issue and recording of evidence. This application was contested by Respondent No. 1. After affording opportunity of hearing to the parties, the learned Appellate Court *vide* order dated 12.9.2014 accepted the application and framed additional issue.

2. The petitioner through this petition under Section 115, CPC seeks revision of order dated 12.9.2014 on the ground that the Appellate Court has not passed any order qua the request to lead evidence in respect of additional issue and thus to this extent impugned order is not sustainable. On the other hand, learned counsel for Respondent No. 1 submits that no evidence is required in respect of additional issue as it is a legal issue and, therefore, the order passed by the Appellate Court warrants no interference by this Court.

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

4. The petitioner filed an application under Order XIV Rule 5 read with Order XLI Rule 25, CPC which contained three prayers, that is, (i) to frame additional issue; (ii) to record evidence on additional issue; and (iii) to remand the case to the learned Trial Court for a fresh decision. The learned Appellate Court has allowed the petitioner's application to the extent of framing of additional issue *vide* order dated 12.9.2014 but has not passed any order with regard to the other two prayers made in the application. Thus, without touching merits of the case, I am inclined to dispose of this petition with a direction to the learned Appellate Court to decide the remaining prayers of the petitioner which were made in his application under Order XIV, Rule 5 read with Order XLI Rule 25, C.P.C within a period off four week from the receipt of certified copy of this order.

(Y.A.) Revision petition allowed

**PLJ 2020 Lahore (Note) 184**
***Present*: SHAHID WAHEED, J.**
**MUHAMMAD YAQUB--Applicant**
**versus**
**KHUDA BAKHSH--Respondents**

C.M. No. 66 of 1993 in R.A. No. 39 of 1992, decided on 16.4.2015.

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

----Ss. 12(2), 100 & 114--Purchasing of property--Suit for pre-emption--Dismissed--Appeal--Allowed--Revision petition--Allowed--Civil appeal--Matter was remanded--Filing of application for setting aside order during pendency of review application--Review application was dismissed--Appeal before Hon'ble Supreme Court--Dismissed--Binding of findings of divisional bench of High Court--Applicant filed an application under Section 114 C.P.C. and sought review of judgment passed by this Court--During pendency of said application, applicants filed present application under Section 12(2) C.P.C. for setting aside judgment--Applicant's review application under Section 114 C.P.C. was dismissed by Division Bench of this Court--Applicant assailed said order before Hon'ble Supreme Court of Pakistan--Findings of learned Division Bench of this Court were assailed before Hon'ble Supreme Court of Pakistan--Said appeal was dismissed being not pressed--It means that findings recorded by Division Bench of this Court in its order have attained finality--Thus, findings of learned Division Bench of this Court are binding on this Court as grounds which are now being urged for setting aside judgment and decree passed in Civil Revision are same which were subject matter of application for review of said judgment--Application was dismissed. [Para 4, 5 & 8] A, B & C

*Malik Noor Muhammad Awan*, Advocate for Applicant.
*Mr. Muhammad Mumtaz Faridi*, Advocate for Respondent.
Date of hearing: 16.4.2015.

**ORDER**

This is an application under Section 12(2) C.P.C. for setting aside the judgment and decree dated 4.11.1992 passed by this Court in the Civil Revision No. 1290-D of 1980.

2. In the case on hands, the applicant on 11.11.1976 purchased the suit property. The respondent-plaintiff had instituted a suit against the applicant for pre-empting the said sale. This suit was dismissed by the learned Civil Judge *vide* judgment and decree dated 4.4.1979. The respondent-plaintiff, feeling aggrieved, assailed the said judgment and decree through an appeal before the learned Addl. District Judge-I,

Mianwali. This appeal was allowed *vide* judgment and decree dated 14.7.1980 and the suit was decreed. The judgment and decree of the first Appellate Court was challenged before this Court through revision petition *i.e*. C.R. No. 1290-D of 1980. This civil revision was allowed *vide* judgment and decree dated 13.11.1982 and it was held therein that the applicant was negligent and contumacious in filing an incompetent appeal with deficient court fee. The applicant assailed revisional judgment before the Hon'ble Supreme Court of Pakistan through Civil Appeal No. 89 of 1988. The said appeal was allowed *vide* judgment dated 01.04.1990 and the case was remanded to this Court to rehear the revision petition.

3. After remand the learned counsel for the applicant made following statement before this Court:

> *"Statement of Mr. Rab Nawaz Khan Niazi. Advocate for the petitioner:*
> *'The petitioner only questions the finding of the lower appellate court on issue No. 4. It has been agreed between the parties that the findings of the lower appellate court on this issue may be reversed and that of the trial court be maintained. The revision of the petitioner may be accepted to the above extent and the decree passed by the lower appellate court, dated 14.7.1980, in favour of respondent be modified to the extent that the respondent shall pay Rs. 10,000/- as the sale price and Rs. 11,000/- as the cost of improvement. The payment should be made to the petitioner within one month, failing which the suit of the respondent' shall stand dismissed. The parties may be left to bear their own costs. "*

The statement of the learned counsel for the respondent-plaintiff was also recorded. This statement reads as under:-

> *"Statement of Raja Mahmood Akhtar, Advocate for the respondent-plaintiff: I have heard the statement of the learned counsel for the petitioner. As stated by him, the respondent-plaintiff agrees to pay the sum of Rs. 21,000/- , i.e., Rs. 10,000/- as sale price and Rs. 11,000/-as cost of improvements, within one month, in which event the suit of the respondent-plaintiff shall stand decreed. In case the payment of Rs. 21,000/- is not made within one month, the suit of the respondent-plaintiff shall stand dismissed. It is, however, agreed that the payments already made by the respondent-plaintiff in Court shall be adjusted against the afore-mentioned sum of Rs. 21,000/-. "*

In the light of above statements the civil revision was accepted by this Court in following terms *vide* judgment dated 4.11.1992:-

> *"In view of the foregoing, this revision petition is partly accepted and the finding of the lower appellate court, on issue No. 4 is set aside and that of the trial court thereon is maintained. In consequence, the suit of the respondent-plaintiff shall remain decreed subject to payment of Rs. 10,000/-*

*being the price of the land in dispute and the costs of improvements made thereon by the petitioner-defendant. The respondent-plaintiff shall deposit the afore-mentioned sum of Rs. 10,000/- plus Rs. 11,000/- in the trial court within one month from today, failing which the suit of the respondent-plaintiff shall stand dismissed. It may further be clarified that the respondent-plaintiff shall be entitled to have the deduction of amount if any already deposited in Court by him and shall deposit the remaining amount only within the afore-mentioned period.*
*The parties shall bear their own costs.*

4. On 12.12.1992 the applicant filed an application under Section 114 C.P.C. and sought review of the judgment dated 4.11.1992 passed by this Court in C.R. No. 1290-D of 1980. During the pendency of the said application, the applicants on 24.1.1992 filed the present application under Section 12(2) C.P.C. for setting aside the judgment dated 4.11.1992.

5. The applicant's review application under Section 114 C.P.C. was dismissed by the learned Division Bench of this Court *vide* order dated 16.11.1989. The applicant assailed the said order before the Hon'ble Supreme Court of Pakistan through Civil Appeal No. 1776 of 2001. This appeal was dismissed being not pressed through the following order dated 8.3.2011:

> *"Sardar Muhammad Ghazi, learned ASC on behalf of the appellant is present and does not press this appeal with the submission that an application under Section 12(2) C.P.C. ;has been filed in the High Court, which is still pending. In view of the statement of the learned ASC, this appeal is dismissed being not pressed."*

6. The applicant through the present application under Section 12(2) C.P.C. seeks setting aside of judgment and decree dated 4.11.1992 passed by this Court in Civil Revision No. 1290-D of 1980 on the following grounds:

> *"(a) That the judgment/decree passed by this Hon'ble Court is based on misrepresentation and cannot be sustained in the eye of law.*
> *(b) That as the time for the depositing of decretal amount was fixed by this August Court as one month, at the time of submitting an application by the respondent and recording the statement by Mr. Rab Nawaz Niazi, Advocate, the petitioner had no concern at all with Mr. Rab Nawaz Niazi, hence, his statement or concession cannot be called the petitioner's concession for the extension of time and, hence, the suit became finally dismissed and on that basis the time could not be extended and, hence, the judgment/decree is liable to be quashed."*

7. It is pertinent to mention here that the above cited grounds were also urged by the applicant in his application under Section 114 C.P.C. The grounds urged in the review petition were as follows:

*"That the petitioner knew from some other person that the petitioner's counsel Mr. Rab Nawaz Khan Niazi, Advocate conceded and got the case decided against the petitioner without my consent rather with the connivance of my opponents.*
*That as the decision dated 4.11.1992 is obtained by my Advocate through fraud and this decision has prejudiced me in all respects, hence the indulgence of your lordship is requested."*

8. The afore-stated grounds were dealt with by the learned Division Bench of this Court while deciding the review application, *i.e*. R.A. No. 39-C of 1992 and it was held as follows:

*"In this application for review it has been stated that the learned counsel who made the statement on behalf of the petitioner was not competent to do so nor could be give any consent to a decree being passed. It has been alleged that the learned counsel acted fraudulently while making the concession. There is no merit in the contention raised by the learned counsel for the petitioner. It is not denied that Mr. Rab Nawaz Niazi was duly engaged by the petitioner. A perusal of the power of attorney in his favour shows that the learned counsel was fully competent to make any statement on behalf of his client and to concede the claim. Apart from the express authority conferred by the power of attorney there is always a implied authority in a counsel to enter into any compromise or arrangement with the opposite side. If any authority is needed reference may be made to Dr. Ansar Hassan Rizvi v. Syed Mazahir Hussain Zaidi (1971 SCMR 634). Learned counsel next attempted to argue that a subsequent order was passed by the learned Chief Justice whereby the time for deposit of pre-emption money was extended. In his view after disposal of the revision petition the court had become functus officio and could not grant any extension.*

The above said findings of the learned Division Bench of this Court were assailed before the Hon'ble Supreme Court of Pakistan through Civil Appeal No. 1776 of 2001. The said appeal was dismissed being not pressed. It means that the findings recorded by the learned Division Bench of this Court in its order dated 16.11.1999 have attained finality. Thus, the findings of the learned Division Bench of this Court are binding on this Court as the grounds which are now being urged for setting aside judgment and decree dated 4.11.1992 passed in Civil Revision No. 66 of 1993 are the same which were subject matter of the application for review of said judgment.

9. In the sequel, this application is dismissed.
(Y.A.) Petition dismissed

**PLJ 2020 Lahore 593**

***Present*: SHAHID WAHEED AND CH. MUHAMMAD IQBAL, JJ.**
***Khawaja* MUHAMMAD NAYYER FARID, ADVCATE--Appellant**
**versus**
**GOVERNMENT OF PAKISTAN through Federal Law Minister--Respondents**

I.C.A. No. 52698 of 2020 decided on 21.10.2020.

**Constitution of Pakistan, 1973--**

----Art. 198(3)-- Law Reforms Ordinance, 1972, S. 3--Correction in name of Lahore High Court as Punjab High Court--Constitutional petition--Dismissal--Challenge to--Powers of parliament to enact or amend laws--During course of arguments, appellant could not present any reasonable ground which could make basis to interfere with observation made by Single Judge--Appellant is a practicing advocate and it appears that he is not aware that under our constitutional scheme, parliament exercises sovereign power to enact or amend laws Constitution and no outside power or authority can issue a direction to enact or amend a particular piece of legislation--Name of High Court has been provided in Art. 198(3) of Constitution of Pakistan, 1973--High Court cannot issue direction for making any amendment in provisions of Constitution--Prayer made in instant appeal is misconceived and thus, appeal was dismissed. [P. 594] A

Appellant in Person.
Date of hearing: 21.10.2020.

**ORDER**

This Intra Court, Appeal under Section 3 of the Law Reforms Ordinance, 1972 calls into question the order dated 29th of September, 2020 passed by learned Single Judge in Chamber whereby the constitutional petition brought by the appellant under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, i.e. Writ Petition No. 46700 of 2020 was dismissed.

2. Prayer in the above said petition was that a direction be issued to the respondents to put their efforts for correcting the name of this Court and be defined as Punjab High Court. This prayer was declined by the learned Single Judge with the following observations:

> *"suffice to say that the prayer made in this petition, has no legal basis and the petitioner has not brought forth any issue which would compel this Court to exercise its constitutional jurisdiction. The jurisdiction of the High*

*Court has been defined in the Constitution and does not matter whether the Court has been given one or the other name."*

3. During the course of arguments, the appellant could not present any reasonable ground which could make basis to interfere with the above cited observation made by the learned Single Judge. The appellant is a practicing advocate and it appears that he is not aware that under our constitutional scheme, Parliament exercises sovereign power to enact or amend laws/Constitution and no outside power or authority can issue a direction to enact or amend a particular piece of legislation. Name of this Court has be provided in Article 198(3) of the Constitution of the Islamic Republic of Pakistan, 1973. This Court cannot issue direction for making any amendment in the provisions of the Constitution. The prayer made in this appeal is misconceived and thus, the appeal is dismissed with costs of Rs. 10,000/- to be deposited by the appellant with the Lahore High Court Bar Dispensary.

(M.M.R.) Petition dismissed

**2020 C L C 2108**
**[Lahore]**
**Before Shahid Waheed and Ch. Muhammad Iqbal, JJ**
**Messrs DIGITAL LINK (PVT.) LTD. through Authorised Officer and others----Appellants**
**Versus**
**Messrs HANGZHOU HIKVISION DIGITAL TECHNOLOGY CO. LTD. and others----Respondents**

R.F.A. No.258418 of 2018, decided on 29th September, 2020.

**(a) Contract Act (IX of 1872)---**

----S.62---Novation of contract----Principles----To establish novation of contract, it must be established that there existed a previous valid agreement, that there existed an agreement of parties to cancel previous valid agreement, that there existed agreement of parties that second agreement replaced first agreement and finally that the validity of second subsequent agreement must be established.

**(b) Contract---**

----Contract of correspondence---Place of contract, determination of---Contract of correspondence was deemed to be made at place where letter of acceptance was posted.

The Firm Hira Nand Murti Dhari through Murti Dhar v. The Firm Gurmukh Rai Radhakishen through Radhakishen AIR 1923 Lah. 427; Firm Kanhaiwalal v. Dineshchandra AIR 1959 Madhya Pradesh 234 and Lahore Development Authority v. Sunbeam Corporation (Regd.) PLD 1984 Lah. 430 rel.

**(c) Civil Procedure Code (V of 1908)----**

----O.VII, R.10----Specific Relief Act (I of 1877), Ss.12 & 42 --- Suit for specific performance of (commercial) contract --- Return of plaint on ground of lack of territorial jurisdiction --- Adjudication upon question of territorial jurisdiction----Application of defendant under O.VII, R.10, C.P.C. seeking to return plaint on ground of lack of territorial jurisdiction was allowed by Trial Court---Contention of plaintiffs, inter alia, was that such order was made on basis of Agreement between parties which provided that jurisdiction would lie in a foreign country, however, per defendants, said Agreement was superseded by subsequent Agreement which did not have an exclusionary clause vis- -vis territorial jurisdiction----Validity----Burden existed upon plaintiffs to prove not only that the alleged second agreement validity existed but also the place where the same was accepted so as to establish territorial jurisdiction of Trial Court

through clear satisfactory evidence---Question of territorial jurisdiction, in the present case, was a mixed question of facts and law, which could only be resolved upon appraisal of evidence to be led by parties, which was not done by Trial Court ---- High Court set aside impugned order of Trial Court and remanded matter to Trial Court with direction to decide application under O.VII, R.10, C.P.C. afresh after framing of issues and recording of evidence---Appeal was allowed, accordingly.

Messrs Haji Moosa Haji Omar and others v. The Federation of Pakistan PLD 1956 Kar. 356; Dada Limited v. Pakistan PLD 1959 Kar. 264; Mst. Waris Jan and another v. Liaqat Ali and others PLD 2019 Lah. 333 and M.A. Chowdhury v. Messrs Mitsui O.S.K Lines Ltd and 3 others PLD 1970 SC 373 rel.

Mian Sultan Tanvir Ahmad and Habib Mubashar Ullah for Appellant.

Barrister Aun Ali Raza and Syed Muhammad Kaswar Gardezi for Respondents.

Date of hearing: 29th September, 2020.

## JUDGMENT

**SHAHID WAHEED, J.----**The plaintiffs have brought this appeal in which a very simple question has been raised as to whether the Trial Court without recording evidence could have determined the place where the plaintiffs should have instituted their suit. The facts and circumstances that have given rise to this question are as follows. On 1st January, 2011 defendant No.1, namely, Hangzhou Hikvision Digital Technology Company Ltd, through an agreement appointed the plaintiffs as exclusive distributor to promote and sell its products in Pakistan. This agreement was valid till 31st December, 2014 and one of its conditions was that the suits permitted to be brought in any court would be venued in P.R. of China as jurisdiction as final. The plaintiffs claimed that upon expiry of the said agreement, relationship, agency rights and distributionship was established and governed through another agreement which came into being by correspondence and e-mails exchanged between the parties and when defendant No.1 in the year 2016 resiling from the agreement appointed defendants Nos.2 and 3 as distributors, a cause arose which led them to institute the suit, giving rise to this appeal, seeking decree for specific performance of the agreement and also for declaration to the effect that appointment of defendants Nos. 2 and 3 as distributors of defendant No.1 was illegal with a further prayer that defendant No.1 be restrained from distributing its products through any other person except the plaintiffs. Upon filing of contesting written statement, defendant No.1 filed an application under Order VII, Rule 10, C.P.C. for return of the plaint on the ground that suit as per agreement dated 1st January, 2011 was competent in any court of China. Resisting the ground for return of plaint, the plaintiffs made reference to the subsequent agreement and requested the Trial Court to assume jurisdiction to adjudicate on the dispute. It

is to be noted that the question of returning the plaint under Order VII, Rule 10, C.P.C. arises only when there is another Court in which the suit should have been instituted and when there is no other Court where the plaint can be presented, the suit will be dismissed.[1] It appears that the Trial Court was aware of this principle of law and thus on its conclusion that neither it had the jurisdiction to hear the parties to the dispute nor could the plaintiffs present their plaint to any Court of Pakistan it dismissed the suit while allowing application under Order VII, Rule 10, C.P.C. vide order and decree dated 10th December, 2018. The Trial Court in its order has stated the reason which prevailed upon it to draw the above stated conclusion and that is that "subsequent agreement executed between the parties are in sequel of the first agreement which has not been cancelled by way of subsequent agreement. Hence, principle of novation is not applicable hereto" So, this appeal.

2. Challenging the decree dated 10th December, 2018 it is firstly contended on behalf of the plaintiffs that since the subsequent agreement having no exclusionary clause ousting the jurisdiction of Pakistani Courts had replaced the earlier agreement dated 1st January, 2011, it could not be held that jurisdiction of the Trial Court was barred; and secondly, without granting opportunity to the plaintiffs to produce evidence it could neither be held that the first agreement dated 1st January, 2011 was not cancelled nor that the principle of novation was not applicable.

3. As we understood, the case of the plaintiffs is based on two agreements, to wit, the agreement which was executed on 1st January, 2011 and the other agreement which came into existence through alleged exchange of correspondence/e-mails between the parties to the suit and according to the plaintiff it had superseded the earlier agreement. If it was so, the question of territorial jurisdiction had to be decided on the basis of three principles of law. The first principle is that a contract by correspondence is made at the place where the letter of acceptance is posted.[2] Second principle is that to prove a novation, four elements must be shown, that is, (a) the existence of a previous valid agreement; (b), the agreement of the parties to cancel the first agreement; (c) the agreement of the parties that the second agreement replaces the first one; and, (d) the validity of the second agreement.[3] From a legal standpoint, in the present case, the burden was upon the plaintiff to prove not only the alleged second agreement but also the place where it was accepted so as to establish the territorial jurisdiction of the Court through clear satisfactory evidence. Our examination of the facts and the principle of law applicable thereto suggests that question of jurisdiction, in the attending circumstances, was a mixed question of

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[1] **Messrs Haji Moosa Haji Omar and others v The Federation of Pakistan (PLD 1956 Karachi 356) Dada Limited v Pakistan (PLD 1959 Karachi 264)**

[2] **The Firm Hira Nand Murti Dhari through Murti Dhar v. The Firm Gurmukh Rai Radhakishen through Radhakishen (AIR 1923 Lahore 427) Firm Kanhaiwalal vs. Dineshchandra (AIR 1959 Madhya Pradesh 234) Lahore Development Authority v. Sunbeam Corporation (Regd.) (PLD 1984 Lahore 430) M/s Progressive Constructions Ltd v. Bharat Hydropower Corporation Ltd. (AIR 1996 Dehli 92)**

[3] **Mst. Waris Jan and another v. Liaqat Ali and others (PLD 2019 Lahore 333)**

facts and law, which could only be resolved upon appraisal of evidence to be led by the parties to the suit. This course of action was not adopted by the Trial Court and thus, its conclusion cannot be approved.

4. The third principle to be considered relates to the interpretation of the clause in the agreement dated 1st January, 2011 providing "that all suits permitted to be brought in any Court would be venued in P.R. of China has jurisdiction as final." For the order to be proposed, we would not dilate upon this principle lest it should prejudice case of either of the parties to the suit. However, it is suffice to say that the Trial Court would examine the validity and applicability of the said clause in the agreement in the light of Section 28 of the Contract Act, 1872 and its interpretation made in different cases particularly the case of M.A. Chowdhury [4] wherein the Hon'ble Supreme Court declined to approve the tendency where the jurisdiction of all Courts within the country is taken away and exclusive jurisdiction is given to a foreign Court by a contract.

5. We are conscious of the fact that the instant matter should be decided at the earliest as it pertains to commercial dispute and one of the parties is a foreign company and thus, in furtherance of this spirit and realizing that evidence in this case would be in the form of documents, we asked learned counsel for the defendants that if he admits the documents attached to the plaint then we decide the question of jurisdiction here but he said that he had no instructions to admit or deny the documents. This reply of the defendants' counsel leaves no option for us but to make an order of remand.

6. Objection as to territorial jurisdiction is definitely a threshold question and the same is required to be decided at the earliest without taking a step further in the proceedings. So, we accept this appeal and by setting aside the decree issued through the order dated 10th December, 2018 remit the matter to the Trial Court with a direction to decide the application under Order VII, Rule 10, C.P.C. afresh after framing issue and providing opportunity to the parties to the suit to produce evidence in support of their claims. Since it is commercial dispute, Trial Court shall make an endeavour to decide the application under Order VII, Rule 10, C.P.C. within a period of one month.

7. Parties are directed to appear before the Trial Court on 27.10.2020. No order as to costs. KMZ/D-11/L Appeal allowed.

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[4] **M.A. Chowdhury v Messrs Mitsui O.S.K Lines Ltd and 3 others ( PLD 1970 SC 373)**

**PLJ 2020 Lahore 165**
***Present:*** **SHAHID WAHEED, J.**
**SAJJAD HAIDER--Petitioner**
**versus**
**LAHORE DEVELOPMENT AUTHORITY, through DIRECTOR GENERAL, LAHORE and 4 others--Respondents**

W.P. No. 230783 of 2018, decided on 7.11.2019.

**Constitution of Pakistan, 1973--**

----Art. 199--Acquiring of land for housing scheme--Application for demarcation of land to Assistant Commissioner--Claim of ownership--Sale-deed--Constitutional jurisdiction--Khasra number or whereabouts indicating exact location of plots allegedly owned by him has not been mentioned anywhere; that petitioner himself is not clear as to exact location of his ownership and for that reason he had moved an application before concerned authority for demarcation of his land--Grievance voiced in this petition requires detail investigation through recording of evidence, which exercise cannot be undertaken by High Court in exercise of constitutional jurisdiction under Article 199 of Constitution of Islamic Republic of Pakistan, 1973--Petition was dismissed. [Pp. 166] A & B

*Sh. Naveed Shehryar,* Advocate for Petitioner.

*Sahibzada Muzaffar Ali,* Advocate for LDA/Respondents No. 1 & 2.

*Mr. Asif Ismail Bhatti,* Assistant Advocate General for Respondents No. 3 to 5.

Date of hearing: 7.11.2019.

**ORDER**

Prayer in this constitutional petition is that action of the Lahore Development Authority taking possession of the petitioner's property be declared illegal.

2. It is contended that the petitioner purchased two plots measuring one kanal each through two registered sale deeds dated 08.06.2015 and 06.08.2015 which were duly incorporated in the revenue record *vide* Mutations Nos. 12442 and 12471; that the Lahore Development Authority without any power or jurisdiction has taken possession of the petitioner's above referred plots along with other area and started claiming ownership over them; and that, the petitioner even submitted an application to the Assistant Commissioner for demarcation of his plot but of no avail.

3. On the other hand, learned Legal Advisor of the Lahore Development Authority submitted that perusal of the sale deeds annexed with the instant petition transpires that the petitioner is claiming ownership of two kanals land out of a

joint Khatta measuring 51 kanals, 15 marlas falling in Khewat No. 63, Khatooni Nos. 220 to 233, Mauza Kot Kamboh; that Khasra number or whereabouts indicating the exact location of the plots allegedly owned by him has not been mentioned anywhere; that the petitioner himself is not clear as to exact location of his ownership and for that reason he had moved an application before the concerned authority for demarcation of his land; and that the Lahore Development had acquired Khasra No. 587, 538, 543, 445, 599, 588, 598, 545, 593, 592, 594, 595, 535, 540, 548 min, 541 and 547 of Mauza Kot Kamboh *vide* Notification No. LAC/2458 dated 02.04.1981 for Sabza Zar Housing Scheme.

4. After hearing learned counsel for the parties I am of the view that grievance voiced in this petition requires detail investigation through recording of evidence, which exercise cannot be undertaken by this Court in exercise of constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

5. In view of above, this petition being not maintainable is dismissed.

(Y.A.) Petition Dismissed

**PLJ 2020 Lahore (Note) 150**
***Present:* SHAHID WAHEED, J.**
**MUHAMMAD RAASAB--Appellant**
**versus**
***Mst.* SAHIBAN BIBI--Respondent**

R.S.A. No. 122 of 2006, decided on 22.4.2015.

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

----S. 9--Suit for possession--Decreed--Appeal--Dismissed--Allotment of suit land--Reassessment of facts--Involvement of issues for adjudication--Determination of dispute--Appellate Court has to marshal facts and evidence in both cases of reversal as well as affirmance--Where judgment of Appellate Court is of reversal, Appellate Court should consider all relevant and material evidence on record and give reasons for said decision--Where judgment is of affirmance, it is not necessary that every piece of evidence is considered once again but, it is reiterated, there must be sufficient discussion to show that Court has reassessed facts and circumstances of case--It is an established principle of law that a judicial order must be a speaking order manifesting by itself that Court has made an endeavor for resolution of issues involved for their proper adjudication--Ultimate result may be reached by diligent effort, but if final order does not bear an imprint of that effort and on contrary discloses arbitrariness of thought and action, feeling with painful result, that justice has neither been done nor seems to have been done is inescapable--Judgment recorded by ADJ does not exhibit a judicious treatment of case and determination of dispute and, therefore, cannot be held a valid judgment--Appeal was allowed. [Para 6, 8 & 9] B, C & D

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

----O.XLI R. 31--Duty of Court--A duty is cast upon first Appellate Court to re-examine pleadings and evidence on record and then determine relevant issues. [Para 6] A

*M/s. Qaisar Mahmood Sra* & *Babar Riaz Sidhu*, Advocates for Appellant.
*Mr. Shabbir Hussain Qureshi*, Advocate for Respondent.
Date of hearing: 22.4.2015.

**JUDGMENT**

The appellant, Muhammad Raasab, through this second appeal has challenged the validity and legality of judgment and decree dated 17.02.2006 passed by the learned Addl. District Judge, Pindi Bhattian who affirmed the judgment and decree dated 20.06.2005 passed by the learned Civil Judge, 1st Class, Pindi Bhattian whereby suit of the respondent was decreed.

2. In the present case the respondent sued the appellant before the learned Trial Court for possession of the suit property. It was maintained in the plaint that she after getting allotment of the suit land measuring four marlas from the Provincial Government under Jinnah Abadi Scheme constructed a house; and, that one year and six months prior to the institution of the suit the appellant forcibly dispossessed her from said house. The afore-stated assertions were contested by the appellant through written statement. On pleadings issues were framed and evidence was led. After recording evidence the learned Trial Court decreed the suit *vide* judgment and decree dated 20.06.2005. The appellant assailed the said judgment and decree through an appeal under Section 96 CPC before the learned Addl. District Judge, Pindi Bhattian. This appeal could not evoke favourable response and the same was dismissed *vide* impugned judgment and decree dated 17.02.2006. Hence, this second appeal.

3. It is contended on behalf of the appellant that the judgment and decree of the learned first Appellate Court do not conform with the mandatory provisions of Order XLI Rule 31 CPC; that the learned Addl. District Judge has not given any independent reason for dismissing the appeal of the appellant; and that judgments and decrees of the learned Courts below suffer from misreading and non-reading of evidence and also from misapplication of the provision of law.

4. On the other hand, learned counsel for the respondent has vehemently opposed this appeal and submitted that judgments and decrees of the learned Courts below are valid in all respects and, therefore, no interference is called for.

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

6. The main submission of the learned counsel for the appellant is that the learned first Appellate Court did not consider the evidence on record to get an independent conclusion and thus the judgment and decree passed by the learned first Appellate Court are not valid. It is well settled principle that an appeal under Section 96 C.P.C. is a substantive right conferred by the statute and it is continuation of the proceedings, which comes entirely upon the first Appellate Court, carrying with it a right of rehearing of questions of law and facts as well as reviewing pleadings and evidence afresh. Thus a duty is cast upon the first Appellate Court to re-examine the pleadings and evidence on record and then determine the relevant issues. The object of requiring an Appellate Court to record in its judgment the particulars mentioned in the Order XLI Rule 31 C.P.C. is twofold namely:--

(a) to afford the parties an opportunity of knowing and understanding the grounds of the decision with a view to enable them to exercise, if they deem fit and are so advised, the benefit of second appeal conferred by Section 100 C.P.C; and

(b) to enable the High Court in second appeal to judge whether the lower Appellate Court has properly appreciated the case.

In fact the Appellate Court has to marshal the facts and evidence in both the cases of reversal as well as affirmance. Where the judgment of the Appellate Court is of reversal, the Appellate Court should consider all the relevant and material evidence on record and give reasons for the said decision. Where the judgment is of affirmance, it is not necessary that every piece of evidence is considered once again but, it is reiterated, there must be sufficient discussion to show that the Court has reassessed the facts and circumstances of the case. The superior Courts have repeatedly held that the following are not the proper judgments:

*a) a mere statement that a point is proved or not proved;*
*b) that counsel admits that certain evidence is the best evidence;*
*c) the arguments of plaintiff's counsel represent the correct view of the case;*
*d) that the point is absurd or ridiculous or worthless;*
*e) that the judge is in agreement with the Court below;*
*f) judgment based on mere conjunctures and presumptions;*
*g) judgment based on evidence not legally admitted; and*
*h) judgment not based on independent application of mind to the facts and evidence of the case."*

7. In the light of afore-stated principle of law I now examine the judgment and decree of the learned Addl. District Judge, Pindi Bhattian. The pivotal issue in the instant case is Issue No. 1 viz. *"whether plaintiff was in possession of the suit land and was dispossessed by the defendant without consent and due course of law, illegally and plaintiff is entitled to decree of possession on the suit land against defendant".* In respect of this issue, the learned first Appellate Court after recapitulating the oral as well as documentary evidence led by the parties decided the said issue in the following words:

> "----Respondent was allotted land measuring 4 marlas in khasra No. 2551/228/2 and this piece of land is now in possession of appellant who is occupying it illegally. The learned trial Court has rightly decided this issue in favour of respondent that she is entitled to possession of it as being allottee of the same. Finding of learned trial Court on this issue is maintained accordingly."

The afore-cited extract of the judgment does not show that how the issues stand proved from the evidence available on record. In fact the learned first Appellate Court without appraising the evidence and giving any reason has approved the findings of the learned Trial Court. This was nothing but dereliction of duty. Such a perfunctory disposal leads to wastage of the Court time and the time of the litigants

and, therefore, has always been regarded as improper judgment and of doubtful validity.

8. It is an established principle of law that a judicial order must be a speaking order manifesting by itself that the Court has made an endeavor for the resolution of the issues involved for their proper adjudication. The ultimate result may be reached by diligent effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, feeling with the painful result, that justice has neither been done nor seems to have been done is inescapable. In the present case I, find that the judgment recorded by the learned Addl. District Judge does not exhibit a judicious treatment of the case and the determination of the dispute and, therefore, cannot be held a valid judgment.

9. In view of above, this appeal on the basis of afore-stated preliminary substantial question of law, is allowed and the impugned judgment and decree dated 17.02.2006 of the learned Addl. District Judge, Pindi Bhattian are hereby set aside and the matter is remanded to him for fresh disposal in accordance with law preferably within a period of six months. Parties are directed to appear before the learned Addl. District Judge, Pindi Bhattian on 27.05.2015. No order as to costs.

(Y.A.) Appeal allowed

**PLJ 2020 Lahore (Note) 160**
***Present:*** **SHAHID WAHEED, J.**
**AMIR ALI SHAH, etc--Petitioners**
**versus**
**ADJ, etc--Respondents**

W.P. No. 875 of 2013, heard on 27.11.2015.

**Constitution of Pakistan, 1973--**

----Art. 199--Civil Procedure Code, (V of 1908), O.XIII R. 2, O.VII, R. 18--Suit for declaration--Application for seeking permission to produce documents in rebuttal evidence--Dismissed--Revision petition--Accepted--Exercise of jurisdiction--Material irregularity--Revisional Court had not appraised:- (i) whether document, i.e, application moved by donor, Sabir Ali deceased, before Sub-Registrar was a public document; and, (ii) whether said document could be allowed to be produced in rebuttal evidence of plaintiff/Respondent No. 2--This omission is fatal and leads to conclusion that learned Additional District Judge, Ferozewala, while passing impugned order had acted in exercise of in jurisdiction illegally and with material irregularity--Petition was allowed. [Para 5] A

*Mr. Ahmad Waheed Khan*, Advocate for Petitioners.
*Mr. Qaisar Mahmood Sra*, Advocate for Respondent No. 2
*Nemo* for Respondent No. 3.
Date of hearing: 27.11.2015.

**JUDGMENT**

Prayer in this petition is to set aside the revisional order dated 13.12.2012 whereby the learned Additional District Judge, Ferozewala by setting aside the order dated 22.02.2012 of the learned Civil Judge, Ferozewala, District Sheikhura accepted the application under Order XIII Rule 2 read with Order VII Rule 18 CPC and allowed the Respondent No. 2 to produce before the learned Trial Court a document, that is,

copy of application moved by one Sabir Ali (deceased) before the Sub-Registrar, in rebuttal evidence.

2. The facts culminating in the above said impugned order are that on 03.04.1997 the Respondent No. 2 instituted a suit against the petitioners and predecessor of Respondent No. 3, Muhammad Zahir Shah and sought declaration to the effect that gift deed No. 2358 volume No. 1653 dated 08.04.1996 and mutation No. 1008 dated 24.04.1996 were illegal, void and ineffective upon her rights. The petitioners along with the Respondent No. 3 are contesting the said suit by filing a written statement. On pleadings the learned Trial Court *vide* order dated 04.03.2002 framed issues and directed the parties to adduce evidence in support of their respective claims. The affirmative evidence of the plaintiff/Respondent No. 2 stood concluded on 03.01.2012. Subsequently oral evidence of the petitioners and Respondent No. 3 also concluded on 03.02.2012. After conclusion of the affirmative evidence the plaintiff/Respondent No. 2 on 08.02.2012 filed an application under Order XIII Rule 2 read with Order VII Rule 18 CPC seeking permission to produce a copy of the application which was moved by the alleged donor, *i.e.* Sabir Ali deceased, to the Sub-Registrar along with affidavit in rebuttal evidence. This application was resisted by the petitioners. On consideration of the matter, the learned Trial Court *vide* order dated 22.02.2012 dismissed the said application. The relevant extract of the said order reads as under:

> *"It is clear from perusal of record that petitioner wants to produce the certified copy of application as well as affidavit in pursuance of which a gift deed was executed by local commission. The perusal of record further reveals that onus to prove the validity of gift deed was placed on plaintiff as narrated in the issue No. 1. In this context the plaintiff had to produce any relevant documents in affirmative evidence, the plaintiff herself concluded her affirmative evidence, through her counsel, the documents purported to be produced do not fall within the ambit of rebuttal evidence. In view of above discussion, the petition in hand is meritless, hence, the same is hereby rejected."*

3. The Respondent No. 2, feeling aggrieved, assailed the said order through a revision petition before the learned Additional District Judge, Ferozewala, District Sheikhupura. This revision was accepted *vide* order dated 13.12.2012 and Respondent No. 2 was allowed to produce the said document in rebuttal evidence subject to payment of costs of Rs. 2000/-.

4. The petitioners through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 have called into question the revisional order dated 13.12.2012 of the learned Additional District Judge on the ground that the learned Additional District Judge, Ferozewala, while passing the said order had not appraised the grounds on the basis of which the learned Trial Court dismissed the application of Respondent No. 2; that the document which is sought to be produced in rebuttal evidence is not a public document and this fact was also not appreciated properly by the learned Revisional Court; and, that the principle laid down in the case of *Moazam Majeed Bajwar v. Tariq Munawar and others* (2012 MLD 417) was misconstrued by the learned Additional District Judge.

5. I confronted the learned counsel for Respondent No. 2 with the afore noted arguments and asked as to whether the learned Additional District Judge, Ferozewala, while passing the impugned order dated 1.12.2012 had taken into consideration ground which prevailed upon the learned Trial Court to dismiss the application for production of said document in rebuttal evidence. In response to said query, learned counsel for Respondent No. 2 took me to the order dated 13.12.2012 of the learned Additional District Judge, Ferozewala. I have read the said order with the assistance of the learned counsel for Respondent No. 2/plaintiff. Perusal of the said order unfolds that the learned Revisional Court had not appraised:- (i) whether the document, i.e, application moved by the donor, Sabir Ali deceased, before the Sub-Registrar was a public document; and, (ii) whether the said document could be allowed to be produced in rebuttal evidence of the plaintiff/Respondent No. 2. This omission is fatal and leads to the conclusion that the learned Additional District Judge, Ferozewala, while passing the impugned order dated 13.12.2012 had acted in exercise of his jurisdiction illegally and with material irregularity.

6. Despite service no one has appeared on behalf of legal heirs of Respondent No. 3, therefore, they are proceeded against ex-parte.

7. In the sequel, this petition is accepted and the order dated 13.12.2012 of the learned Additional District Judge, Ferozewala, is set aside and declared to have been passed without lawful authority and of no legal effect. Resultantly, the revision petition of the Respondent No. 2 titled *"Zahoor Fatima v. Aamir Ali Shah"* (*i.e.*CR. No. 21/12) shall be deemed to be pending before the learned Additional District Judge, Ferozewala, who shall decide the same afresh in accordance with law. Parties are directed to appear before the learned Additional District Judge, Ferozewala, on 17.12.2015.

(Y.A.) Petition allowed

**P L D 2021 Lahore 33**
**Before Shahid Waheed, J**
**MUHAMMAD RIAZ---Petitioner**
**Versus**
**GOVERNMENT OF PUNJAB through Collector and others---Respondents**

Civil Revision No. 4782 of 2015, heard on 22nd October, 2020.

**(a) Jurisprudence---**

----Legal system---Meaning of legal system is derived from values in a given society.

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

----Arts.2-A, 3, 9, 25(3), 31, 34, 35, 37 & 38---Right of wife in Islam---Responsibilities of husband---Scope---Within Islamic traditions, the first and most important right that a wife has over her husband is to be treated with respect and kindness---When a woman gets married, she has financial rights over her husband---Husband must provide her with all necessities for her to live a comfortable life---Incumbent upon husband to offer provisions of house, food, clothing, healthcare and other tools required for her subjective standard of living---Given values and keeping with Arts. 2-A, 3, 9, 25 (3), 31, 34, 35, 37 & 38 of the Constitution, the Legislatures have made special provisions to help woman in distress and for her protection against moral and material abandonment---Object of all laws is that ill-used wives and discarded divorcees should not be driven to material and moral dereliction to seek sanctuary in the streets---Islamic ethos and general sociological background for resolution of all such disputes, must be appreciated.

**(c) Islamic law---**

----Gift by husband to wife---Gift, revocation of---Collusion---Proof---Onus to prove---Special costs, imposition of---Parties were husband and wife inter se, and suit was filed by husband to revoke gift of land made in favour of his wife---Plea raised by plaintiff was that gift mutation in favour of wife was outcome of collusion of defendants and that plaintiff was not aware of the gift at the time of affixing his thumb impression---Both the Courts below concurrently dismissed suit and appeal filed by plaintiff---Validity---Type of allegations made by plaintiff upon its proof, acted as a catalyst bringing beneficiary under burden to establish validity of transaction---Allegation of collusion was made by plaintiff, who as per Art. 117 of Qanun-e-Shahadat, 1984, had burden to prove the same---Court could not proceed on the basis of weaknesses of defendants until such burden was discharged---By falsely accusing his wife, husband not only tarnished her chastity but also made a despicable attempt to seize her property---High Court declined to interfere in

concurrent judgments and decrees passed by two Courts below---High Court imposed heavy costs upon husband under S.35-A, C.P.C. which would to some extent serve as "balm to relieve the wife from pain of wound inflicted by her husband"---Revision was dismissed in circumstances.

M. Krishnaswami Naidu v. Secretary of State represented by Collector of Tanjore and others AIR (30) 1943 Madras 15; Muhammad Aslam v. Muhammad Tufail and 2 others 1995 CLC 1061; Inayat Ali Shah v. Anwar Hussain 1995 CLC 1906; Tahira Bibi v. Muhammad Khan and others PLD 2018 Lah. 803; Amina Bibi v. Khatija Bibi (1864) 1 Bom. H.C. 157; Ma Mi v. Kallandel Ammal AIR 1927 PC 22; Emnabai v. Hajirabai (1889) 13 Bom 352; Abdul Rehman Nachiyal v. Muhammad Nurdin Maracayer 23 IC 547; Bee Jan Bee v. Fatima Beebee 8 IC 431; Neaz Begum v. Manzur Ahmad 11 IC 534; Abdul Mateen and others v. Mst. Mustakhia 2006 SCMR 50 and Al-Muslim Shaih, Cairo, Kitab al-Hibat, P.64 rel.

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

----S. 52---Entries in revenue record---Presumption---When entries of mutation get incorporated in Jamabandi (annual record) then it is presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor.

Bhagwan Das v. Mangal Sain AIR 1929 Lah. 93; Abdul Ahad and others v. Roshan Din and 36 others PLD 1979 SC 890; Ahmad Ali and others v. Muhammad Iqbal and another 1986 SCMR 244; Divisional Evacuee Trust Property Committee, Hyderabad v. Deputy Commissioner and another 1989 SCMR 1610; The Evacuee Trust Property Board and others v. Haji Ghulam Rasul Khokhar and others 1990 SCMR 725; Syed Muhammad Haider Zaidi and others v. Abdul Hafeez and others 1991 SCMR 1699; Mazloom Hussain v. Abid Hussain and 4 others PLD 2008 SC 571 and Mt. Wallan v. Fazla and others AIR 1939 PC 114 rel.

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

----S. 42---Mutation of gift---Gift of property by husband to wife---Wife, possession of---Constructive possession, principle of---Applicability---Once mutation of names is proved, the natural presumption arising from relation of husband and wife existing between them is that husband's subsequent acts with reference to property have been done on his wife's behalf and not on his own---Such principle indicatestheory of constructive possession is well applicable to gifts between husband and wife.

**(f) Islamic law---**

----Gift---Revocation---Effect---Gift made by husband in favour of his wife is to made more congeniality---Islamic Law, in such like events, does not give husband any right to revoke the gift.
Abdul Majid Khan and another v. Mst. Anwar Begum PLD 1989 SC 362 and Hamilton's Hedaya by Grady at page 486 rel.
Mian Muhammad Ismail Thaheem for Petitioner.
Muhammad Arif Raja, Additional Advocate General, Punjab for Respondents Nos. 1 to 3.
Rana Mazhar Iqbal for Respondents Nos. 4 and 5.

Date of hearing: 22nd October. 2020.

**JUDGMENT**

**SHAHID WAHEED, J**.---I have been presented with a case which reflects the social malaise where a husband being wearied of the withering beauty of his wife not only accuses her of dishonesty but also in the lure of his materialistic desire wants to take back his gift which he once made to her while recognizing her services, care and love. It is a trite saying that meaning of a legal system is derived from values in a given society. It would not be an overstatement to say that values are treated by our society on ethical basis, which are uncompromising in the matter of woman's rights and do not allow her to labour under any legal disability. This value system stems from the concept of Islam which lay strong emphasis on the position of a wife. Within the Islamic traditions, the first and most important right that a wife has over her husband is to be treated with respect and kindness. When a woman gets married, she has financial rights over her husband in that he must provide her with all the necessities for her to live a comfortable life. It is thus, incumbent upon the husband to offer the provisions of house, food, clothing, healthcare and other tools required for her subjective standard of living. Given this values and in keeping with Articles 2-A, 3, 9, 25(3), 31, 34, 35, 37 and 38 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution), the legislatures have made special provisions to help woman in distress and for her protection against moral and material abandonment. The object of all our laws is that ill-used wives and discarded divorcees should not be driven to material and moral dereliction to seek sanctuary in the streets. And so we must appreciate the Islamic ethos and the general sociological background for the resolution of all such disputes. From this coign of vantage, I will view the present case.

2. Here the plaintiff, Muhammad Riaz, after the death of his first wife, married Fatima Bibi, defendant No.4, who was a divorcee and mother to two daughters. On 15th June, 1995 the plaintiff through mutation No.595 gifted 56 Kanals of his total 144 Kanals of land to his wife (defendant No.4). This land is situated within the revenue estate Chaito, Tehsil Phalia, District Mandi Bahauddin. Ten years later, Fatima Bibi sold 4 Kanals of the gifted land to Muhammad Anwar, defendant No.5,

vide mutation No.840 dated 4th May, 2005. It appears that the plaintiff for his diminishing initial warmth and mutual affection made the said sale as the cause to bring a suit for the revocation of gift. The plaintiff in his suit for declaration joined Province of Punjab through Collector, Mandi Bahauddin (defendant No.1), Tehsildar, Phalia (defendant No.2), Patwari Halqa Chaito, Tehsil Phalia (defendant No.3), his wife Fatima Bibi (defendant No.4) and subsequent vendee, namely, Muhammad Anwar (defendant No.5). Prayer in the suit was that a declaration be granted that gift mutation No.595 dated 15th June, 1995 and sale mutation No.840 dated 4th May, 2005 were against law and facts, result of collusion and thus, ineffective upon his proprietary rights.

3. The allegations made in the plaint were denied by the wife of the plaintiff, Fatima Bibi (defendant No.4) and the subsequent vendee, Muhammad Anwar (defendant No.5) through a joint contesting written statement with a plea that the gift was rightly sanctioned in the revenue record as the plaintiff voluntarily fulfilling the conditions of the gift in presence of the witnesses handed over the possession of the land to his wife, who still had it. It was also maintained in the reply that the plaintiff was aware of the sale as it was made, with his consent, in favour of Muhammad Anwar and possession was delivered.

4. The pleadings of the parties call upon this Court to examine the validity of two transactions. The first transaction was dated 15th June, 1995 when the land stood transferred in the name of defendant No.4 by way of gift vide mutation No.595 whereas second was the transaction of sale, of the portion of the gifted land, made in favour of defendant No.5 through mutation No.840 dated 4th May, 2005. These two transactions were brought under discussion before the Courts below through issue Nos.1 and 2, which on examination of evidence were found to be valid. Since the plaintiff has sought revision of the concurrent findings, it is essential to first appraise the legality of gift transaction because upon the fate of it hinges the existence of other transaction of sale. So let's see what was the plaintiff's first objection to the gift. He alleged that gift mutation No.595 dated 15th June, 1995 was the outcome of the collusion of the defendants; and, that he was not aware of the gift at the time of affixing his thumb impression. Such type of allegation upon its prove acts as a catalyst bringing the beneficiary under burden to establish the validity of transaction. Since the allegation of collusion was made by the plaintiff, he as per Article 117 of the Qanun-e-Shahadat, 1984 had the burden to prove it; and until such burden was discharged, the Court could not proceed on the basis of weaknesses of the defendants. In this view of the matter, I have to examine as to whether the plaintiff had been able to discharge his burden. It is to be noted that initial burden to prove the said negative fact was to be discharged the moment the plaintiff would have substantiated his allegation prima facie by making a statement on oath before the Trial Court[1] . On the contrary, the plaintiff, when appeared

1 **"M. Krishnaswami Naidu v. Secretary of State represented by Collector of Tanjore and others" (A.I.R. (30) 1943 Madras 15)**
**"Muhammad Aslam v. Muhammad Tufail and 2 others" (1995 CLC 1061)**

before the Trial Court as his own witness did not utter a single word about collusion and thus, had been failed to discharge his burden. In these circumstances the conclusion would be that the allegation of collusion was false and the mutation of gift was rightly sanctioned by the Revenue Officer.

5. There is another good reason to hold that the plaintiff was not entitled to the decree as prayed for in the plaint. The mutation proceedings were conducted in a public assembly and in that connection the plaintiff and his wife (defendant No.4) personally appeared before the revenue officer and in presence of the witnesses, namely, Muhammad Shafi, Lambardar (DW-1) and Shera (PW-2), acknowledged and confirmed the oral gift and delivery of possession. It was on this statement that the land then mutated in the name of Fatima Bibi (defendant No.4). Copy of mutation No.595 dated 15th June, 1995 was retained on record as Ex.P.1. A perusal of record indicates that this mutation was given effect to and incorporated in jamabandi of mouza Chaito for the year 1996-1997, 2000-01 and 2004-05, copies whereof were produced as Ex.P.3, Ex.P.4, and Ex.P.5 respectively. When entries of mutation get incorporated in jamabandi (that is annual record) then it is presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor[2]. As against the aforesaid entries, mere verbal statements did not extend any help to the plaintiff for that the documentary evidence could not be rebutted by oral evidence[3]. In this scenario, the plaintiff could not be heard saying that he was not aware of the gift at the time of making of thumb impression. I find that the plaintiff had been unsuccessful in rebutting the entries made in the jamabandi and thus, interference therewith was uncalled for.

6. Before moving on to the next objection, I would pause here so as to examine the motive which according to the plaintiff led the defendants to collude with each other for obtaining the sanction of gift mutation. As stated in the plaint, wife of the plaintiff is very clever and cunning woman who took him to defendants Nos.2 and 3 with the impression that the documents for obtaining agriculture loan could be prepared but she in collusion with defendants Nos.2 and 3 got his thumb prints on the mutation of gift. When this averment is read in conjunction with the statement of the plaintiff which he made during the course of his cross-examination as PW-1, it transpires that obtaining a loan and making a gift are two incidents which took place on different dates and year. It is to be noted that cross-examination of the plaintiff was recorded on 13th October, 2011. As regards the mutation of gift, the plaintiff upon being asked during cross-examination stated that it happened sixteen years ago. If these sixteen years are counted from the date of cross-examination, it almost corresponds with the date of gift mutation i.e. 15th June, 1995. So, it is clear

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**"Inayat Ali Shah v. Anwar Hussain" (1995 CLC 1906)**
**"Tahira Bibi v. Muhammad Khan and others" (PLD 2018 Lahore 803)**

2 **"Bhagwan Das v. Mangal Sain" (A.I.R. 1929 Lahore 93) "Abdul Ahad and others v. Roshan Din and 36 others" (PLD 1979 SC 890) "Ahmad Ali and others v. Muhammad Iqbal and another" (1986 SCMR 244) "Divisional Evacuee Trust Property Committee, Hyderabad v. Deputy Commissioner and another" (1989 SCMR 1610) "The Evacuee Trust Property Board and others v. Haji Ghulam Rasul Khokhar and others" (1990 SCMR 725) "Syed Muhammad Haider Zaidi and others v. Abdul Hafeez and others" (1991 SCMR 1699) "Mazloom Hussain v. Abid Hussain and 4 others" (PLD 2008 SC 571)**

3 **"Mt. Wallan v. Fazla and others" (A.I.R. 1939 PC 114)**

that transaction of gift took place in the year 1995. Now I need to know the year when the plaintiff obtained a loan. The plaintiff said in his cross-examination that he had obtained a loan and used it to build a house with three large rooms, a drawing-room, a boundary-wall and a door; that they used to live in the same house before; that there was a single room when he married Fatima; and, that it has been six years since the house was built. This statement conclusively suggests that the incident of loan happened in the year 2005 whereas the gift was made in the year 1995 and thus, the conclusion is that the plaintiff had been failed to prove the alleged motive of collusion. It means the facts constituting the foundation of the cause to challenge the mutation of gift were false.

7. I will now turn to the second objection raised by the plaintiff to the gift. He stated that the three essential requisites for a valid gift, that is, the offer of the gift; acceptance thereof; and, delivery of possession in pursuance thereunder were not complied with, therefore, the gift was not complete. This objection does not hold water. While examining this objection, it should be kept in mind that it was an inter-spousal gift. I have said this above and now I repeat it here to answer this objection that at the time of attestation of Mutation No.595 dated 15th June, 1995 the husband (the plaintiff) and wife (the defendant No.4) had confirmed and acknowledged the fulfillment of the required conditions of the gift in front of the witnesses and before the revenue officer. The said mutation was incorporated in the subsequent Khasra Gardawaris (Ex.D.4 and Ex.D.5) as well as the record of rights (Ex.P.3, Ex.P.4, Ex.P.5) showing the transfer of possession of the land in favour of defendant No.4 pursuant to the gift; presumption of correctness, though rebuttable, is attached to them. In the present case the plaintiff had not been able to rebut the said presumption and to satisfy the Court that the elements of offer and acceptance of gift or delivery of possession of land to establish a valid gift were missing. It would, therefore, be taken that mutation was effected by the plaintiff himself. It is now well settled that once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own[4] . This principle indicates that the theory of constructive possession is very well applicable to gifts between husband and wife[5]. Applying this principle to the facts of the present case the wife (defendant No.4) would be deemed to be in possession of the land under the gift[6].

8. In the end, the plaintiff in his plaint has also stated that even if the gift proves to be valid in favour of his wife, he revokes it. This is highly abominable. There is a tradition in the Sahih al-Muslim that the Holy Prophet (Sallallahu Alayhi Wa

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4 **"Amina Bibi v. Khatija Bibi" (1864) I Bom. H. C. 157 "Ma Mi v. Kallander Ammal" (AIR 1927 PC 22) "Emnabai v. Hajirabai" (1889) 13 Bom 352 "Abdul Rehman Nachiyal v. Muhammad Nurdin Maracayer" (23 IC 547) "Bee Jan Bee v. Fatima Beebee" (8 IC 431)**

5 **Neaz Begum v. Manzur Ahmad (11 IC 534)**

6 **"Abdul Mateen and others v. Mst. Mustakhia" (2006 SCMR 50)**

Sallam) said, "the person who revokes his gift, is like the dog that licks up what it disgorges"[7] . The desire to revoke the gift indicates that the plaintiff's intention is only to hurt his wife who is now stated to be a patient of multiple diseases. Instead of taking care of her, he, undeterred by his failure in Courts below, is dragging her in the litigation up to the level of this Court. This is the same wife who gave birth to the plaintiff's children and looked after his house. The plaintiff has not denied her love, her affection, her care and her services. Thus, it would not be inapt to say that the plaintiff had made the gift to his wife so as to make more congeniality. In such like events, the law does not give the plaintiff (husband) any right to revoke the gift[8] . The reason of this prohibition may be explained by referring Hamilton's Hedaya by Grady wherein at page 486 it has been stated that if a husband makes a gift of anything to his wife or a wife to her husband, it cannot be retracted because the object of the gift is an improvement of affection (in the same manner as in the case of presents to relations); and as the object is obtained, the gift cannot be retracted. Explaining it further, in the foot-note, Hedaya says that the increase of affection excited in the wife by the gift is supposed, by the law, to be a return which she pays for it, and which consequently deprives the donor of the power of retraction.

9. It is now fully established that defendant No.4, Fatima Bibi, was the owner in possession of the suit land on the basis of gift. Since she was the lawful owner, she had the right to sell her land to whomever she wanted. Defendant No.4 while appearing before the Trial Court as her own witness as DW.2 said in her statement that she had sold 4 Kanals of gifted land to defendant No.5, Muhammad Anwar, with the consent of the plaintiff to meet the marriage expenses of her two daughters, who were from her first husband. This admission was sufficient to hold that sale made in favour of defendant No.5 vide mutation No.840 dated 4th May, 2005 (Ex.P.6) was valid.

10. Upshot of the above discourse leaves no room for doubt that the suit brought by the plaintiff was based on mala fide and false allegations and its sole purpose was to rob defendant No.4 of her property so that she would spend the rest of her life in contempt. The plaintiff has been unable to identify any infirmity in the findings returned by the Courts below and thus, interference therewith is not warranted.

11. Before parting with this judgment, I must say that man and woman are of equal rank, but they are not identical. They are a peerless pair, being supplementary to one another, each helps the other, so that without the one the existence of the other cannot be conceived, and, therefore, it follows as a necessary corollary from these facts, that anything that will impair the basic right of a woman to be treated with

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[7] **Al-Muslim: Shaih, Cairo, Kitab al-Hibat, P.64.**
[8] **"Abdul Majid Khan and another v. Mst. Anwar Begum" (PLD 1989 SC 362)**

decency and proper dignity will not only involve the infringement of Article 9 of the Constitution which guarantees that no person shall be deprived of life or liberty save in accordance with law but also ruin our social fabric which is interwoven with the family bond. Prophet Muhammad (Peace Be Upon Him) said: "the best of you is the best to his family and I am the best among you to my family. The most perfect believers are the best in conduct and best of you are those who are best to their wives" (Ibn-Hanbal No.7396). In the case at hands the plaintiff through his callousness, carelessness and negligence has exhibited a conduct unbecoming of a Muslim. By falsely accusing his wife, the plaintiff has not only tarnished her chastity but also made a despicable attempt to seize her property. This Court would loathe approving this conduct and would burden the plaintiff with a heavy costs which will to some extent serve as balm to relieve the defendant No.4's pain of her wounds inflicted by the plaintiff.

12. In the result, the revision sought for through this application is declined with costs of Rs.100,000/-.

MH/M-146/L Revision dismissed.

**2021 C L C 1**
**[Lahore]**
**Before Shahid Waheed and Ch. Muhammad Iqbal, JJ**
**MUHAMMAD MOHSIN RAFIQ and others----Petitioners**
**Versus**
**Messrs SIDDIQUI & CO.----Respondent**

I.C.A. No.47541 of 2020, decided on 1st October, 2020.

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

----S.2(14) & O.XLIII---"Order"---Connotation---Word 'order' means the formal expression of any final decision--- Any order which is not found on any decision is devoid of attaining status of an order.

**(b) Contempt of Court Ordinance (IV of 2003)---**

----Ss.3 & 19---Constitution of Pakistan, Art. 204---Contempt of Court---Words 'orders passed in contempt'---Scope---Importer was aggrieved of non-compliance of orders of release of vehicle by Customs Authorities, therefore, he filed contempt application---Single Judge of High Court before invoking contempt proceedings allowed one week time to the authorities for compliance of the order--- Validity--- Only such orders, decisions, judgments which finally terminated contempt proceedings against contemnor were appealable--- Words 'orders passed in contempt' meant the order only awarding punishment and it was that order which could be assailed in Intra Court Appeal--- Interlocutory, interim or procedural orders did not fall within the ambit of order passed in contempt of Court--- Authorities assailed interim procedural order of Single Judge of High Court which they were deliberately avoiding to comply with the direction and lingering on the matter on one pretext or the other--- Intra Court Appeal was dismissed, in circumstances.

West Pakistan Water and Power Development Authority through its Chairman v. Chairman, National Industrial Relations Commission PLD 1979 SC 912; M.H. Khondkar and another v. The State and another and M. Noman v. The Dacca Improvement Trust and 3 others 1971 SCMR 743; Midnapore Peoples Co-op. Bank Ltd. v. Chunilal Nanda AIR 2006 SC 2190; B.N.Taneja (IFS) v. Bhajan Lal 1988 (3) SCC 26; Union of India v. Mario Cabrale Sa AIR 1982 SC 691; State of Maharashtra v. Mahboob S. Allibhoy 1996 (4) SCC 411 and J.S. Parihar v. Ganpat Duggar 1996 (6) SCC 291 ref.

Ch. Muhammad Zafar Iqbal for Petitioner.

## ORDER

This Intra Court Appeal under Section 19 of the Contempt of Court Ordinance, 2003 has been filed against the order dated 24.09.2020, passed by the learned Single Judge-in-Chamber in Crl.Org.No.43053 of 2020, filed by the respondent.

2. Brief facts of the case are that the respondent imported vehicles which were seized by the Model Collectorate of Customs. The matter was referred to Adjudicating Authority who passed order dated 31.01.2019 against the respondent. The respondent challenged the said order in an appeal before the Customs Appellate Tribunal, who directed the appellants vide order dated 20.02.2020 to release the imported vehicles after receipt of duties and taxes etc. Against the above order the Custom Department filed Tax Reference which is still pending without any restraining order.

The respondent filed the Writ Petition No.30314 of 2020 for the release of his vehicles in light of order passed by Custom Appellate Tribunal dated 20.02.2020. The learned Single Judge-in-Chamber while accepting the writ petition directed the appellants vide order dated 15.07.2020 to comply with the order of the Customs Appellate Tribunal dated 20.02.2020 within a period of two weeks. Against the order dated 15.07.2020, the appellants filed Review Application No.34525/2020 which was dismissed by the learned Single Judge-in-Chamber on 30.07.2020. The respondent filed contempt Petition Crl.Org.No.43050/2020 in which the learned Single Judge-in-Chamber vide impugned interim order dated 24.09.2020 afforded an opportunity to the appellants to comply with the order dated 15.07.2020 within one week. Hence, this appeal.

3. We have heard the arguments of learned counsel for the appellants and have gone through the record with his able assistance.

4. The learned Single Judge-in-Chamber, vide order dated 15.07.2020, passed in Writ Petition No.30314/2020, directed the appellants to comply with the order dated 20.02.2020 of the Customs Appellate Tribunal. The operative part of order dated 15.07.2020 is as under:

> "In this view of the matter, this petition is allowed and the respondents are directed to comply with the direction given by the Customs Appellate Tribunal through its order dated 20.02.2020 within the period of two weeks."

The appellants instead of challenging the above order before the appellate forum, opted to file a Review Application which was also dismissed vide order dated 30.07.2020. The operative part whereof is reproduced as under:-

"I am afraid the applicant has not put forward any relevant grounds for review of order dated 15.07.2020. It is apparent that the Customs Appellate Tribunal through its order dated 20.02.2020 allowed the appeal filed by respondent No.1 and directed the applicant to release the imported goods of respondent No.1 subject to payment of redemption fine and duties and taxes. Despite passage of sufficient time, the applicant has not been able to obtain any stay order against the decision of the Customs Appellate Tribunal' and as such this Court directed the applicant to comply with the direction given by the Customs Appellate Tribunal. The order passed by this Court on 15.07.2020 does not suffer from any error floating on the surface of the record. This review application is accordingly dismissed.".

After having exhausted the selected remedy of the review, the order dated 15.07.2020, passed in main writ petition attained status of finality and appellants are placed under obligation to comply with the said order. Respondent filed contempt petition Crl.Org.No.43050/2020 in which learned Single Judge-in-Chamber before initiation of regular proceedings for contempt, allowed a week's time to the appellants to comply with the order passed in the main writ petition, otherwise, the proceedings for contempt shall be initiated. The said order dated 24.09.2020 is reproduced as under:

"7. It is thus clear that the petitioner is only required to pay the amounts as per the order of the Customs Appellate Tribunal without furnishing any additional documents. The respondents are prima facie in contempt of order of this Court. This Court while showing restraint grants one week's time to the respondents to ensure the compliance of order of this Court failing which appropriate proceedings shall be set in motion."

Admittedly order passed in the main writ petition is still in field and same has attained the status of finality as it has not been got reversed from any competent forum and therefore, its compliance in true letter and spirit has to be effected. Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 confers jurisdiction to the superior Courts to punish those persons who commit violation or deny compliance of said order of the Court. Article 204 of the Constitution is reproduced as under:-

"204. Contempt of Court.-(1) In this Article, "Court" means the Supreme Court or High Court.

(2) A Court shall have power to punish any person who-

(a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court;

(b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt;

(c) does anything which tends to prejudice the determination of a matter pending before the Court; or

(d) does any other thing which, by law, constitutes contempt of the Court.

(3) The exercise of the power conferred on a Court by this Article may be regulated by law and, subject to law, by rules made by the Court."

In furtherance of the above provision of the Constitution, the Contempt of the Court Ordinance, 2003 was promulgated. Section 3 whereof describes the contempt of Court which provision is as under:-

"3. Contempt of Court.---Whoever disobeys or disregards any order, direction or process of a Court, which he is legally bound to obey; or commits a willful breach of a valid undertaking given to a Court; or does anything which is intended to or tends to bring the authority of a Court or the administration of law into disrespect of disrepute, or to interfere with or obstruct or interrupt or prejudice the process of law or the due course of any judicial proceedings, or to lower the authority of a Court or scandalize a Judge in relation to his office, or to disturb the order or decorum of a Court, is said to commit "contempt of Court". The contempt is of three types, namely, the "civil contempt", "criminal contempt" and "judicial contempt".

Every superior court has the jurisdiction under Section 5 of the said Ordinance to convict and punish the contemnor in contempt of court.

5. Section 19 of the Contempt of Court Ordinance, 2003 provides a remedy of appeal which provision of law reads as under:-

"19. Appeal.- (1) Notwithstanding anything contained in any other law or the rules for the time being in force, orders passed by a superior court in cases of contempt shall be appealable in the following manner:--

(i) in the case of an order passed by a single judge of a High Court an intra-court appeal shall lie to a bench of two or more judges;

(ii) in a case in which the original order has been passed by a division or larger bench of a High Court an appeal shall lie to the Supreme Court; and

(iii) in the case of an original order passed by a single judge or a bench of two judges of the Supreme Court an intra-court appeal shall lie to a bench of three judges and in case the original order was passed by a bench of three or more judges an intra-court appeal shall lie to a bench of five or more judges.

(2) The appellate court may suspend the impugned order pending disposal of the appeal.

(3) The limitation period for filing an appeal shall be thirty days."

6. The main controversy revolves around the word "orders passed in cases of contempt". As the plural word "orders" has been used in the above provision of Section 19 of the Ordinance ibid. It is appropriate to determine whether all kind of orders including interim, interlocutory or the final order passed in contempt proceedings are appealable. As the word orders has not been defined in the very Ordinance, it is appropriate to trace out its meaning from sister legislation as parimateria.

In Section 2(14) of the Civil Procedure Code word order has been described as:-

"(14) "Order" means the formal expression of any decision of a Civil Court which is not a decree:

According to Order XLIII, C.P.C. only the effective, determinative orders are appealable. Normally an order has following characteristics:-

(i) Order which finally resolved the controversy.

(ii) Order which materially and directly affect the final decision.

(iii) The order which causes some inconvenience/prejudice the party without there being any final determination.

(iv) The routine order passed to facilitate the progress in reaching the final order or judgment.

The conjoint reading of definition of word "order" or "orders" provided in Section 2(14) of C.P.C. and in Order XLIII, C.P.C., it can be said that word "order" means "the formal expression of any final decision" and any order which is not founded on any decision is devoid of attaining the status of an order. The challenging of each and every interim procedural kind of order will over-flood the litigation and would make the very litigations as well as the proceedings whereunder as unending. This liberty would practically negate the spirit and intent behind the legislation of Article 204 of the Constitution and entire

proceedings in original jurisdiction of the superior court (High Court) would become virtually inexecutable and worthless. Only such orders, decisions, judgments which finally terminate the contempt proceedings against the contemnor are appealable. The word "order passed in contempt" means the order only awarding punishment and it is the said order which can be assailed in Intra Court Appeal, whereas the interlocutory interim or procedural orders do not fall within the ambit of the order passed in contempt of court. Reliance is placed on the case titled West Pakistan Water and Power Development Authority through its Chairman v. Chairman, National Industrial Relations Commission (PLD 1979 SC 912) wherein the Hon'ble Supreme Court (Five Members Bench) has held that:-

> "When therefore, section 10 talks of an "order under this Act" being appealable, in its very nature confining ourselves to the facts and circumstances of the present case, it means an order of conviction and not an order of the kind involved herein."

(emphasis supplied)

Further in M.H. Khondkar and another v. The State and another and M. Noman v. The Dacca Improvement Trust and 3 others (1971 SCMR 743) one M.Noman filed contempt petition against Dacca Improvement Trust and the said petition was dismissed and a show-cause notice was issued to said Noman as to why he should not be punished in contempt of the Court. He challenged the rejection of his contempt petition as well as issuance of show-cause notice to him, in the Special Leave to appeal and the Hon'ble Supreme Court of Pakistan dismissed the said petition as such it can safely be observed that matter of the initiation or exonerating the contemnor from contempt proceedings is exclusively between the court and the contemnor and any procedural, interlocutory, interim order passed in this regard do not fall within the domain of Section 19 of the Ordinance, 2003 ibid and no Intra Court Appeal is available against such orders.

7. As a parimeteria in the Indian Contempt of Court Act, 1971, a right of appeal is provided against any order or decision passed by the superior judiciary in its original jurisdiction which provision is as under:-

> "19. Appeals:-(1) An appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt-
>
> (a) where the order or decision is that of a single judge, to a Bench of not less than two Judges of the court;
>
> (b) where the order or decision is that of a Bench, to the Supreme Court:

Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.

(2) Pending any appeal, the appellate court may order that-

(a) the execution of the punishment or order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail; and

(c) the appeal be heard notwithstanding that the appellant has not purged his contempt.

(3) Where any person aggrieved by any order against which an appeal may be filed satisfies the High Court that he intends to prefer an appeal, the High Court may also exercise all or any of the powers conferred by subsection (2).

(4) An appeal under subsection (1) shall be filed

(a) in the case of an appeal to a Bench of the High Court, within thirty days;

(b) in the case of an appeal to the Supreme Court, within sixty days, from the date of the order appealed against."

The question whether any order or decision passed in contempt proceedings would mean every procedural, interim, interlocutory order passed for reaching the main conclusion, is appealable as a matter of right. The issue of availability of remedy of appeal against interim, interlocutory, procedural order passed in contempt of court proceedings was resolved by the Supreme Court of India in a case reported as Midnapore Peoples Co-op. Bank Ltd. v. Chunilal Nanda (AIR 2006 SC 2190) wherein it has been observed that in the event of orders refusing to initiate contempt proceedings or initiating contempt proceedings or acquitting / exonerating the contemnor or dropping the proceedings for contempt, appeal would not be maintainable as the appeal under Contempt of Court laws is provided only in respect of orders punishing for contempt. In another case cited as B.N.Taneja (IFS) v. Bhajan Lal [1988 (3) SCC 26] it has been observed that right of appeal in contempt proceedings is only against any decision or order of a High Court passed in the exercise of its jurisdiction to punish for contempt. Similar view has been taken in other judgments of Indian Jurisdiction cited as Union of India v. Mario Cabrale Sa (AIR 1982 SC 691), State of Maharashtra v. Mahboob S. Allibhoy [1996 (4) SCC 411] and J.S. Parihar v. Ganpat Duggar [1996 (6) SCC 291].

8. Bare perusal of the interim order dated 24.09.2020 shows that the learned Single Judge-in-Chamber on preliminary hearing and before initiation of the legal proceedings in contempt provided an opportunity to the appellants to comply with order dated 15.07.2020. The impugned order is mere a procedural innocuous order in nature which does not inflict any sort of punishment upon the appellants. Such procedural order which does not inflict any penalty or punishment to the contemnor is not appealable, as such, Intra Court Appeal against procedural orders is not maintainable.

9. Today learned counsel for the appellants, while advancing arguments, submitted that the appellants are ready to comply with the order dated 15.07.2020, passed by learned Single Judge-in-Chamber but due to non-furnishing of the required documents by the respondent, the matter is being delayed. This plea of the appellants stand negated on the principle of approbate and reprobate as on the one hand the appellants have filed reference before the departmental forum, desisted the constitutional petition of the respondent, filed Review Application, contempt petition and also have assailed the interim procedural order of the learned Single Bench through instant Intra Court Appeal, which shows that they are deliberately avoiding to comply with the order and lingering on the matter on one pretext or the other.

10. In view of above, instant Intra Court Appeal is hereby dismissed in limine being not maintainable.

MH/M-134/L Intra Court Appeal.

**2021 M L D 77**
**[Lahore]**
**Before Shahid Waheed, J**
**SHAHTAJ SUGAR MILLS LIMITED through Ijaz Ahmad Chaudhary and 16 others---Petitioners**
**Versus**
**PROVINCE OF THE PUNJAB through Secretary Punjab Food Department and another---Respondents**

Writ Petition No. 59541 of 2020, decided on 17th November, 2020.

**(a) Administration of justice---**

----Good governance---Role of administration---Scope---In a civilized society the administration cannot be a silent spectator to crime or violation of law---Any Public Officer or Authority has inherent power to take all possible steps to check malpractice, undo fraud and implement law in its letter and spirit.

**(b) Punjab Sugar Factories (Control) Rules, 1950---**

----Rr.14(2) & 16(1)---Constitution of Pakistan, Art. 199---Constitutional petition---Interlocutory order---Collection of information---Petitioners are sugar factories who were aggrieved of direction issued by Cane Commissioner to provide information regarding payment of 11% interest to sugarcane growers on late payments---Validity---No document or evidence was available to establish that through investigation/inquiry by Cane Commissioner, any right or privilege of petitioners was being jeopardized or infringed---Petitioners were anticipating that on the basis of inquiry a penal action would be taken against them---On such apprehension petitioners could not be allowed to maintain petition---Letter or pro forma issued by Cane Commissioner requiring information about payment of cane growers was the first step of inquiry/investigation---Decision of objections to inquiry proceeding was interlocutory order in the nature of a step toward a final order eventually to be passed by Cane Commissioner---High Court declined to interfere in the matter as petition under Art. 199 of the Constitution was not maintainable against intermediate stages or steps of inquiry/investigation---Constitutional petition was dismissed in circumstances.

National Steel Rolling Mills and others v. Province of West Pakistan 1968 SCMR 317 and Virasat Ullah v. Basher Ahmad, Settlement Commissioner (Industries) and another 1969 SCMR 154 rel.
Arshad Nazir Mirza and Barrister Maryam Salman for Petitioners.

Muhammad Arif Raja, Additional Advocate General for Respondents.

## ORDER

**SHAHID WAHEED, J.---**The record appended with this petition indicates that the Cane Commissioner, Punjab, on perusal of data provided by the sugar mills, came to know of the malpractice of not paying the interest at the rate of 11% to the sugarcane growers on account of delayed payments beyond 15 days. Since it was a violation of the mandatory provisions of Rule 14(2) of the Punjab Factories (Control) Rules, 1950, the Cane Commissioner in exercise of powers conferred under Rule 16(10) of the Punjab Sugar Factories (Control) Rules, 1950 directed the Occupiers/General Managers of all the sugar mills in the Punjab to provide information about the payment of cane growers' dues on the pro forma which included grower-wise details of date of cane purchased and date of its payment. This information was required to ascertain how much of interest amount had been paid to the growers on account of delayed payments.

2. The petitioners challenged before this Court through W.P. No.45469 of 2020 the proforma through which the Cane Commissioner sought information about the payment of cane growers' dues. During pendency of the said petition, the petitioners filed objections to the pro forma before the Cane Commissioner. Upon noticing this fact the petition was disposed of through order dated 29th September, 2020 with the direction to the Cane Commissioner to decide the objections after affording opportunity of hearing to the petitioners and through a well-reasoned speaking order.

3. Pursuant to the order made by this Court in W.P.No.45469 of 2020, the petitioners appeared before the Cane Commissioner and argued their objections. The first objection of the petitioners to the pro forma was to the effect that the information sought could only be obtained if the areas were reserved or assigned. This objection was found not tenable by the Cane Commissioner, Punjab for three reasons. Firstly, that the provisions of Rule 16(10) of the Punjab Sugar Factories (Control) Rules, 1950 are independent and not dependent upon declaration of assigned/ reserved area; secondly, that the assignment or reservation of areas to particular mills is not mandatory under the law; and thirdly, that in order to safeguard the interest of the growers, the practice of assignment/ reservation of areas to the sugar mills has long been discarded as per Sugar Policy 1987 and consequently, the cane growers are free to sell their produce/sugarcane. The second objection of the petitioners was that the Cane Commissioner could not call for record for a period of more than two years from the date of last transaction. This objection was accepted and the

petitioners were directed to provide complete information of cane purchased and payment made against it on the prescribed proforma for the last two years vide order dated 10th November, 2020.

4. The petitioners feeling aggrieved by the order dated 10th November, 2020 have filed the instant petition with the contention that the Cane Commissioner without having any complaint from any grower cannot undertake any inquiry/ investigation and thus, his suo motu exercise of jurisdiction has no backing of law.

5. After hearing, I am not inclined to interfere with the order dated 10th November, 2020 passed by the Cane Commissioner, Punjab as well as the investigation/inquiry under the Punjab Sugar Factories (Control) Rules, 1950. The contention canvassed before me sans merit as the law does not make it a condition precedent that before embarking upon any investigation to check malpractice the Cane Commissioner must receive a complaint. In any civilized society, the administration cannot be a silent spectator to crime or violation of law. In fact it is an inherent power of any public officer or authority to take all possible steps to check malpractice, undo fraud, and, implement the law in its letter and spirit. Exactly the same is being done by the Cane Commissioner through inquiry/investigation. It is to be noted that the subject matter of the inquiry/investigation being carried out by the Cane Commissioner pertains to the bread and butter of the cane growers/small farmers. The Constitution of our country and the relevant laws cast a duty upon the organs of the State to protect the rights of the weaker section of the society. The petitioners have not brought on record any document or evidence to establish that through the investigation/inquiry by the Cane Commissioner their any right or privilege has been jeopardized or infringed. It appears that the petitioners are anticipating that on the basis of inquiry a penal action would be taken against them. If it is so, the petitioners cannot be allowed to maintain this constitutional petition. This has been so held by the Hon'ble Supreme Court of Pakistan in the case of "National Steel Rolling Mills and others v. Province of West Pakistan" (1968 SCMR 317 (2)) and "Virasat Ullah v. Basher Ahmad, Settlement Commissioner (Industries) and another" (1969 SCMR 154).

6. There is another good reason for declining the prayer made in this petition. A letter or pro forma issued by the Cane Commissioner requiring information about the payment of cane growers is the first step of the inquiry/investigation. The decision of the objections to the inquiry proceedings being interlocutory

order is in the nature of a step towards a final order eventually to be passed by the Cane Commissioner. It is now well settled that a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is not maintainable against intermediate stages or steps of the inquiry/investigation. Interference at this stage in the decision of the Cane Commissioner rejecting the objections would amount to stifling the inquiry/investigation. This is neither desirable nor permissible under the law.

7. Dismissed.

MH/S-68/L Petition dismissed.

**P L D 2021 Lahore 52**
**Before Shahid Waheed, J**
**MUHAMMAD BAKHSH---Petitioner**
**Versus**
**FAIZ MUHAMMAD and others---Respondents**

Civil Revision No. 2422 of 2010, heard on 5th October, 2020.

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

----Ss. 13 & 5---Demand of pre-emption, mandatory nature of---Talb-i-Muwathibt and Talb-i-Ishhad, strict proof of performance---Foundational facts on which plaint in a suit for pre-emption was to be based---Right of pre-emption as strictissimi juris---Deficiencies in proof of making of Talbs to be fatal for suit for pre-emption---Scope---Expression "cause of action" for purposes of suit for possession under Punjab Pre-emption Act, 1991 meant essential facts constituting right upon making of demands of pre-emption by pre-emptor in prescribed manner and its refusal by vendee---Said expression referred to facts upon which pre-emptor asked Court to arrive at a conclusion in his/her favour---Vital for plaintiff to prove the making of Talbs (demands of pre-emption) in accordance with law so as to establish that he had got cause to institute suit and to claim decree for possession of suit land through pre-emption---Right of pre-emption being strictissimi juris required strict proof of making of Talbs and any contradiction between contents of plaints and statement of witnesses eclipsed right of pre-emption---Where there existed contradiction between date of knowledge of sale of land mentioned in plaint and that mentioned by witnesses, then it had to be concluded that Talb-i-Muwathibat was not made in prescribed manner---Where plaintiff did not make immediate declaration to exercise his/her right to pre-emption upon getting information of sale of land but instead deferred it till next day, then same was fatal to claim of making of Talb-i-Muwathibat---Onus was on plaintiff to prove that statutory formalities regarding making of Talb-i-Ishhad were strictly observed and plaintiff had to produce evidence, including postman, to prove personal service of notice upon vendee (or vendee's refusal to accept same) however, where such requirement was not fulfilled, then conclusion to be drawn was that foundational facts stated in plaint were false---Law did not grant any power to any Court to condone any deficiency or deviation in matter of demands of pre-emption or to show any laxity in said matter---Making of demands of pre-emption in prescribed manner gave occasion for, and formed foundational facts constituting a cause of action in a particular pre-emption suit, which had no relation whatever to any defence that may be set up by a vendee and

therefore mere conceding statement of defendant would not validate such deficiencies.

E.A. Evans v. Muhammad Ashraf PLD 1964 SC 536; Abdul Qayyum v. Muhammad Rafique 2001 SCMR 1651; Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Muhammad Hayat v. Muhammad Jaffar 2009 CLC 259; Basharat Ali Khan v. Muhammad Akbar 2017 SCMR 309; Khan Afsar v. Afsar Khan and others 2015 SCMR 311; Muhammad Akram v. Mst. Zainab Bibi 2007 SCMR 1086; Habib Khan v. Mst. Taj Bibi and others 1973 SCMR 227; Din Muhammad v. Abrar Hussain and another PLD 2009 SC 930 and Ghulam Sarwar v. Rukhsana Kausar and others PLJ 2012 Lahore 442 rel.

**(b) Maxim---**

----"Nullus commodum capere potest de injuria sua propria": A party could not be permitted to take advantage of his/her wrong or manipulation.

Ghulam Hussain Malik for Petitioner.
Muhammad Hanif Niazi for Respondent No.1.
Muhammad Shakil Ghauri for Respondent No.2.

Date of hearing: 5th October, 2020.

**JUDGMENT**

**SHAHID WAHEED, J.---**The subsequent vendee has brought this application under Section 115, C.P.C. to seek revision of the appellate decrees issued by the Addl. District Judge, Bhakkar through his consolidated judgment dated 27th of March, 2010 whereby the decree dated 12th of April, 2007 of the Trial Court was reversed and suit of the plaintiff, respondent No.1 herein, for possession through pre-emption was decreed.

2. The facts of the present case paint a sordid picture of collusiveness, misrepresentation and misapplication of law. Dispute in this case related to the land measuring 8-Kanals situate in Chak No.51/TDA, Tehsil and District Bhakkar which was owned by one Muhammad Amin. This land was sold to defendant No.1, namely, Abdul Aziz (respondent No.2 herein) vide mutation No.492 dated 21st of September, 2002 (Exh.P5). This sale was sought to be pre-empted by the plaintiff on the ground of his superior right of pre-emption with the assertion that he had made requisite Talbs in accordance with the law. On 2nd of January, 2003 the

plaintiff (respondent No.1 herein) impleading Abdul Aziz as defendant instituted a suit seeking decree for possession of the above stated land through pre-emption. At trial, the present petitioner filed an application under Order I, Rule 10, C.P.C. for his impleadment as defendant in the suit on the ground that he had purchased the suit land from Abdul Aziz on 22nd of October, 2002 for a consideration of Rs.175,000/- vide Roznamcha Waqiati dated 22nd October, 2002 (Exh.D7) and mutation No.495 (Exh.D1) which was attested on 9th of June, 2003. This application was allowed and consequently the petitioner was impleaded as defendant No. 2 in the suit.

3. Defendant No.1, Abdul Aziz in his written statement denied the claim of the plaintiff with the assertion that he had not made any demand of pre-emption in accordance with the law. On the other hand, present petitioner also contested the claim of the plaintiff on the ground that he had not made any Talb in respect of the sale made in his favour. The divergent stances of the parties, led the Trial Court to frame issues and invite evidence thereon. Accordingly, the plaintiff in support of his claim produced oral as well as documentary evidence whereas defendant No.1, Abdul Aziz neither produced any evidence nor cross-examined the witnesses of the plaintiff. The suit of the plaintiff was, however, contested by the present petitioner. He also tendered oral and documentary evidence before the Trial Court.

4. One of the material questions to be determined in this case was whether the plaintiff had fulfilled the requisite Talbs under the law. This question was the subject matter of issue No.1 and onus to prove thereof was upon the plaintiff. On consideration of the matter, the Trial Court decided this issue against the plaintiff. The second important issue was whether the plaintiff had got cause of action to file the suit. This was issue No.3 and was decided against the plaintiff on the basis of findings returned on issue No.1. It is to be noted that the Trial Court in respect of issue No.3 has returned its findings in paragraph No.15 of its judgment, which consists of three lines and it is full of contradictions. The finding of the Trial Court is that "in view of my finding on issue No.1, plaintiff has superior right of pre-emption being Shariek so he has got cause of action to file the suit" whereas the conclusion is that "issue is decided against the plaintiff". It appears that the mention of the words "plaintiff has superior right of pre-emption being Shariek so he has got cause of action to file the suit" was a clerical error as question of superior right was subject matter of issue No.2, whereas, issue No.1 pertained to making of Talbs which was decided against the plaintiff. This aspect of the matter was neither considered nor corrected by the Appellate Court nor did it give its own findings on

issue No.3. This omission is one of the reasons which pursuaded me to examine this case under Section 115(1), C.P.C. The other material issue was issue No.7-A to the effect that whether the present petitioner (defendant No.2 in the suit) was bona fide purchaser of the suit land. The Trial Court in its findings declared that the defendant No.2 was not bona fide purchaser. The findings returned by the Trial Court on other issues are not relevant and thus, the same were not brought under discussion here. It is, however, suffice to say that on the basis of findings on issues Nos. 1, 3 and 7-A, the suit was dismissed by the Trial Court vide judgment and decree dated 12th of April, 2007.

5. The plaintiff thereupon questioning the findings in respect of issue No.1 preferred an appeal before the Additional District Judge, Bhakkar whereas defendant No.2 also preferred a separate appeal and thereby challenged findings only in respect of issue No.7-A. Both the appeals were consolidated. During appeal defendant No.1, Abdul Aziz appeared before the Appellate Court and made statement on oath admitting the claim of the plaintiff and stated that he had no objection on acceptance of appeal. On the basis of this statement appeal of the plaintiff was allowed whereas appeal of the present petitioner was dismissed with the observation that he was not bona fide purchaser. Two decrees were issued through consolidated judgment dated 27th of March, 2010. So, this revision.

6. The plaintiff-pre-emptor, at the outset, has raised a preliminary objection with regard to locus standi of the present petitioner. It is argued that upon dismissal of his appeal, which was limited only to the point that findings returned by the Trial Court on issue No.7-A was illegal, and particularly when defendant No.1 had conceded the claim of the plaintiff, the present petitioner cannot be allowed to maintain the instant revision. I will address this objection in the later part of this judgment. However, before proceeding further, it would be pertinent to state here that this case appeared to me the one where the plaintiff and defendant No.1 had joined their hands so as to defeat the rights of the present petitioner and thus, I thought it prudent to examine the decrees of the Courts below under Section 115(1), C.P.C. and accordingly asked learned counsel for the plaintiff -pre-emptor to show as to how the requirements of Talbs were made and proved and also how the plaintiff had got cause of action to file the suit. Learned counsel for the plaintiff-pre-emptor accordingly took me to the contents of the pleadings and the evidence led before the Trial Court and also the statement of defendant No.1 whereby he conceded the claim of the plaintiff. The pith and substance of his argument was that since defendant No.1 had conceded the claim of the plaintiff, there was no need of

any evidence to prove the admitted facts, and secondly, minor discrepancies in the statements of the witnesses cannot be made basis to non-suit the plaintiff-pre-emptor.

7. In terms of civil law the expression "cause of action" for the purposes of suit for possession under the Punjab Pre-emption Act, 1991 means essential facts constituting the right upon the making of demands of pre-emption by the pre-emptor in the prescribed manner and its refusal by the vendee. In fact it refers to the facts upon which the pre-emptor asks the Court to arrive at a conclusion in his favour. It was thus, vital for the plaintiff to prove the making of Talbs (demands of pre-emption) in accordance with the law so as to establish that he had got the cause to institute the suit and to claim decree for possession of suit land through pre-emption. In the present case two transactions of sale were involved. Through the first transaction the land stood transferred in the name of defendant No.1 Abdul Aziz vide mutation No.492 dated 21st of September, 2002 (Exh.P5), whereas the second transaction pertained to oral sale allegedly made on 22nd of October, 2002 in favour of present petitioner. Leaving aside the sale made in favour of present petitioner, it was to be, firstly, seen as to whether the pre-emptor-plaintiff had made Talb-i-muwathibat in accordance with the law in respect of sale incorporated in mutation No.492 dated 21st of September, 2002 (Exh.P5). The plaintiff pleaded that qua this sale, no public notice was issued and thus he got knowledge thereof on 11th of December, 2002 at 12.00 noon through Ghulam Essa in the presence of Muhammad Husain; and, that upon getting information a declaration to exercise right of pre-emption was immediately made which was followed by the notice of Talb-i-Ishhad dated 12th of December, 2002. This plea cast a duty upon the plaintiff to prove two facts. Firstly, that in respect of mutation No.492 no public notice in terms of section 31 of the Punjab Pre-emption Act, 1991 was given; and secondly, the date, time and place where Talb-i-muwathibat was made. According to section 31 of the Punjab Pre-emption Act, 1991 the Officer attesting the mutation of sale shall, within two weeks of the attestation, give public notice in respect of such attestation and this notice shall be deemed to have been sufficiently given if it is displayed on the main entrance of a mosque and on any other public place of the village or place where the property is situated. Presumption of regularity, though rebuttable, is attached to all official acts. The plaintiff nevertheless did not make any effort to rebut the said presumption as neither the witnesses who appeared on behalf of the plaintiff stated any word about non-compliance of the provision of Section 31 of the Punjab Pre-emption Act, 1991 nor any document was tendered in evidence to rebut the above stated presumption. It would, therefore, be presumed

that the plaintiff-pre-emptor had due knowledge of the attestation of sale mutation No.492 within two weeks from the issuance of public notice under section 31 of the Punjab Pre-emption Act, 1991. It is an admitted fact that the mutation No.492 was attested on 21st of September, 2002, whereas, the alleged declaration to exercise right of pre-emption was made on 11th of December, 2002. This declaration cannot be construed a valid jumping demand of pre-emption within the contemplation of Explanation-I to subsection (1) of section 13 of the Punjab Pre-emption Act, 1991 which provides that Talb-i-muwathibat means immediate demand made by a pre-emptor, in the sitting or meeting (Majlis) in which he has come to know of the sale declaring his intention to exercise the right of pre-emption.

8. There is another good ground to hold that the plaintiff had not made Talb-i-muwathibat in accordance with the law. The plaintiff in paragraph No.3 of the plaint maintained that he got knowledge of the sale of the suit land on 11th of December, 2002. On the other hand when he appeared as his own witness before the Trial Court on 9th of April, 2005 as PW-1 he stated during the course of examination-in-chief that he got knowledge of the sale of suit land 2 years, 3 months and 18 days ago. According to this statement the date of getting knowledge of the sale was 23rd of December, 2002, which did not tally with the one mentioned in paragraph No.3 of the plaint. Learned counsel for the plaintiff made an attempt to overcome this contradiction by making reference to different precedents and stated that this being a mathematical or calculation error could not be made basis to hold that Talb-i-muwathibat was not made in accordance with the law. This argument is not convincing. The right of pre-emption being strictissimi juris requires strict proof of making Talbs. Any contradiction between the contents of plaint and statement of witnesses eclipses the right of pre-emption. The above contradiction cannot be ignored and it leads to the conclusion that Talb-i-muwathibat was not made in the prescribed manner.

9. There is yet another aspect of the matter with respect to making of Talb-i-muwathibat. One of the members of the alleged Majlis, that is to say, witness of Talb-i-muwathibat was Muhammad Hussain. He appeared before the Trial Court as PW-3. This witness in his examination-in-chief stated as follows:-

The above referred statement indicates that the plaintiff did not make immediate declaration to exercise his right of pre-emption upon getting information of sale but instead deferred it till the next day, which was fatal to his claim of making valid Talb-i-muwathibat.

10. The second Talb which was required to be made and proved by the plaintiff was Talb-i-Ishhad. It was maintained by the plaintiff that on 12th of December, 2002 notice of Talb-i-Ishhad attested by two truthful witnesses was sent to the vendee-defendant No.1. The defendant No.1 in his written statement had denied the claim of the plaintiff with respect to making of Talb-i-Ishhad. The record of the case indicates that defendant No.1 after filing contesting written statement did not join the proceedings of trial. This absence was, in no way, beneficial to the plaintiff because for obtaining decree he had to prove by convincing and reliable evidence that he had met the requirements of Talb-i-Ishhad. The law with respect to making of Talb-i-Ishhad is contained in subsection (3) of section 13 of the Punjab Pre-emption Act, 1991 which envisages that where a pre-emptor has made Talb-i-muwathibat, he shall as soon thereafter as possible but not later than two weeks from the date of knowledge make Talb-i-Ishhad by sending a notice in writing attested by two truthful witnesses, under registered cover acknowledgment due, to the vendee, confirming his intention to exercise right of pre-emption. It means that Talb-i-Ishhad shall be made by (a) written notice; (b) attested by two truthful witnesses; (c) sent under registered cover; and (d) acknowledgment due. These four formalities are mandatory where the facility of post office is available. Admittedly in the present case, facility of post office was available to the pre-emptor and, therefore, onus was on him to prove that while making Talb-i-Ishhad said formalities were strictly observed but on the contrary neither any of the witnesses, who appeared on behalf of the pre-emptor, stated that notice was sent along with acknowledgment due nor acknowledgment due card was produced before the Trial Court. Such default as per settled principle[1] was fatal. Notwithstanding the above, the plaintiff also had to produce evidence, including postman to prove that in fact notice was personally served upon the vendee or that he refused to accept notice, which was sent at his correct address.[2] The plaintiff did not even meet this requirement of the law, then the conclusion which could be drawn that the foundational facts stated in the plaint were all false and the plaintiff was guilty of making misrepresentation before the Court.

11. Upon noticing that the plaintiff had misrepresented the foundational facts constituting cause of action, I asked learned counsel for the plaintiff as to how in the attending circumstances of the case a decree as prayed for in the plaint could be issued. He replied that since defendant No.1 at the stage of appeal had accepted the

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1. **E.A. Evans v Muhammad Ashraf (PLD 1964 SC 536) Abdul Qayyum v Muhammad Rafique (2001 SCMR 1651) Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105)**
   **Muhammad Hayat v. Muhammad Jaffar (2009 CLC 259) Basharat Ali Khan v Muhammad Akbar (2017 SCMR 309)**
2. **Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105) Khan Afsar v. Afsar Khan and others (2015 SCMR 311)**

right of the plaintiff, there was no need to prove making of demands of pre-emption (Talbs); and that, instant revision was not competent as the Appellate Court had issued decree with the consent of the plaintiff's vendee (that is, defendant No.1). This reply sans merit. It has been proved that upon failure of the plaintiff to make demands as per the law, his right of pre-emption had been extinguished. Law has not granted any power to any Court to condone any deficiency or deviation in the matter of demands of pre-emption or to show any laxity in the matter.[3] The question then is whether in these circumstances the right of the plaintiff-pre-emptor could have been revived at the appellate stage by the conceding statement of defendant No.1. The answer to this question is in the negative for that firstly, the making of demands for pre-emption in a particular prescribed manner gives occasion for and forms the foundational facts constituting cause of action in a pre-emption suit which has no relation whatever to the defence that may be set up by the vendee; secondly, since the first demand of pre-emption (Talb-i-muwathibat) was not made before defendant No.1, he could not make any statement about the veracity of the facts related to it, and even if he did make such a statement, its status would at best be of hearsay and the issuance of a decree on the basis of such evidence would be against justice, good conscious, and equity; and thirdly, the assertions of the plaintiff with regard to second demand of pre-emption (Talb-i-Ishhad) were also proved to be false as the notice was neither sent in the prescribed manner nor it was served upon defendant No.1. The admission of these false facts by defendant No.1 had no legal status as no illegal act can be held justified by the concession of the opposite party or in other words a false claim cannot be declared valid by the statement of the defendant and if this is allowed to happen, it would encourage fraud which in turn would create chaos in the society which is not commendable. Upshot of the discussion is that as the entire foundation of cause of action was false, the suit could not succeed even as regards defendant No.1 admitting the plaintiff's claim[4] . The Appellate Court thus, misdirected itself while accepting the conceding statement of defendant No.1 and as a consequence issued an illegal decree in the exercise of its jurisdiction with material irregularities. So this revision cannot be refused on the ground that the decree under challenge is a consent decree and that objection with regard to the petitioner's locus standi also loses its significance as this Court has examined the said decree under section 115(1), C.P.C. Resultantly, by reversing the findings of the Appellate Court on issue No.1, it is held that the plaintiff had no cause of action to bring the suit.

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[3] **Muhammad Akram v. Mst. Zainab Bibi (2007 SCMR 1086)**

[4] **Habib Khan v. Mst. Taj Bibi and others (1973 SCMR 227)**

12. I cannot proceed further without observing here that the absence of defendant No.1 during trial and subsequently his admission before the Appellate Court was understandable as his no interest was at stake for that he had already sold the land to the present petitioner; and that, in fact the statement of defendant No.1 made before the Appellate Court was sufficient to draw the conclusion that he had colluded with the plaintiff so as to defeat the right of the present petitioner. Since the plaintiff by manipulating defendant No.1 frustrated the legal rights of the petitioner-defendant No.2, he cannot be permitted to take advantage of his wrong or manipulation. This is exactly the spirit of legal maxim, nullus commodum capere potest de injuria sua proprio.

13. Now I address issue No.7-A viz, whether the petitioner was the bona fide purchaser of the suit land. The claim of the petitioner was that defendant No.1 namely, Abdul Aziz orally sold the suit land to him on 22nd of October, 2002 vide Roznamcha Waqiati (Ex.D7), that is, prior to the suit which was instituted by the plaintiff on 2nd of January, 2003. The correctness of this claim could be easily determined by taking into account the defence set up by the defendant No.1 in his written statement and his evidence. Defendant No.1 although in his written statement had denied the sale in favour of the petitioner yet this denial had no legal value as defendant No.1 did not join the trial after filing the written statement nor did he give any evidence to prove the contents of his written statement. In these circumstances, I have to look at the objection to the sale in the light of the plaintiff's statement. The plaintiff in the course of his cross-examination as P.W.1 had admitted the sale in favour of the petitioner but his objection was that since it was incorporated in the revenue record vide mutation No.495 (Ex.D1) dated 9th of June, 2003 during the pendency of his suit, the petitioner could not be declared bona fide purchaser. This objection unequivocally suggests that the oral sale made in favour of the petitioner did fulfill the ingredients of sale. It would thus, mean that the petitioner-defendant No.2 had acquired sufficient interest in the suit land on the basis of oral sale prior to the date of filing of suit. It is true that this sale was not made in accordance with the provisions of the Transfer of Property Act, 1882 but nevertheless it was valid in terms of section 2(d) read with section 13 and section 30 of the Punjab Pre-emption Act, 1991 and could be pre-empted. The attestation of this oral sale through mutation No.495 (Ex.D1) dated 9th of June, 2003 was just a consequential step so as to bring it in conformity with the provisions of the Transfer of Property Act, 1882 or for the purposes of the Punjab Land Revenue Act, 1967 and other allied laws. In the wake of above, it could not be held that the petitioner was not bona fide purchaser and consequently findings of the Courts below in

respect of issue No.7-A are hereby reversed. It is to be noted that reversal of findings on issue No.7-A provides locus standi to the petitioner to maintain this petition and also another ground to dismiss the suit following the principle settled in Din Muhammad's case[5] and Ghulam Sarwar's case[6] as the land prior to institution of the suit, had been transferred by way of oral sale in favour of the petitioner and to which no demand of the pre-emption (Talb) was made by the plaintiff.

14. In the result this revision is allowed. The judgment and decrees dated 27th of March, 2010 of the Addl. District Judge, Bhakkar, is set aside and consequently the judgment and decree dated 12th of April, 2007 of the Trial Court dismissing the suit of the plaintiff is restored with the clarification/modification that the plaintiff had no cause of action to bring the suit and also the present petitioner/ defendant No.2 was a bona fide purchaser of the suit land. No order as to costs.

Order accordingly.

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[5] **Din Muhammad v. Abrar Hussain and another (PLD 2009 SC 930)**

[6] **Ghulam Sarwar v. Rukhsana Kausar and others (PLJ 2012 Lahore 442)**

**P L D 2021 Lahore 168**
**Before Shahid Waheed, Atir Mahmood and Ch. Muhammad Iqbal, JJ**
**MUHAMMAD SAIF ULLAH---Petitioner**
**Versus**
**LAHORE DEVELOPMENT AUTHORITIES and others---Respondents**

Review Application No. 2005 of 2019, decided on 17th November, 2020.

**(a) Interpretation of statutes---**
----Procedural and substantive law---Determination of nature of a statute---Test applied to determine whether a statute is "procedural law" or "substantive law"---Scope---Real nature of any statute could not be determined by its nomenclature and description, but a glance at such statute's actual contents was essential---While distinction between substantive law and procedural law was clearly drawn in theory, there were many rules of procedure which, in practical operation, were wholly or substantially equivalent to rules of substantive law---Law of procedure may be defined as that branch of the law which governed process of litigation and all that was the residue was substantive law and related not to process of litigation but to its purpose and subject matter.

The Anatomy of Science (1926) P. 178; Salmond on Jurisprudence by P. J. Fitzgerald, 12th Edition, Section 128; Nabi Ahmed and another v. Home Secretary, Government of the West Pakistan, Lahore and 4 others PLD 1969 SC 599; S. M. Junaid v. President of Pakistan PLD 1981 SC 12; Aftabuddin Qureshi and another v. Mst. Rachel Joseph and another PLD 2001 SC 482 and Muhammad Asghar v. Hussain Ahmad and others PLD 2014 SC 89 rel.

**(b) Civil Procedure Code (V of 1908)---**
----Preamble & S. 1---Nature and scope of the Civil Procedure Code, 1908---Every important rule of both procedure and substantive law were intertwined in the C.P.C. so as to make same as much as possible a comprehensive compendium to cover complete system of the Courts of Civil Judicature.

**(c) Civil Procedure Code (V of 1908)---**
----S. 115---Revision---Nature of jurisdiction under S.115, C.P.C.---Right to seek revision by filing application under S.115 of C.P.C. of a case decided in which no appeal lay, on ground of irregular or improper exercise or non-exercise of jurisdiction, was a substantive right conferred by the C.P.C.

The Relation of Dress to Art in Pall Mall Gaz. (28 Feb. 1885); Muhammad Riasat, SET (Science) and others v. The Secretary of Education, N.W.F.P., Peshawar and 2 others 1997 SCMR 1626; Azmatullah through LRs. v. Mst. Hameeda Bibi and others 2005 SCMR 1201; National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others 2011 SCMR 446; Karamat Hussain and others v.

Muhammad Zaman and others PLD 1987 SC 139 and Mandi Hassan alias Mehdi Hussain and another v. Muhammad Arif PLD 2015 SC 137 rel.

**(d) Interpretation of statutes---**

----Statutory amendment/repeal---Effect of amendment/repeal of statutes---Maxim "nova constitutio futuris formam imponere debet non praeteritis"----Construction of amendatory or repealing statutes---Scope----Where a section of a statute was amended, then original provision ceased to exist and said new section superseded it and became part of law just as if amendment had always been there and in such a situation, rules of interpretation applicable to repeal may also apply to amendment---No difference existed between a case where Legislature declared a particular section as amended in a particular way and a case where Legislature declared that a section stood repealed and its place would be taken by a new section, if said new section was same as amended section---General rule as to the effect of repeal of a statute followed from legal maxim "nova constitutio futuris formam imponere debet non praeteritis" which meant that new law ought to regulate what is to follow, not the past.

People v. Supervisors of Montgomery (67 N.Y.109); The Construction of Statute by Earl T. Crawford, Saint Louis Thomas Law Book Company (1940); Chapter XII; Understanding Statutes by S. M. Zafar, Second Edition, Chapter-VI and Saeed Ahmad v. The State PLD 1964 SC 266 rel.

**(e) Civil Procedure Code (V of 1908)---**

----Ss. 115 & 104---Code of Civil Procedure (Punjab Amendment) Act (XIV of 2018), S. 19---Revisional jurisdiction of High Court under S.115, C.P.C.---Nature---Effect of amendment in S.115, C.P.C.---Applicability of bar to revision against order passed under S.104, C.P.C. vide S.115(5), C.P.C., applicability of---Right to remedy of revision accrued on commencement of suit/proceedings---Scope---Question before High Court was whether S.115(5), C.P.C. which was inserted by Code of Civil Procedure (Punjab Amendment) Act, 2018 and which barred revision under S.115, C.P.C. on orders passed by District Court in an appeal filed under 104, C.P.C.; would apply on cases which had already commenced in Trial Court/Original Court before such enactment/insertion came into force---Held, that legal pursuit of a remedy, appeal or second appeal or revision were steps in a series of proceedings all connected by intrinsic unity and were to be regarded as one legal proceeding---Right of appeal or revision or second appeal was not a mere matter of procedure but a substantive right, and institution of a suit carried with it implication that all such rights then in force, were preserved to parties thereto till rest of career of such suit---Right of appeal or revision was vested right and such right accrued to litigant and existed as on and from date the lis commenced and although same may be actually exercised when adverse judgment was pronounced, however such right was to be governed by law prevailing as on date of institution of suit or proceeding and not by law that prevailed at date of decision or at date of filing of such appeal/ revision---

Said vested right of appeal or revision or second appeal could be taken away only by a subsequent enactment, if it so provided expressly or by necessary intendment and not otherwise---High Court held that right of revision vested in parties at such date when litigation commenced and such right was to be governed by law as it prevailed on said date which was that date the parties acquired right to seek remedy of revision under S.115, C.P.C., if unsuccessful in appeal under S.104, C.P.C.---Review was allowed, accordingly.

School Board Election for the Parish of Pulborough, Bourke and others v. Nutt (1894) 1 QB 725; Colonial Sugar Refining Company Limited v. Irving 1905 AC 369; Muhammad Ishaq v. The State PLD 1956 SC 256; Garikapati Veeraya v. N. Subbiah Coudhry and others PLD 1957 SC (Ind.) 448; The State v. Maulvi Muhammad Jamil and others PLD 1965 SC 681; Muhammad Alam and 3 others v. The State PLD 1967 SC 259; Adnan Afzal v. Capt. Sher Afzal PLD 1969 SC 187; Nabi Ahmed and another v. Home Secretary, Government of the West Pakistan, Lahore and 4 others PLD 1969 SC 599; Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners PLD 1981 SC 553; Idrees Ahmad and others v. Hafiz Fida Ahmad Khan and 4 others PLD 1985 SC 376 and West Pakistan Industrial Development Corporation v. Rashid Ahmad and another 1988 SCMR 526 rel.

Rana Rashid Akram Khan and Sh. Usman Karim-Ud-Din for Petitioner.
Ali Mehdi Bukhari for Respondents/LDA.
Uzair Karamat Bhandari, Amicus Curiae.
Khalid Ishaq, Amicus Curiae
Date of hearing: 17th November, 2020.

## JUDGMENT

**SHAHID WAHEED, J.**---The solitary cause which has been made basis to seek review of the order dated 7th December, 2018 dismissing the revisional application, that is, C.R. No.211935 of 2018 is the opinion that has been expressed in "Javed Iqbal, etc v. Province of Punjab, etc." (W.P.No.203044 of 2018), hereinafter called Javed's case, on the effect of subsection (5) added to Section 115 of the Code of Civil Procedure Act-V of 1908 ("C.P.C.") by the Code of Civil Procedure (Punjab Amendment) Act, 2018 ("Amendment Act, 2018"). It implies that instant application not only seeks review of the order dated 7th December, 2018 but also intends to get authoritative pronouncement from this Bench regarding the effect of addition made in section 115, C.P.C. by the Amendment Act, 2018.

2. The question posed to us by this application has nothing to do with the merits of the dispute between the parties, so there is no need to recapitulate the facts that led

to the cause for bringing the action in the original Court. In fact, we are here concerned only with those events indicating how and when did the case go up in the litigation ladder. They may be briefly stated. It is not disputed in this case that the applicant is the holder of the decree dated 27th September, 2003 whereby he was held entitled to the transfer of the property (i.e. plot No.147, Nishter Block, Allama Iqbal Town, Lahore) subject to payment of the average market price to the Lahore Development Authority ("LDA"). This decree was maintained till the Hon'ble Supreme Court of Pakistan. On 14th November, 2006, the applicant took out the proceedings for execution of the decree. During these proceedings, the judgment debtor, namely, the LDA submitted the challan form in respect of the interim cost of the property demanding the deposit of Rs.15,846,160/- as an assessment of average market price. The applicant invoking the provisions of Order XXI, Rule 34, C.P.C. objected to the assessment made by the judgment debtor. The objections were declined by the Executing Court vide order dated 1st February, 2011. Under section 104 read with Order XLIII, Rule 1, C.P.C. this order was appealable and so the applicant preferred an appeal before the Additional District Judge, Lahore. This appeal was dismissed vide order dated 14th April, 2018. In the meantime, it had so happened that on 20th March, 2018 the Amendment Act, 2018 was promulgated and thereby subsection (5) was added to section 115, C.P.C., which set forth that no proceedings in revision would be entertained by the High Court against an order passed by the District Court under section 104, C.P.C. This amendment came under consideration in Javed's case and it was held that it would not affect the rights to remedy by way of appeal or otherwise available under an original enactment to the litigating parties on the date of commencement of the lis. It appears that the applicant was neither aware of this opinion nor had any knowledge of the amendment made in section 115, C.P.C. and he in routine on 12th May, 2018 presented his memorandum of revision in the office of this Court to challenge the order dated 14th April, 2018 of the Additional District Judge. Since the office was conscious of the opinion made in Javed's case, it entertained the applicant's revision and fixed it for hearing before a Single Bench of this Court. The applicant's revision came up for hearing before the Single Bench on 7th December, 2018 when his counsel was asked as to how after the promulgation of the Amendment Act, 2018 the proceedings in revision were competent for which he could not offer any reply and thus, on this short ground, the revisional application was dismissed being not competent. Subsequently, the applicant got knowledge of the opinion expressed in Javed's case, which was diametrically opposed to the one through which his revisional application was declined. He then filed the instant review application. Taking note of the divergent views of two Single Benches of this Court, the matter

was referred to the Hon'ble Chief Justice for constituting Full Bench so as to settle the issue conclusively. Accordingly the case was processed and now this application is before us.

3. In the light of circumstances described above, the question we have to address is whether the addition of subsection (5) in section 115, C.P.C. by the Amendment Act, 2018 will also have an effect on the cases which had already commenced in the original Court before its enactment. In order to untangle the intricacies of this question, it will be necessary to take note of the provisions of section 115, C.P.C. as they stood before amendment and after amendment. Before the amendment the provisions of section 115, C.P.C. were like this:

"115. Revision.---(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears.

(a) to have exercised a jurisdiction not vested in it by law, or
(b) to have failed to exercise a jurisdiction so vested, or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

Provided that, where a person makes an application under this subsection, he shall, in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court. and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court,

Provided that such application shall be made within ninety days of the decision of the subordinate Court which shall provide a copy of such decision within three days thereof, and the High Court shall dispose of such application within three months.

(2) The District Court may exercise the powers conferred on the High Court by subsection (1) in respect of any case decided by a Court subordinate to such District Court in which no appeal lies and the amount or value of the subject-matter whereof does not exceed the limits of the appellate jurisdiction of the District Court.

(3) If any application under subsection (1) in respect of a case within the competence of the District Court has been made either to the High Court or the District Court, no further such application shall be made to either of them.
(4) No proceedings in revision shall be entertained by the High Court against an order made under subsection (2) by the District Court."

It is to be noted that prior to the amendment, the power of revision was wider and it could be exercised in any case where a jurisdictional error was committed by the original Court or where substantial injustice had resulted. It seems that the legislature felt that this power should be suitably curtailed and thus, through the Amendment Act, 2018 amendments were made in section 115, C.P.C., which became like this:-

"115. Revision.---(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-
(a) to have exercised a jurisdiction not vested in it by law, or
(b) to have failed to exercise a jurisdiction so vested, or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

Provided that where a person makes an application under this subsection, he shall, in support of such application, furnish copies of the pleadings, documents and order of the sub-ordinate Court and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the record of the subordinate Court.
Provided further that the subordinate court shall provide copies of the document to a person within three days of the decision, and the High Court shall dispose of such application within six months,

(2) The District Court may exercise the powers conferred on the High Court by subsection (1) in respect of any case decided by a Court subordinate to such District Court in which no appeal lies and the amount of value of the subject-matter where of does not exceed the limits of the appellate jurisdiction of the District Court.

(3) If any application under subsection (1) in respect of a case within the competence of the District Court has been made either to the High Court or the District, no further such application shall be made to either of them.

(4) No proceedings in revision shall be entertained by the High Court against an order made under subsection (2) by the District Court.

(5) No proceedings in revision shall be entertained by the High Court against an order passed by the District Court under section 104."

4. Here we are concerned with the newly added subsection (5) in section 115, C.P.C. by the Amendment Act, 2018 and its plain reading makes it clear that an order passed by the District Court under section 104, C.P.C. is no longer the subject matter of revision. It has been contended on behalf of the applicant that the right to move the High Court in the exercise of its revisional jurisdiction was vested right which attached to litigation when it commenced and that it could not be affected by any subsequent amendment unless an express provision was made giving retrospective operation to the amendment; that exercise of revisional power by the High Court was not part of procedural law; and, that the provisions of section 115, C.P.C., which were in force on the date when the litigation had commenced, would be decisive of the question as to whether a revisional application was or was not maintainable. In response, it is submitted that plain meaning of provisions of a statute has to be given full effect and even a bare reading of newly added subsection (5) makes it clear that order made by the District Court cannot be brought under challenge through the proceedings in revision and thus, the order dismissing the applicant's revision was on terra firma; that there was no vested right to file a revisional application; and, that if the revisional power did not exist when it was invoked, the revisional application filed by the applicant, would not be held to be maintainable. It is just a coincidence that Mr. Uzair Karamat Bhandari, Advocate-Amicus Curiae is of the view of the applicant and the other Amicus Curie, namely, Mr. Khalid Ishaq, Advocate has endorsed the arguments of the respondent.

5. Before we make up our minds as to which set of arguments is plausible, we have to determine two ancillary issues, the answers to which will contribute to settle the main question. These issues are that in which category of law the C.P.C. falls and that what is the nature of the remedy of revision provided in it? It is to be noted that here we are confronted with a code of law whose title though contains the word "procedure", but nevertheless, on its basis, its category cannot be ascertained with certainty. We think the real nature of any statute cannot be determined by its nomenclature and description, but for that a glance at its actual contents is essential and before undertaking this exercise it ought to be kept in mind that this is a fact

that although the distinction between substantive law and procedural law is clearly drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. Such a type of complexity also appears in physical science, and probably for that reason, we find that the issue we are discussing at the moment is similar to what Gilbert N. Lewis said in his book. 'The Anatomy of Science'[1] . He said, "one by one we have seen how categories, which at first seen sharply defined, merge one into another, and how every classification when analyzed shows that some imaginary line has been arbitrarily taken as a boundary". This brings us to the point where we have to see which appropriate test can be applied to get the correct answer to the issue under discussion. The easiest and simplest test, as far as we understand, is the one that has been suggested by Sir John Salmond[2] . According to him the law of procedure may be defined as that branch of the law which governs the process of litigation. All the residue is substantive law and relates not to the process of litigation but to its purpose and subject matter. This test has been recognized by our Supreme Court and applied in various cases[3] . Let us now apply this test. The C.P.C. has been divided into two parts, one consisting of sections 1 to 158 and the other comprising the Orders I to LII which are divided into rules. The part consisting of the Sections is generally referred to as the body of the C.P.C. and gives several substantive rights to the litigants whereas the other part is referred to as rules which govern the conduct of the parties as well as of the Court at various stages of the proceedings in the Court; provide a mechanism for settlement of the disputes, and specify the process through which a case gets to its final conclusion. Upon this analysis, the conclusion to which we cannot resist is that virtually every important rule of both procedure and substantive law are intertwined in the C.P.C. so as to make it as much as possible comprehensive compendium to cover a complete system of the Courts of Civil Judicature.

6. Proceeding to the second supplementary issue, we may mention that the body of the C.P.C. provides different remedies to a litigant, one of which is revision. This remedy has been provided under section 115. The Superior Courts have differing views on the nature of this remedy. Some say it is the right of a litigant and some say it is his privilege. It is important to note that precedents are the anchors of the law and thus, respect and adherence to them is the rule rather than the exception. Inasmuch as the Supreme Court is unquestionably the ultimate expositor of law, the

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**1 The Anatomy of Science (1926) P. 178**
**2 Salmond on Jurisprudence by P. J. Fitzgerald, 12th Edition, Section 128**
**3 *"Nabi Ahmed and another v. Home Secretary, Government of the West Pakistan, Lahore and 4 others"* (PLD 1969 SC 599)**
***"S. M. Junaid v. President of Pakistan"* (PLD 1981 SC 12)**
***"Aftabuddin Qureshi and another v. Mst. Rachel Joseph and another"* (PLD 2002 SC 482)**
***"Muhammad Asghar v. Hussain Ahmad and others"* (PLD 2014 SC 89)**

High Courts and other Courts are absolutely bound by its precedents. It is not only a matter of owing obedience but also of developing consistency in the evenhanded administration of justice in the courts. Nevertheless, it often happens, that we are confronted with discordant decisions and for that, we cannot provide ourselves with an excuse in the words of Oscar Wilde when he said that "consistency is the last refuge of the unimaginative"[4] . The rule, however, that applies is that when there is a conflict between two decisions of the Supreme Court, it is the decision of the larger of the Benches, whether it is earlier or later, should be followed by High Courts and other Courts in the country[5] . Mindful of this principle, when we began to study the precedents that have been presented to us, we looked at Karamat Hussain's[6] case which was heard and decided by a five-member Bench of the Hon'ble Supreme Court. In that case second appeal was filed in the High Court which by virtue of amendment made in section 102, C.P.C. by the Law Reforms Ordinance XII of 1972 was found not competent because the value for the jurisdiction of the suit given in the plaint was less than Rs.2,000/-. It was then pleaded before the High Court that further proceedings in the matter be taken after treating the second appeal as revision. The High Court, however, instead of doing so held that as the regular second appeal was incompetent valuation-wise and that since there was no obligation in law to convert the said appeal into revision especially when a revision was "only a privilege and not a right" and that the intention of the legislature in making the amendment in section 102, C.P.C. was to discourage litigation in matters of small valuation. The High Court accordingly declined to convert the second appeal into revision petition and proceeded to dismiss it as incompetent. On appeal, the Hon'ble Supreme Court while disapproving the said viewpoint remanded the matter to the High Court declaring that mere fact that exercise of revisional jurisdiction was discretionary did not mean that it was a privilege and not a right. It would be profitable if the relevant extract of that judgment is reproduced below not only for the facility of reference but also for clarity of thought:-

"Thus, if the second appeal that is brought before the High Court exhibits certain features which demonstrate that it falls within the scope of interference under section 115, C. P. C., the Court should exercise its jurisdiction under the said provision of law. It hardly needs saying that the Court will be in a position to

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**4** **The Relation of Dress to Art in Pall Mall Gaz. (28 Feb. 1885) sprinted in Aristotle at Afternoon Tea: The Rare Oscar Wilde 52 (John Wyse Jackson ed., 1991)**

**5** ***"Muhammad Riasat, SET (Science) and others v. The Secretary of Education, N.W.F.P., Peshawar and 2 others"*** **(1997 SCMR 1626)**
***"Azmatullah through LRs. V. Mst. Hameeda Bibi and others*** **(2005 SCMR 1201)**
***"National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others"*** **(2011 SCMR 446)**

**6** ***"Karamat Hussain and others v. Muhammad Zaman and others"*** **(PLD 1987 SC 139)**

examine this aspect of the matter only if it considers the facts of each case and this can only be done if the appeals are treated as revisions whereafter the question can be examined by the High Court whether the Court subordinate to it has exercised a jurisdiction not vested in it by law or has failed to exercise its jurisdiction so vested or acted in exercise of its jurisdiction illegally or with material irregularity. True, the exercise of this jurisdiction by the High Court is discretionary but that does not mean that a revision is not a right but only a privilege. A privilege is some particular benefit or advantage conferred on a person or a class of persons which other citizens do not enjoy while a right is some benefit conferred on a person by virtue of a given law. Here, the provisions of section 115 of the C.P.C. confer on every person who has litigated before a Court subordinate to the High Court the right to assert before the latter that the decision rendered by the subordinate Court against him is liable to correction under its revisional jurisdiction. Indeed where the conditions for the exercise of revisional jurisdiction are satisfied the High Court should itself interfere. Of Course, it may in certain circumstances, in exercise of its judicial discretion, refuse to exercise its discretion in favour of the petitioner such as where the petitioner has approached the Court, without reasonable cause, with undue delay or his conduct has been contumacious or because of the existence of some other special circumstances which disentitle him from relief. But the mere fact that the exercise of revisional jurisdiction is discretionary does not mean that it is a privilege. Even the Writ Jurisdiction conferred upon the High Courts by the Constitutional is discretionary. But the right to apply for a writ is certainly not a privilege. On the contrary it is one of the most valuable right that can be conferred upon a citizen."

7. The principle explained in Karamat Hussain's case was re-examined by a three-member Bench of the Hon'ble Supreme Court in Mandi Hassan's[7] case and reiterated that though revision is a supervisory jurisdiction, which is vested in a higher forum and is exercised for scrutiny if a case decided by the subordinate court suffers from any defect in terms of exercising of its jurisdiction on the ground that it has acted in exercise of such jurisdiction illegally or with material irregularity, but nevertheless it is not a privilege but a valuable right of an aggrieved party. Let us be

7 ***"Mandi Hassan alias Mehdi Hussain and another v. Muhammad Arif"*** **(PLD 2015 SC 137)**

acquainted with the exact observations made by the Hon'ble Supreme Court while describing revision as a right. They are like this:

"2. Before embarking upon to resolve the above proposition, we find it expedient, to briefly assess the nature of the jurisdiction of courts in relation to civil revision filed in terms of section 115, of the C.P.C. There can hardly be two opinions on the nature of revisional jurisdiction. It is a supervisory jurisdiction, which is vested in a higher forum (subject to the pecuniary jurisdiction of the case either the learned District Court or the learned High Court) and is exercised and/or is invoked for scrutiny if a 'case decided' by the court subordinate to the higher court's jurisdiction, suffers from any defect in terms of exercise of its jurisdiction and/or on the ground(s) that the court subordinate has acted in exercise of such jurisdiction illegally and/or with material irregularity. On the basis of the law enunciated and settled by this Court, there is wee room for doubt that being a supervisory jurisdiction, the higher forum which is approached (i.e. the revisional court) is conferred with the power to ensure that the court subordinate thereto (to the revisional court) conforms to the parameters of its jurisdiction, In other words the revisional jurisdiction is meant to rectify; to obviate, forefend and stave off the exercise of jurisdictional errors/defects and the illegalities and/or material irregularity committed by the subordinate court in that regard. But the "case decided" (order/judgment assailed) has to squarely fall within the scope and the purview of section 115 of the C.P.C. It may however be categorically and unequivocally mentioned here, that approaching a higher court in the revisional jurisdiction for the redressal of one's grievance, if the case is covered by section ibid (115, C.P.C.) is not a privilege, but is a valuable right of an aggrieved party. Obviously, such exercise of revisional jurisdiction shall be subject to the rules of discretion; but the matter of approaching the revisional court cannot be relegated to a mere privilege of the court and not a right. The above view is fortified by a five Members Bench judgment of this Court reported as Karamat Hussian and others v. Muhammad Zaman and others (PLD 1987 SC 139) which held that "True the exercise of this jurisdiction by the High Court is discretionary but that does not mean that a revision is not a right but only a privilege". In an another case Muhammad Yousaf and 3 others v. Khan Bahadur through Legal Heirs (1992

SCMR 2334), this Court concluded that "the exercise of revisional jurisdiction by the High Court is a matter exclusively between the High Court and the subordinate Courts, albeit the parties to the litigation have a right (emphasis supplied by us) to bring to their notice the jurisdictional/legal errors as envisaged in section 115 of the C.P.C.". This is the apt, the conclusive and the final enunciation of law on the subject by this Court. And any view set out by certain dicta, of the various learned High Courts contrary to the above principle, which invariably comes to our notice, treating and considering the revisions to be a mere privilege and not a right carries no legal sanctity."

8. It is an admitted fact on all hands that the view expressed in Karamat Hussain's case has not yet been altered or changed or modified by any five-member Bench of the Supreme Court, therefore, the same view will be adhered to. On being faced with this scenario, counsel for the parties as well as Amicus Curiae jointly submitted that revision is a vested right of an aggrieved person/litigant. In this milieu, there is no need to discuss the other precedents cited before us to determine the nature of the remedy of revision. We, therefore, hold that to seek revision by filing an application under section 115 of a case decided in which no appeal lies, on the ground of irregular or improper exercise or non-exercise of jurisdiction, is a substantive right conferred by the C.P.C.

9. We deem it expedient to explain why the remedy of appeal or revision or second appeal is considered the substantive right. In our opinion, it is so because only these remedies safeguard a proper control of the Courts and the quality of the granted legal protection by a Court of higher rank. Though the control of the exercise of Court functions is essential in a democratic state under the rule of law but certainly, it cannot be done by other state powers because under the doctrine of separation of powers contemplated by our Constitution the independence of the courts excludes it. Consequently, as single possible control which does not affect the independence of the courts remains a review and action for annulment of judicial decisions by appeal or revision or second appeal on which decides another Court of the higher rank. The possibility to review judicial decisions, through the said remedies, has a further positive consequence for the quality of legal protection: It improves the image of justice in the public and increases the confidence of the society in the rightness of judicial decisions. At the same time, these remedies oblige the Courts to issue correct and convincing judgments because the Judges know that their activity can be subject of control.

10. Having determined the category of the C.P.C. and the nature of the remedy of revision provided in it, we have now reached the stage where we have to find the answer to the main question whether the Amendment Act, 2018 reveals any intention to take away the right to file revision against the order of the District Court passed under Section 104 C.P.C. in the proceedings pending on the date of its promulgation. We can conveniently note that under the Amendment Act, 2018 the second proviso of subsection (1) of section 115, C.P.C. has been changed and at the same time subsection (5) has been added within it. This strict scrutiny analysis thus provides us with a calculus that the Amendment Act, 2018 is in the nature of an amendatory statute which has made an addition to or operates to change the original section 115, C.P.C. so as to effect an improvement therein, or to more effectively carry out the purposes for which the C.P.C. was promulgated. It is now well settled that where a section of a statute is amended, the original ceases to exist and the new section supersedes it and becomes a part of the law just as if the amendment had always been there[8] . In such a situation, we are of the opinion, that the rules applicable to repeal may also apply to amendment. To substantiate this view we can cite with confidence Saeed Ahmad's[9] case which states that there is no difference at all between a case where the legislature says that a particular section will stand amended in a particular way and a case where it says that the section stands repealed and its place will be taken by a new section if the new section is the same as the amended section. The relevant excerpt from the judgment made by the Hon'ble Supreme Court in Saeed Ahmad's case is as follows: -

"It will be observed that in accordance with this section all rights, liabilities, etc. continue in spite of repeal and all proceedings can be taken and continued which could have been taken or continued if the repealing Act did not come into force. When I asked learned counsel for the appellant what he had to say in reply to this section his only answer was that this section applies to a repeal and not to an amendment and before us there is a case of an amendment. Every amendment contains repeal for the law in the form in which it stood previously disappears and a new law comes into force. There is no difference at all between a case where the Legislature says that a particular section will stand amended in a particular way and a case where it says that the section stands repealed and its place will be taken by a

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*8* ***People v. Supervisors of Montgomery*** **(67 N.Y. 109)**
**The Construction of Statute by Earl. T. Crawford, Saint Louis Thomas Law Book Company (1940), Chapter XII; and, Understanding Statutes by S. M. Zafar, Second Edition, Chapter-VI.**

*9* ***"Saeed Ahmad v. The State*** **(PLD 1964 SC 266)**

new section, if the new section is the same as the amended section. Whenever there is an amendment the Legislature could very well have said that the previous provision would be omitted and the provision as amended would be inserted. There is no reason for giving any different effect to these two methods which achieve the same result. At the same time there is no difference in principle between repeal and amendment and if in the case of a total repeal a proceeding can be continued as if there was no repeal why should the proceeding not be continued in the case of an amendment."

11. The general rule as to the effect of repeal of a statute follows from the legal maxim "nova constitutio fututris forman imponere debet non prateritis" i.e. a new law ought to regulate what is to follow, not the past. This maxim was statutorily recognized in section 38(2) of the Interpretation Act, 1889, which is on the same lines as Section 4 of the Punjab General Clauses Act, 1956 and it provides for the effect of repeal. Now it becomes necessary to have a look at the provisions of Section 4 of the Punjab General Clauses Act, 1956 which reads as under:-

"4. Effect of repeal.---(1) Where this Act or any other Punjab Act repeals any enactment then, unless different intention appears, the repeal shall not__
(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or

enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act had not been passed.

(2) The provisions of subsection (1) shall apply on the expiry or withdrawal of any Ordinance promulgated by the Governor under section as if it had been repealed by a Punjab Act."

12. In view of Section 4, the repeal of a statute, which is not retrospective in operation, does not prima facie affect the pending proceedings which may be continued as if the repealed enactment was still in force. In other words, such repeal does not affect the pending cases which would continue to be concluded as if the enactment has not been repealed. In fact, when a lis commences, all rights and obligations of the parties get crystalized on that date. The mandate of Section 4 of the General Clauses Act is simply to leave the pending proceedings unaffected which commences under the un-repealed provisions unless the contrary intention is expressed. We find clause (c) of Section 4, refers to the words "any right, privilege, obligation ..acquired or accrued" under the repealed statute. We may hasten to clarify, the mere existence of a right not being "acquired" or "accrued", on the date of the repeal would not get the protection of Section 4 of the General Clauses Act.

13. It must be underscored that section 4 of the Punjab General Clauses Act, 1956 occurs in a group of sections 3 to 12 and heading of that group of Sections is "General Rules for Construction". The Courts have applied its principles on the question whether a remedy given under the repealed provisions of law is such a right which survives the repeal. In this regard we may cite the case of Pulborough Parish School Board Election, Bourke[10] wherein it was observed that "every statute which takes away or impairs vested rights acquired under existing law, or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect". This principle was followed in the Colonial Sugar Refining Company Limited's case[11] . In that case, although the right of appeal from the Supreme Court of Queensland of His Majesty in Council given by the repeal law had been taken away by the repealing enactment, which provided only an appeal from the Supreme Court of Queensland to the High Court of Australia, yet the Act not being retrospective, the Privy Council ruled that a right of appeal to the King in Council in a suit pending when the (repealing) Act was passed and decided by the

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*10* ***"School Board Election for the Parish of Pulborough, Bourke and others v. Nutt"*** **(1894) 1 QB 725**
*11* ***"Colonial Sugar Refining Company Limited v. Irving"*** **(1905 AC 369)**

Supreme Court afterwards was not taken away. Exact observation made in this case reads as under: -

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the Appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the Appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

14. It is a matter of fact that whenever the superior Courts of Pakistan or India have faced such a question like the one we are presently discussing, they have invariably placed reliance on the principle settled in the case of Colonial Sugar Refining Company. The list of such type of cases is long and we do not want to burden this judgment by discussing the facts of each of them and the principle settled therein. It would, however, be suffice to say that the principle that emerge from the reading of those judgments[12] are that: (i) the legal pursuit of a remdy, appeal or second appeal or revision are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding, (ii) the right of appeal or revision or second appeal is not a mere matter of procedure but is a substantive

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12 **"*Muhammad Ishaq v. The State*" (PLD 1956 SC 256)**
**"*Garikapati Veeraya v. N. Subbiah Coudhry and others*" (PLD 1957 SC (Ind.) 448)**
**"*The State v. Maulvi Muhammad Jamil and others*" (PLD 1965 SC 681)**
**"*Muhammad Alam and 3 others v. The State*" (PLD 1967 SC 259)**
**"*Adnan Afzal v. Capt. Sher Afzal*" (PLD 1969 SC 187)**
**"*Nabi Ahmed and another v. Home Secretary, Government of the West Pakistan, Lahore and 4 others*" (PLD 1969 SC 599)**
**"*Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners*" (PLD 1981 SC 553)**
**"*Idrees Ahmad and others v. Hafiz Fida Ahmad Khan and 4 others*" (PLD 1985 SC 376)**
**"*West Pakistan Industrial Development Corporation v. Rashid Ahmad and another*" (1988 SCMR 526)**

right, (iii) the institution of the suit carries with it the implication that all rights of appeal or revision or second appeal then in force are preserved to the parties thereto till the rest of the career of the suit, (iv) the right of appeal or revision or second appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date of the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing as the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal, (v) this vested right of appeal or revision or second appeal can be taken away only by a subsequent enactment, if it so provides expressly or by, by necessary intendment and not otherwise.

15. Whereas the Amendment Act, 2018 does not indicate that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when it was passed. In the case before us the proceedings were instituted on 14th November, 2006, and on the principle established by the decisions referred to above the right of revision vested in the parties thereto at that date and is to be governed by the law as it prevailed on that date, that is to say, on that date the parties acquired the right, if unsuccessful, to go up in revision from the District Court to High Court under section 115, C.P.C. provided the conditions thereof were satisfied. We would, therefore, accept this application and hold that the applicant could have brought revision against the order made by the District Court under section 104, C.P.C.

16. The legal issues having been disposed of, the civil revision will now come up for hearing before an appropriate Single Bench as to the rest of the points that may be urged.

17. The foregoing were the reasons that persuaded us to accept the instant application through the following short order: -

"For the reasons to be recorded later, this application is accepted and order dated 7th December, 2018 on review is hereby recalled. The office is accordingly directed to fix Civil Revision No.211935 of 2018 before any learned Single Bench after soliciting order from the Hon'ble Chief Justice."

18. Before parting, we must record our thanks to Mr. Uzair Karamat Bhandari, Advocate and Mr. Khalid Ishaq, Advocate, who have assisted us as Amicus Curiae in deciding this application and we also express our appreciation to the cogent arguments advanced by the learned counsel for both the parties.

KMZ/M-6/L Order accordingly.

**2021 P L C (C.S.) 304**
**[Lahore High Court]**
**Before Shahid Waheed, Shams Mehmood and Muhammad Sajid Mehmood Sethi, JJ**
**Prof. Dr. ASAD ASLAM KHAN and others**
**Versus**
**GOVERNMENT OF PUNJAB through Secretary Specialized Health Care and Medical Education Department, Civil Secretariat, Lahore and 11 others**

Writ Petitions Nos.256002 of 2018 and Writ Petition No.41040 of 2020, decided on 27th October, 2020.

Per Shahid Waheed, J; Shams Mehmood Mirza and Muhammad Sajid Mehmood Sethi, JJ, agreeing.

**(a) Civil service---**
----Tenure post---Scope---Once a person is appointed to a tenure post, his appointment to that office begins when he joins and it comes to an end on completion of the tenure but no right is conferred to hold the post for entire period--- Tenure can be curtailed on attaining age of superannuation by incumbent of the post.

Pakistan (through the Secretary, Cabinet Secretariat, Karachi) v. Moazzam Hussain Khan and another PLD 1959 SC 13 and Pakistan v. Fazal Rahman Khundkar and another PLD 1959 SC 82 rel.

**(b) King Edward Medical University Lahore Act (V of 2005)---**
----S.15---University of Agriculture Faisalabad Act (XII of 1973), S.15-A---Qanun-e-Shahadat (10 of 1984), Art. 114---Constitution of Pakistan, Art.199---Constitutional petition---Writ of quo-warranto---Pro-Vice Chancellor, appointment of---Estoppel, principle---Applicability---Petitioner assailed appointment of Pro-Vice Chancellor appointed in King Edward Medical University (KEMU)---Validity---Notification appointing respondent in KEMU was issued on the basis of interpretation made in an earlier case decided by High Court---Interpretation made in that earlier case did not find favour with Full Bench of High Court and the notification in question was not valid---Respondent appointed in KEMU could not plead estoppel nor he could gain any right on the basis of such notification--- High Court directed to make fresh appointment to the post of Pro-Vice Chancellor KEMU within a period of one month as the post could not be left vacant for unlimited period---Constitutional petition was allowed accordingly.

Ch. Shoaib Saleem v. The King Edward Medical University and others (W.P. No.9316 of 2015) dissenting.

Dr. Muhammad Iqbal Zafar v. Province of Punjab (W.P. No.217977 of 2018); Prof. Dr. Muhammad Iqbal Zafar v. The Province of Punjab through Secretary to the Government of Punjab, Agriculture Department, Lahore and others 2019 PLC (C.S.) 63; Pakistan v. Messrs Zeal Pak Cement Factory Ltd. 1985 SCMR 1968; Magor and St. Mellons Rural District Council v. Newport Corporation (1950) 2 All. E.R. 1226; Magor and St. Mellons Rural District Council v. Newport Corporation (1951) 2 All. E. R. 839; Abdul Haque Indhar and others v. Province of Singh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others 2000 SCMR 907 and Muhammad Ikhlaq Memon v. Zakaria Ghani and others PLD 2005 SC 819 rel.
Per Muhammad Sajid Mehmood Sethi, J.

**(c) King Edward Medical University Lahore Act (V of 2005)---**
----S.15---University of Agriculture Faisalabad Act (XII of 1973), S.15-A--- Constitution of Pakistan, Art. 199--- Constitutional petition--- Pro-Vice Chancellor, appointment of--- Petitioners assailed appointments of Pro-Vice Chancellors appointed in King Edward Medical University (KEMU) and University of Agriculture Faisalabad--- Validity--- One of the three senior most Professors could be nominated by Chancellor to hold office of Pro-Vice Chancellor for a term of three years under S.15 of King Edward Medical University Lahore Act, 2005 and under S.15-A of University of Agriculture Faisalabad Act, 1973--- There was no prohibition regarding nomination of a Professor with less than three year service for the post of Pro-Vice Chancellor--- High Court suggested the authorities to incorporate necessary amendments in King Edward Medical University Lahore Act, 2005, and University of Agriculture Faisalabad Act, 1973, by adopting due course of law to manifest its intention regarding terms of post of Pro-Vice Chancellor--- Constitutional petition was disposed of accordingly.
**(d) Interpretation of statute---**
----Prohibition---Applicability---Whatever is not specifically prohibited is permissible and prohibition cannot be presumed.
Additional Collector-II Sales Tax, Lahore v. Messrs Abdullah Sugar Mills Ltd. 2003 SCMR 1026 and Asma Zafarul Hassan v. United Bank Ltd. and another 1981 SCMR 108 rel.

**(e) Interpretation of statute---**
----Express intention---Harmonious construction, doctrine of---Scope---In construing provisions of a statute, Court has to find out express intention from the words of statute and eschew construction which leads to absurdity and give rise to practical inconvenience or make provisions of existing law nugatory---In order to remove apparent defect and to give force and life to intention of legislature, doctrine of harmonious construction has to be adopted.

Barrister Imran Aziz Khan and Muhammad Azam Zafar Khan for Petitioner (in Writ Petition No.256002 of 2018).

Agha Itizar Ali Imran for Petitioner (in Writ Petition No.41040 of 2020).

Akhtar Javaid, Additional Advocate General, Punjab for Respondent No.1.

Mian Abdul Sattar Ijaz with Abid Iqbal Hafeez, Senior Law Officer and Muhammad Junaid Riaz, Liaison Officer KEMU for Respondents Nos.2 to 5 (in Writ Petition No.256002 of 2018).

Rana Muhammad Afzal for Respondent No.7 (in Writ Petition No.256002 of 2018).

Malik Muhammad Awais Khalid for Respondents (in Writ Petition No.41040 of 2020).

Date of hearing: 2nd October, 2020.

## JUDGMENT

**SHAHID WAHEED, J.---**This judgment shall dispose of two petitions brought under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, to wit, W.P.No.256002 of 2018 titled "Prof. Dr. Asad Aslam Khan v. Government of Punjab and others" (hereinafter called the first petition) and W.P.No.41040 of 2020 titled "Prof. Dr. Muhammad Sarwar Khan v. Government of Punjab and others" (hereinafter called the second petition) as they involve identical questions in controversy.

2. The petitioner of the first petition and respondent No.3 of the second petition are in the twilight of their careers as Professor. The petitions before us, as we understood, canvass the notion that a University cannot perform its functions in a befitting manner and deliver optimum results unless its officers are appointed in the manner which is prescribed in the law. Both the petitions have thus, called upon us that while interpreting the provisions relating to the terms and conditions of the Pro-Vice Chancellor, the appointment of the present incumbent of the said post be declared illegal.

3. Before proceeding further, it is essential to sketch briefly how these two petitions have come to be heard by this Bench. The first petition is related to the appointment of the Pro-Vice Chancellor in the King Edward Medical University (the KEMU) under the King Edward Medical University, Lahore Act, 2005 (the KEMU Act). This petition was first presented to one of us, namely, Shahid Waheed, J., hearing in Single Bench. At the preliminary hearing, it was argued that the impugned Notification No.SO(ME)4-7/2018(KEMU) dated 7th November, 2018 was issued by Government of the Punjab in pursuance of the interpretation made by this Court

in Shoaib's case[1], which would be appropriate to re-examine in the light of Moazzam Hussain's case[2] and Fazal Rahman Khundkar's case[3]. Considering the argument, it was deemed appropriate that the matter be referred to the Hon'ble Chief Justice for sending the case to a Division Bench for authoritative interpretation of the law. The case was accordingly referred to the Division Bench. In the meantime, Dr. Muhammad Iqbal Zafar had brought his petition[4] seeking a declaration from this Court to the effect that his appointment as Pro-Vice Chancellor of the University of Agriculture, Faisalabad (the UOA) was liable to continue from the date of his appointment till three years in terms of Section 15-A of the University of Agriculture Faisalabad Act, 1973 notwithstanding the fact that he had attained the age of superannuation. This petition was presented before one of us (Shams Mehmood Mirza, J.). It is to be noted that the language of Section 15-A of the University of Agriculture Faisalabad Act, 1973 (the UOA Act) is identical with that of Section 15 of the KEMU Act but nevertheless the interpretation made in the case of Muhammad Iqbal Zafar was contrary to the one which was expressed in Shoaib's case. Subsequently, the petition[5] of Prof. Dr. Muhammad Sarwar Khan challenging the nomination made by the Vice Chancellor of the UOA for the post of Pro-Vice Chancellor was laid before Shams Mehmood Mirza, J. On the peremptory date of hearing of this petition, it was noticed that the view taken in Shoaib's case was not adhered to in the case of Dr. Muhammad Iqbal Zafar and thus, it was thought desirable to get the matter settled by a Division Bench of this Court. During the pendency of the petition brought by Prof. Dr. Muhammad Sarwar Khan, appointment was made to the post of Pro-Vice Chancellor in the UOA. This appointment led Dr. Muhammad Sarwar Khan to file another petition, that is, W.P.No.41040 of 2020 (the second petition) to challenge the appointment on the basis of interpretation made in Shoaib's case. The files were accordingly put up before the Hon'ble Chief Justice for appropriate orders. It appears that since the view expressed in the case of Dr. Muhammad Iqbal Zafar was approved by the learned Judges of the Division Bench of this Court in I.C.A. No.223243 of 2018[6], these petitions along with the connected cases, in pursuance of the above-referred referring order, has been placed before us.

4. Now, it will be proper to set out the respective stands taken up by the petitioners and the respondents in these two petitions. Admitted fact of the first petition is that the Chancellor selected and approved the name of respondent No.7, Prof. Ijaz Hussain, for appointment to the post of Pro-Vice Chancellor of the KEMU from amongst the panel of following professors made by the Vice Chancellor: -

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1 *Ch. Shoaib Saleem v. The King Edward Medical University and others (W.P No. 9316 of 2015)*

2 *Pakistan (through the Secretary, Cabinet Secretariat, Karachi) v. (1) Moazzam Hussain Khan (2) Mian Anwar Ali, Director of Intelligence Bureau Karachi (PLD 1959 Supreme Court 13)*

3 *Pakistan v. Fazal Rahman Khundkar and another (PLD 1959 Supreme Court 82)*

4 *Dr. Muhammad Iqbal Zafar v. Province of Punjab (W.P. No. 217977 of 2018)*

5 *Prof. Dr. Muhammad Sarwar Khan v. University of Agriculture and other (W.P. No. 33710 of 2020)*
*Through this petition is clubbed with these petitions but it has been disposed of through separate order of even date.*

6 *Prof. Dr. Muhammad Iqbal Zafar v. The Province of Punjab through Secretary to the Government of Punjab, Agriculture Department, Lahore and others (2019 PLC (C.S.) 63)*

1. Prof. Asad Aslam Khan, Professor of Ophthalmology

2. Prof. Irshad Hussain Qureshi, Professor of Medicine

3. Prof. Muhammad Arshad Chohan, Professor of Obstt & Gynae

4. Prof. Aftab Asif, Professor of Psychiatry

5. Prof. Ijaz Hussain, Professor of Dermatology

6. Prof. Ayesha Malik, Professor of Obstt and Gynae

In pursuance of above-stated approval respondent No.7 was appointed as Pro-Vice Chancellor of the KEMU for a term of three years vide Notification No.SO (ME) 4-7/2018 (KEMU) dated 7th November, 2018. Petitioner, Prof. Asad Aslam Khan, is aggrieved by the said notification. His grouse is that he being the senior-most Professor in the KEMU had a legitimate expectancy to be appointed to the post of Pro-Vice Chancellor but he was illegally ignored solely on the pretext that his remaining length of service was less than three years. It is his plea that the provisions contained in Section 15(1) of the KEMU Act do not lend to the Government any interpretation that a Professor having remaining length of service less than three years would be ignored from making his appointment as Pro-Vice Chancellor; and, that if the appointment of respondent No.7 is allowed to be continued, it would compel the petitioner and other seniors to render remaining period of service under a junior colleague, which would not be wholesome for the affairs of the University. On the other hand the common defence of the respondents is that the petitioner cannot be allowed to throw challenge to the appointment of respondent No.7 to the post of the Pro-Vice Chancellor as it has been made in the light of interpretation made by this Court in Shoaib's case wherein it was held that any Professor with the remaining service of less than three years could not complete the term of office to the post of the Pro-Vice Chancellor and, therefore, did not meet the statutory requirement of Section 15 of the KEMU Act.

5. The second petition pertains to the appointment made by Government of the Punjab in the Agriculture Department to the post of Pro-Vice Chancellor in the UOA vide Notification No.SO (R&E) 24-2/2019-Pro-VC (UAF) dated 31st August, 2020, which reads as under:

"The Governor/Chancellor, in terms of Section 15-A (1) read with Sections 10, 11(8) and 41 of the University of Agriculture Faisalabad Act, 1973, has been pleased to nominate Prof. Dr. Asif Tanveer, Chairman, Department of Agronomy/Director Academics, University of Agriculture Faisalabad as Pro-Vice Chancellor, University of Agriculture Faisalabad for a period of three (03) years or till attaining the age of superannuation, whichever is earlier."

Dr. Muhammad Sarwar Khan has questioned the validity of the above-cited notification on the ground which is diametrically opposed to the one that has been urged in the first petition. Here plea of the petitioner is that since the remaining length of service of Dr. Asif Tanveer is less than three years, he per Shoaib's case could not be appointed as Pro-Vice Chancellor of the UOA whereas the defence of the respondents is that appointment is valid as it has been made in the light of interpretation made by this Court in Muhammad Iqbal Zafar's case.

6. The pleadings of both the cases raise only one question as to which of the two interpretations of the terms and conditions related to the post of the Pro-Vice Chancellor, which has come to the light through Shoaib's case and Muhammad Iqbal Zafar's case, is correct. This question, in fact, in its fold encompasses three sub-questions for our consideration. First, what is the eligibility criteria for making appointment to the post of Pro-Vice Chancellor? Second, what is the tenure of the incumbent of the post of Pro-Vice Chancellor? Third, what kind of relief can be granted? It would be pertinent to mention here that it was very easy for us to answer the above-stated questions in the light of interpretation made by the learned Judges of the Division Bench of this Court in Muhammad Iqbal Zafar's case but we did not consider it appropriate and thought it expedient to re-examine the law so as to make authoritative pronouncement relating to the terms and conditions of the post of Pro-Vice Chancellor.

7. To answer the afore-stated questions, it is essential to make a quick survey of the relevant provisions of the law. In this case two laws are involved, that is to say, the KEMU Act and the UOA Act. The language of the relevant sections of the two laws is more or less identical. Whatever is the difference, it is not of much significance and shall be explained in due course. The first relevant provision of the KEMU Act is Section 8 wherein the details of the Officers of the KEMU have been enumerated and this is to the following effect: -

"8. Officers of the University: the following shall be the officers of the University, namely
(i) the Vice Chancellor;

(ii) the Pro-Vice Chancellor;

(iii) the Deans;

(iv) the Directors;

(v) the Chairman;

(vi) the Registrar;

(vii) the Controller of Examinations;

(viii) the Treasurer;

(ix) the Librarian; and

(x) such other persons as may be prescribed."

The details of Officers of the UOA have been given in Section 10 of the UOA Act, which reads as under: -

"10. Officers of the University: the following shall be the officers of the University:-

(i) the Chancellor:

(ii) the Pro-Chancellor;

(iii) the Vice-Chancellor;

(iii a) Pro-Vice Chancellor

(iv) the Deans;

(v) the Directors;

(vi) Principal of the Constituent College:

(vii) the Chairmen of the Teaching Departments;

(viii) the Registrar;

(ix) the Treasure;

(x) the Controller of Examinations;

(xi) the Librarian; and

(xii) such other persons as may be prescribed."

A comparative study of the two laws indicates that the UOA has three additional Officers, namely, the Chancellor, the Pro-Chancellor and the Principal of the Constituent College and list of all other Officers is the same in both the laws.

8. The second important provision in both the laws pertains to the post of Pro-Vice Chancellor. It is interesting to note that the post of the Pro-Vice Chancellor in the KEMU as well as in the UOA was created by making amendment in their respective Acts in the year 2012 and, it appears, for this reason the language of Section 15 of the KEMU Act and Section 15-A of the UOA Act is self same and reads as under:-

"Pro-Vice Chancellor-(1) the Chancellor shall nominate the Pro-Vice Chancellor of the University, from amongst three senior most Professors of the University, for a term of three years.

(2) The Pro-Vice Chancellor shall perform such functions as may be assigned to him under this Act, statutes or regulations.

(3) The Syndicate or the Vice Chancellor may assign any other functions to the Pro-Vice Chancellor in addition to his duties as Professor."

9. Last provision of law governing the questions, under consideration, relates to retirement from service. In this context Section 36 of the KEMU Act provides that: -

"36. Retirement.-An officer, other than the Vice-Chancellor, teacher or other employee of the University shall have the right to retire from service on such date, after he has completed twenty years of service qualifying for pension or other retirement benefits as the competent authority may, in the public interest, direct; or where no direction is given, on the completion of sixtieth year of his age.

Explanation.- In this section "competent authority" means the appointing authority or a person duly authorized by the appointing authority in that behalf, not being a person lower in rank to the officer, teacher or other employee concerned."

Whereas Section 41 of the UOA contains the provision of retirement from service in following words:

> "41. Retirement from Service. - An officer, "other than the Chancellor, Pro-Chancellor and Vice-Chancellor" teacher or other employee of the University shall retire from service-
>
> (i) on such date, after he has completed twenty-five years of service qualifying for pension or other retirement benefits, as the competent authority may, in the public interest, direct, or
>
> (ii) where no direction is given under clause (i) on the completion of sixtieth year of his age.

Explanation- In this section "competent authority" means the appointing authority or a person duly authorized by the appointing authority or in that behalf, not being person lower in rank to the officer, teacher or other employee concerned."

Except the words "the Chancellor", "Pro-Chancellor" and "twenty-five" used in Section 41 of the UOA Act, the provisions relating to retirement in both the laws are identical.

10. The above survey of laws makes it pellucid that the relevant provisions governing the terms and conditions of the post of Pro-Vice-Chancellor in both the universities are similar and thus, common interpretation would be suffice to answer the questions which fall for our consideration in this case.

11. We have now reached to the stage where we have to read the provisions of the above-stated laws under the well-recognized principles of interpretation so as to find out the answers to the questions under consideration. Before getting into that exercise, it is to be noted that inasmuch as the language of a statute constitutes the depository or reservoir of the legislative intent, in order to ascertain or discover that intent, the statute must be considered as a whole, just as it is necessary to consider a sentence in its entirety in order to grasp its true meaning. Consequently, effect and meaning must be given to every part of the statute - to every section, sentence, clause, phrase and words. In the wake of this principle, when we dissect the provisions of the KEMU Act or the UOA Act, it transpires that performing of the duties of the Pro-Vice-Chancellor is an additional responsibility that the Chancellor assigns to a person who is not only a Professor but also one of the three senior most Professors at the University. It means that a direct recruitment to the post of Pro-Vice-Chancellor is prohibited and the eligibility criteria for the post of Pro-Vice-Chancellor is twofold: firstly, that a candidate should be a Professor; and, secondly, he should be amongst three senior most Professors of the University. This eligibility being in plain and clear words admits no further condition that the three senior most Professors must also have at least three years of remaining service.

12. On the contrary we see that in Shoaib's case it has been held that any Professor with the remaining service of less than three years cannot complete the term of office to the post of Pro-Vice Chancellor and, therefore, does not meet the statutory requirements of the Act. This interpretation, in our view, adds the words "with at least three years of remaining service" in Section 15(1) of the KEMU Act or Section 15-A(1) of the UOA Act. It is a trite saying that on questions of construction different minds may come to different conclusions and we are content to say, with all due deference, that we do not agree with the reading of above-stated words in the clear language of the statute as no principle of interpretation or statutory construction approves injection of a word of one's own choice where the language of the statute unmistakably points to the meaning and presents no difficulty in

understanding[7] . Such type of inter-meddling with legislative intent and purpose appears to be an echo of what was said by Denning, L.J., in Magor's case[8] while sitting in the Court of Appeal. He said, "we sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis". We do not agree with the above-stated opinion of Denning, L.J., and for it we rely upon the observation that the House of Lords made while hearing appeal against the said opinion. House of Lords said, "it appears to be a naked usurpation of the legislative function under the thin disguise of interpretation, and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act[9]."

13. Our examination of the different provisions of the KEMU Act or the UOA Act and the principles of the interpretation suggests that the post of Pro-Vice Chancellor is a tenure post. The words "tenure post" is capable of different interpretations depending on the language of statutes. In civil service the tenure means a term during which an office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment to the said office begins when he joins and it comes to an end on the completion of the tenure but no right is conferred to hold the post for the entire period. The tenure could be curtailed on attaining the age of superannuation by the incumbent of the post[10]. The same condition applies to the cases in hands. The tenure prescribed in the statutes, under consideration, is three years and it is intended to allow the Professor, holding the post of Pro-Vice Chancellor, to share his intellectual opinions, even if he is in opposition to opinions of people in other positions of high power. In fact, tenure in the affairs of University encourages commitment, discipline, collegiality and compassion to the institution. Applying the maxim de una aliqua ejus particula proposita judicare vel respondere (it is unjust to decide or respond as to any particular part of a law without examining the whole of the law), the conjoint reading of law suggests that since Section 15 of the KEMU Act (Section 15-A of the UOA Act) does not contain any non-obstante clause, it cannot be said to override the provisions contained in Section 36 of the KEMU Act (Section 41 of the UOA Act) and the consequence would be that the appointment to the post of Pro-Vice Chancellor though shall be made on a three years tenure but it could be curtailed on the completion of sixtieth year of age of the incumbent. We, therefore, concur with the view expressed by the learned Single Judge in Muhammad Iqbal Zafar's case that notwithstanding the fixed tenure attached to the office of Pro-Vice Chancellor, the incumbent thereof on attaining the age of superannuation before the expiry of three years will have to

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*7 Pakistan v. Messrs Zeal Pak Cement Factory Ltd. (1985 SCMR 1968)*
*8 Magor and St. Mellons Rural District Council v. Newport Corportaion (1950) 2 All. E.R. 1226*
*9 Magor and St. Mellons Rural District Council v. Newport Corportaion (1951) 2 All. E.R. 839*
*10 Pakistan (through the Secretary, Cabinet Secretiarat, Karachi) v. (1) Moazzam Hussain Khan (2) Mian Anwar Ali, Director of Intelligence Bureau Karachi (PLD 1959 Supreme Court 13) Pakistan v. Fazal Rahman Khundkar and another (PLD 1959 Supreme Court 82)*

retire as he/she does not enjoy the immunity from retirement allowed to the office of Chancellor.

14. Lastly, we address the question that what kind of relief can be granted in these petitions. As far as the first petition is concerned, our conclusion is that since the Notification No.SO (ME) 4-7/2018 (KEMU) dated 7th November, 2018 appointing Prof. Dr. Ijaz Hussain as Pro-Vice-Chancellor in the KEMU was issued on the basis of interpretation made in Shoaib's case, which does not find our favour, the said Notification is not valid and thus, respondent No.7 can neither be allowed to plead estoppel nor to gain any right on the basis thereof[11] . In the second petition the appointment made to the post of Pro-Vice Chancellor in the UOA is found valid and thus, interference therewith is uncalled for.

15. In the result, the first petition (i.e. W.P.No.256002 of 2018) is accepted and consequently, the Notification No.SO (ME) 4-7/2018 (KEMU) dated 7th November, 2018 is set aside declaring that it has been issued without lawful authority and is of no legal effect. Since the post of Pro-Vice Chancellor cannot be allowed to be left vacant for an unlimited period of time, respondents Nos.1 to 4 are directed to make fresh appointment to the post of Pro-Vice-Chancellor, King Edward Medical University in the light of interpretation of provisions of the laws made hereinabove within a period of one month. The second petition (i.e. W.P.No.41040 of 2020) lacks merit and is accordingly dismissed.

16. One of us (Muhammad Sajid Mehmood Sethi, J.) has agreed with the decision subject to his own reasons recorded in the additional note attached herewith.
sd/- sd/-

(SHAMS MEHMOOD MIRZA) (SHAHID WAHEED)
Judge Judge
Sd/

(MUHAMMAD SAJID MEHMOOD SETHI)
Judge

MUHAMMAD SAJID MEHMOOD SETHI, J.----I have had the privilege of reading the judgment handed down by my learned brother Shahid Waheed, J., and I agree with the decision subject to the following reasons on difference of opinion in the decisions rendered by two learned Single Benches in the cases of Shoaib and Dr. Muhammad Iqbal Zafar (supra).

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[11] ***Abdul Haque Indhar and others v. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others (2000 SCMR 907)***
***Muhamamd Ikhlaq Memon v. Zakaria Ghani and others (PLD 2005 SC 819)***

2. In Shoaib's case, the learned Single Bench, while interpreting Section 15 of the KEMU Act, observed that a Professor with the remaining service of less than three years cannot complete the term of the office of Pro-Vice-Chancellor, therefore, he does not meet the statutory requirements of Section 15 of the Act. It was further observed that Pro-Vice Chancellor is an officer within the contemplation of Section 8(ii) of the Act with retiring age of sixty years, in view of Section 36 of the Act, therefore, a person having service less than three years cannot be appointed as Pro-Vice Chancellor. The said judgment was not further assailed and was implemented.

3. In the case of Dr. Muhammad Iqbal Zafar, petitioner sought declaration to the effect that his appointment as Pro-Vice Chancellor of UOA was liable to continue from the date of his appointment till three years in terms of Section 15-A of the UOA Act notwithstanding the fact that he had attained the age of superannuation. The learned Single Bench, vide order dated 1.06.2018, refused to issue the declaration that the petitioner was entitled to complete the tenure of the post of Pro-Vice-Chancellor as a matter of right even though he had attained the age of superannuation. Said judgment was assailed in I.C.A. No. 223243/2018 and the learned Division Bench in its judgment dated 05.07.2018 observed that when a Professor who was nominated as Pro-Vice-Chancellor was no more a Professor on superannuation was also no more a Pro-Vice-Chancellor, and the post of Pro-Vice-Chancellor was nomination post and not an appointment upon a tenure post.

4. As is evident from the aforesaid, the judgment rendered by learned Single Bench in the case of Dr. Muhammad Iqbal Zafar was affirmed by the learned Division Bench on 05.07.2018. Learned Single Bench, being not aware of the said judgment of learned Division Bench, referred the matter to Hon'ble Chief Justice vide order dated 30.07.2020 for fixing the case before the learned Division Bench of this Court. However, the matter was referred to this Full Bench wherein it transpired that the view in Dr. Muhammad Iqbal Zafar's case has already been affirmed by the learned Division Bench. After the said decision, there was no need to further deliberate upon the issue as there is no contra view of any other learned Division Bench on the issue in hand, nor judgment dated 05.07.2018 of learned Division Bench is subject matter of the reference, however, we decided to pronounce authoritative judgment on the issue in hand. No doubt this Full Bench can form an independent opinion in the presence of a judgment of learned Division Bench but, since we have not noticed any flaw in the judgment of learned Division Bench rendered in the case of Dr. Muhammad Zafar Iqbal, therefore, without overruling it, concurrence can be made with the judgment of learned Division Bench under the doctrine of merger. Reference in this regard can be made to judgments reported as Gangadhara Palo v. Revenue Divisional Officer and another [(2011) 4 SCC 602], Sahabzadi Maharunisa v. Mst. Ghulam Sughran (PLD 2016 SC 358) and Nasrullah Khan v. Mukhatar-ul-Hassan (PLD 2013 SC 478). In the case of Gangadhara Palo it was held by the Supreme Court of India as under:

"According to the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court. Hence, if some reasons, however meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist."

In view of the above stated legal position, I concur with the said decision of learned Division Bench.

5. To elaborate it further, it can be seen from reading of KEMU Act and UOA Act that the offices / posts under the two statutes are not of same nature. There are offices to which persons are nominated, and there are posts to which persons are appointed. Then there are expressly provided ex-officio posts. Different posts are of different natures and status. There are full time office holders e.g. Registrar and Teachers. Then there are posts to which a person is appointed for a term e.g. Vice-Chancellor. There are office holders who are nominated e.g. Pro-Vice Chancellor, members of Senate and Syndicate, and there are elections and elected members to the authorities. And thus, their terms of office depends on the nature of their status.

6. So far as the office of Pro-Vice Chancellor is concerned, one of the three senior most Professors is nominated by the Chancellor to hold this office. Under Section 15 of the KEMU Act and Section 15-A of the UOA Act the Pro-Vice Chancellor is nominated for a term of three years. Under the said provisions, apparently there is no prohibition regarding nomination of a Professor with less than three year service for the post of Pro-Vice Chancellor. It is established principle that whatever is not specifically prohibited is permissible and as a matter of general principle, prohibition cannot be presumed. Reference in this regard can be made to Additional Collector-II Sales Tax, Lahore v. Messrs Abdullah Sugar Mills Ltd. (2003 SCMR 1026) and Asma Zafarul Hassan v. United Bank Ltd. and another (1981 SCMR 108).

7. On the other hand, under Section 36 of the KEMU Act and Section 41 of the UOA Act, a Professor is bound to retire from service on attaining age of superannuation. If Section 15 of the KEMU Act and Section 15-A of the UOA Act is interpreted as a Professor who cannot complete the term of three years cannot be considered for nomination for the post of Pro-Vice Chancellor, then the text of the said provisions will have to be read as follows: "from amongst three senior most Professors of the University [whose age on the date of nomination is not above 57 years], for a term of three years.". If the said text or similar words are not read into the text of said provisions, then the condition of nomination from amongst three senior most Professors will be compromised. If the said provisions are interpreted without filling in the gaps in their text, the words "three senior most Professors" will become redundant or will have to be read down. Similarly, the words "for a term of

three years" have been reduced to futility with the interpretation given by learned Single as well as Division Bench in the case of Dr. Muhammad Zafar Iqbal. Needless to say that fundamental rule of interpretation is that in construing the provisions of a statute, the Court has to find out the express intention from the words of the statute and eschew the construction which leads to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory. In order to remove the apparent defect and to give force and life to the intention of legislature, doctrine of harmonious construction has been employed by the learned Single Bench, Division Bench and has been followed in the main judgment which in my view is not wrong in the given circumstances but, more appropriately, such gaps have to be filled by the legislature by amending Acts, as held by the House of Lords in the case of Magor and St. Mellons Rural District Council (supra). Therefore, clarifications / amendments in the KEMU Act and UOA Act with regard to nomination of a Professor having service less than the tenure of the post of Pro-Vice Chancellor and his status after his retirement to hold the post in question, are necessary to be explicitly incorporated in the relevant statutes. Steering thoughts can be gathered from Indian jurisdiction. For example, Section 13 of the Kannur University Act, 1996, deals with appointment of Pro-Vice Chancellor for a term of four years and its subsection (2) specifically provides that person who is more than 56-years of age shall not be appointed against said post. Therefore, I suggest that necessary amendments in two Acts ibid, with regard to above discussed points are required to be incorporated by the Legislature by adopting due course of law to manifest its intention regarding the term for the post of Pro-Vice Chancellor.

Sd/-
Muhammad Sajid Mehmood Sethi
Judge

Order accordingly.

**2021 C L C 898**
**[Lahore]**
**Before Shahid Waheed and Ch. Muhammad Iqbal, JJ**
**ALTAMUSH SAEED----Petitioner**
**Versus**
**GOVERNMENT OF PUNJAB and another----Respondents**

I.C.A. No.55556 of 2020, decided on 24th December, 2020.

**Punjab Compulsory Teaching of the Holy Quran Act (XVII of 2018)---**
----S.3---Compulsory teaching of the Holy Quran---Scope---Appellant filed "appeal in public interest" seeking direction to the Government to take all possible steps to enable the Muslims, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to enforce the Punjab Compulsory Teaching of the Holy Quran Act, 2018---Secretary School Education Department, inter alia, stated that the provisions of Punjab Compulsory Teaching of the Holy Quran Act, 2018, would be enforced in letter and spirit and implemented in all educational institutions from the next academic year---Chairman, Punjab Curriculum and Textbook Board, inter alia, stated that the Board shall take all steps before the commencement of next academic year to ensure that every book that is to be taught in any school did not contain any offensive material about the teaching of Holy Quran and Sunnah, Islamic Ideology and pious personalities of Islam---Parties felt satisfied and jointly submitted that the appeal be disposed of in terms of the recorded statements---Appeal was disposed of accordingly.

Malik Aneeq Ali Khatana for Appellant.

Ahmad Awais, Advocate General Punjab and Ch. Faza Ullah, A.A.G. along with Lt.Gen (Retd) Muhammad Akram Khan, Chairman PCTB, Atta Dastgeer, Director (Manuscripts), Muhammad Aslam Sipra, Deputy Director (Legal), Liaqat Ali Channar, Law Officer, Dr. Sohail Shahzad, Secretary School Education Department and Humayun Akhtar Sahi, Deputy Secretary (Legal), SED.

Rana Ashfaq, PTA Law Officer.

Muhammad Amir Sohail Saleemi for PHEC.

## ORDER

This appeal has been filed in the public interest seeking direction to the Government/ respondents to take all possible steps to enable the Muslims, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to enforce the Punjab Compulsory Teaching of the Holy Quran Act, 2018 (Act XVII of 2018) whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.

2. The Secretary School Education Department Government of the Punjab, after consulting the Advocate General, Punjab, wants to make a statement. Let his statement be recorded.

Statement of Dr. Sohail Shahzad, Secretary School Education Department.

i) That the provisions of the Punjab Compulsory Teaching of the Holy Quran Act, 2018 shall be enforced in letter and spirit and implemented in all educational institutions from the next academic year.

ii) That a notification shall be issued that from the next academic year no private or public school shall prescribe or suggest any kind of book or reading material without getting its approval from the Government or its authorized officer/department/ organization and in case of its violation all kind of legal actions shall be taken.

3. The Chairman, Punjab Curriculum and Textbook Board, in the presence of Advocate General, Punjab, also wants to make a statement. Let his statement be also recorded.

Statement of Lt. Gen (Retd.) Muhammad Akram Khan, Chairman PCTB.

i) That the Punjab Curriculum and Textbook Board shall take all steps before the commencement of next academic year to ensure that every book that is to be taught in any school does not contain any offensive material about the teaching of Holy Quran and Sunna, Islamic Idology and pious personalities of Islam.

ii) That before the start of next academic year steps shall also be taken to remove all incorrect material or derogatory remarks, or misleading information with respect to ideology, important features, culture, history and heroes of Pakistan and Islam from every book that is to be taught in any school.

iii) That it shall be ensured that during the next academic year no book to be taught in any school contains indecent material.

4. All the learned counsel for the parties feel satisfied and jointly submit that this appeal be disposed of in the terms of above recorded statements.

5. Order accordingly.

6. The Secretary School Education Department, Government of the Punjab and the Chairman, Punjab Curriculum and Textbook Board before the commencement of next academic year shall submit compliance report before us through the Addl. Registrar (Judicial) of this Court.

Order accordingly.

**P L D 2021 Lahore 364**
**Before Shahid Waheed and Faisal Zaman Khan, JJ**
**MUHAMMAD YAQOOB through Legal heirs---Petitioners**
**Versus**
**LAND ACQUISITION COLLECTOR (M-4) NATIONAL HIGHWAY AUTHORITY**
**and 4 others---Respondents**

R.F.As. Nos. 781 and 957 of 2014, heard on 10th March, 2021.

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

----S.18---Reference to Court---Administration of justice---Justice has to be not only swift but also fair---Court must examine preliminary objections to claim at the outset---Court, upon declaring objections valid, is relieved of its duty to take further proceedings in the matter and parties also stand discharged from further hassle.

**(b) Precedent---**

----Binding nature---Precedents are anchors of law---Respect and adherence to precedents is rule rather than exception---Supreme Court is the ultimate expositor of law, High Courts and others Courts are bound by its precedents---Not only owning obedience, but also of developing consistency in evenhanded administration of justice in Courts.
Muhammad Saif Ullah v. Lahore Development Authorities and others PLD 2021 Lah. 168 rel.

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

----Ss.18 & 31---Reference and compensation---Principle---Concept of consent and protest cannot go together, therefore, it is essential that whenever a person feels dissatisfied with amount of compensation determined in award, it ought to first raise its protest either by making application before Collector asking him to send reference to Court for determination of his objections or in alternative receive amount of compensation under protest, otherwise such person is precluded to make any grouse and taking out any proceedings.

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

----S. 23---Compensation, determination of---Principle---Question to determine compensation payable, is market value at the relevant time---Best method of fixing market value is to find what a willing purchaser would pay to a willing seller.

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

----Ss.18 & 31---Qanun-e-Shahadat (10 of 1984), Arts. 117 & 120---Acquisition of land---Compensation---Determination---Average value of previous sales---Potential value---Proof---Onus to prove---Appellants/ landowners were aggrieved of award of compensation given by authorities and sought increase therein---Mutations of sale in recent past were produced by landowners to prove market value of land but Trial Court dismissed the reference and maintained the award---Validity---Landowners were to prove mutations by adducing evidence either of vendor or vendee or witnesses passing consideration under mutations, to prove that sale transactions were genuine transactions between willing vendor and willing vendee---Landowners did not prove that consideration passed represented prevailing market value and lands under acquisition and lands concerning sale were similarly situated and possessed of same or similar nature, advantage etc.---No evidence was brought on record from independent source that land had an orchard and had also come into commercial area---Potential value of land could not be determined on the basis of mere oral assertion of landowners---Landowners failed to discharge burden of proving market value as well as potential value of land---High Court declined to interfere in order passed by Trial Court and maintained compensation fixed by authorities---Appeal was dismissed, in circumstances.

Ghulam Muhammad v. Government of West Pakistan PLD 1967 SC 191; Government of N.W.F.P and others v. Akbar Shah and others 2010 SCMR 1408; Wali Ahmad v. Collector, Land Acquisition and others 1985 SCMR 224; Zardad Khan and others v. Government of N.W.F.P. and others 1987 SCMR 1387; The Land Acquisition Collector v. Ch. Muhammad Ali 1979 CLC 523; Hyderabad Development Authority through M.D., Civic Centre, Hyderabad v. Abdul Majeed and others PLD 2002 SC 84; Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604; Manzoor Hussain (deceased) through L.Rs. v. Misri Khan PLD 2020 SC 749; Nirman Singh and others v. Lal Rudra Partab Narain Singh and others AIR 1926 PC 100; North West Frontier Province v. Shad Mohammad Khan and others 1975 Law Notes 338; Land Acquisition Collector-II Tarbela Dam Resettlement Organisation, WAPDA and 2 others PLD 1976 Pesh. 50; Government of Sindh and 2 others v. Muhammad Usman and 2 others 1984 CLC 3406; Liyar Khan v. Land Acquisition Collector/A.C., Swabi 2003 YLR 3287; Saeedur Rehman and others v. Assistant Commissioner/Collector Acquisition, Swabi 2004 CLC 378 and Abdul Sattar v. Land Acquisition Collector Highways Department and others 2010 SCMR 1523 rel.

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

----S.23---Compensation---Factor affecting value of land to be acquired---Prices go up in the locality concerned, as soon as the information that government is about to acquire land in that vicinity reaches owners of property in that locality.
Mian Asghar Ali for Appellants (in both Appeals).
Muhammad Awais Kamboh for Respondents Nos.1 to 3.

Malik M. Jahangir Aslam for Respondents Nos. 4 and 5.
Date of hearing: 10th March, 2021.

## JUDGMENT

**SHAHID WAHEED, J.---**These two appeals that have been presented to us are from two land-owners who are also related to each other and whose lands were acquired for the construction of Faisalabad to Multan Motorway (M-4) and both of them are from the judgments of the Senior Civil Judge, Faisalabad answering references filed under section 18 of the Land Acquisition Act, 1894 (Act I of 1894). Since not only the facts but also the claims to compensation and the evidence in support of them was same in these two appeals, we considered it appropriate to hear them together and also to decide them by a consolidated judgment so that there would be no conflict in our decision.

2. The facts in brief giving rise to these appeals are that on 8th January, 2004, the District Collector, Faisalabad issued a notification (Ex.R.3) under section 4 of the Land Acquisition Act, 1894 ("the Act") to the effect that an area of 666 Kanals 06 Marlas and 7 Sirsai of Chak No.6-JB, Tehsil and District Faisalabad was intended to be acquired for the public purpose of construction of Faisalabad to Multan Motorway (M-4). This area included 21 Kanals 16 Marlas and 07 Sirsai of appellants of R.F.A. No.781 of 2014 and 21 Kanals 15 Marlas and 06 Sirsai of the appellants of R.F.A. No.957 of 2014. On 7th May, 2009 another notification (Ex.R.5) under section 6 of the Act was issued. After the publication of the above notifications, the Land Acquisition Collector, National Highway Authority, (Faisalabad-Khanewal) Section-I, M-4 Project, Faisalabad initiated proceedings for the determination of compensation payable to the various owners of the land acquired. Notices as required under sections 9 and 10 of the Act were served upon the affected persons requiring them to deliver their statements regarding nature of their respective interests in the land and particulars of their claims to compensation. In response to the notices, the appellants appeared before the Land Acquisition Collector and got recorded their statements that their land was of commercial kind and near to the Bypass and rates offered to them were not reasonable and demanded payment of compensation at the rate of Rs.6,000,000/- per acre. After the usual formalities under the Act had been gone through by the Land Acquisition Collector, he on the basis of evidence and inspection of the site delivered his award on 11th December, 2009 (Ex.R.1) in which the amount of compensation to land-owners was determined by him as under: -

| Sr. No. | Chak No. | Acquired Area K M S | | | Rate per acre | Cost of land |
|---|---|---|---|---|---|---|
| 1. | 6/JB Category -A- | 47 | 13 | 0 | 4,000,000 | 23,825,000 |
| 2. | 6/JB Category -B- | 618 | 13 | 7 | 2,500,000 | 193,340,278 |
| Total Area | 666 | | 06 | 7 | 217,165,278 | |

15% compulsory acquisition charges Rs.32,574,792.00
GRAND TOTAL Rs.249,740,070

3. The land of both the appellants was included in Category-B and compensation of Rs.2,500,000/- per acre was determined for them. They were dissatisfied with the award and in order to seek a judicious determination of their rights they made applications before the Collector under section 18 of the Act asking him to refer their cases to the Court for adjudication. On receipt of these applications, the Collector made the required references to the Court of Senior Civil Judge, Faisalabad. Both references were filed in the Court of Senior Civil Judge on 9th February, 2010. The reference of appellants of R.F.A. No.957 of 2014 was registered in the Reference Court vide No.08-4 of 2010 while the reference of appellants of R.F.A. No.781 of 2014 was registered vide No.09-4 of 2010. Although the two references were in the same Court yet they were not consolidated; however, they were proceeded simultaneously and the orders passed therein were the same. Since the appellants were related, they presented the same type of evidence. The respondents also produced same evidence in both references. On consideration of the matter, the Senior Civil Judge agreed with the award and the objections raised on behalf of the appellants were not accepted and consequently, two separate judgments were passed on the same date i.e. 20th March, 2014. So, these two appeals.

4. It may be mentioned to begin with that for good administration of justice it is essential that it ought to be not only swift but also fair and for that the Court must examine the preliminary objections to the claim at the outset because upon declaring them to be valid the Court is relieved of its duty to take further proceedings in the matter and the parties also stand discharged from further hassle. Mindful of this principle, we considered it prudent to appraise issue No.1 whereby the Reference Court had made the respondents under burden to prove that the appellants had no cause of action. We, therefore, asked the respondents' counsel to explain this objection and also show us as to how from the evidence on record this objection is substantiated. He said that since the appellants had received the amount of compensation determined by the Land Acquisition Collector without any protest, they could no longer be called aggrieved persons nor did they had any cause of action. To prove this objection he took us to the statement of Khalid Mehmood Gill, Land Acquisition Collector, National Highway Authority, who appeared as RW-1 in both the references and during his examination-in-chief had stated before the

Reference Court that the appellants had received their compensation. He also referred to the statement of Muhammad Yaqoob (appellant of R.F.A. No.781 of 2014 who appeared as his own witness in his reference as AW-1 and supporting witness in the other reference as AW-2) and Nasir Mahmood (appellant of R.F.A. No.957 of 2014 who appeared as his own witness in his reference as AW-1 and supporting witness in the other reference as AW-2) and said that both the witnesses had stated that although compensation had been received, it was very low. We have carefully read the statements of the witnesses but they do not explain when the appellants (land-owners) received the amount of compensation and whether it was received under protest. Faced with this situation, the respondents' counsel submitted that since the appellants had not received the compensation due to their objections, the Land Acquisition Collector had filed an application under section 31(2) of the Act in the Reference Court so that the amount of compensation could be deposited in the Court and, that this application was allowed by the Reference Court vide order dated 23rd January, 2012. He further informed us that according to cash register and Qabzul Wasool, the appellants had received the amount of compensation without any protest.

5. It is now clear that the award was made on 11th December, 2009, the appellants on 9th January, 2010 had filed applications before the Land Acquisition Collector asking him to send references to the Court under section 18 of the Act for determination of their legitimate compensations, accordingly the references were forwarded and on 9th February, 2010 they were received in the Court, and finally during the pendency of the references, the amount of compensation was received by the appellants without recording the remarks "under protest". This brings us to the consideration of the question whether, in the given facts and circumstances of the case, the appellants (land-owners) can legitimately be accused of waiver of their right to have their objections determined by the Reference Court. For this we have to look at section 31 of the Act, which cast a duty upon the Collector to tender payment of the compensation awarded by him to the persons interested entitled thereto unless "they shall not consent to receive it", in which case he shall deposit the amount in the Court to which a reference would be submitted. However, this is subject to the proviso that "any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount". To fully understand the consequences of receiving the compensation with or without protest, it is essential to completely read the provisions of section 31 of the Act, which is reproduced below: -

"31. Payment of compensation or deposit of the same in Court.---(1) When the Collector has made an award under section 11-

(a) if the persons interested entitled to compensation and costs (if any) under the award and the Provincial Government accept the award and intimate their acceptance in writing to the Collector before the expiry of the period prescribed in

sub-section (2) of section 18 for making an application to the Collector for referring the award to the Court, or in sub-section (3) of the said section for referring the award to the Court by the Provincial Government, whichever is later, or if the period specified in subsection (2) of the said section for making an application to the Collector or in subsection (3) for referring the award to the Court has expired and no such application or reference has been made, the Collector shall, before taking possession of the land, tender payment of the full amount of compensation and costs (if any) awarded by him to the persons entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in subsection (2);

(b) if the persons interested entitled to compensation and costs (if any) under the award or the Provincial Government object to the award and an application has been made to the Collector under subsection (2) of section 18 for referring the award to the Court or the award has been referred to the Court by the Provincial Government under subsection (3) of that section, the Collector shall, before taking possession of the land, tender payment of the compensation and costs (if any) awarded by him or the estimated cost of acquisition of such land as determined by the Collector of the district under subsection (1) of section 17, whichever is less, to the persons entitled thereto under the award and shall pay it to them unless prevented by some one or more of the contingencies mentioned in subsection (2):
Provided that no payment under clause (b) shall be made until the person entitled to compensation furnishes to the satisfaction of the Collector a security for refund of the amount, if any, which may subsequently be found to be in excess of the compensation awarded to him by the Court.

(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 and costs (if any) 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:
Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation or cost awarded under this Act, to pay the same to the person lawfully entitled thereto.

(3) Notwithstanding anything in this section the Collector may, with the sanction of the Commissioner instead of awarding a money compensation in respect of any land, make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, the remission of land-revenue on

other lands held under the same title, or in such other way as may be equitable having regard to the interests of the parties concerned.

(4) Nothing in the last foregoing subsection shall be construed to interfere with, or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contact in respect thereof."

6. Let us now review the case-law which considered the above cited section to answer such a question as we are presently discussing.
The first case that may be cited in this regard is Ghulam Muhammad v. Government of West Pakistan[1] in which the ownership of the person interested was not clear in the revenue record, therefore, declaring him "disputed item", the Collector deposited the amount of compensation in the Court. Subsequently, the person interested upon getting a mutation sanctioned in his favour recording him as owner received the amount of compensation without any protest and then filed an objection before the Land Acquisition Collector complaining about the inadequacy of the compensation, which was declined. The Collector's decision was defended in the Supreme Court with the argument that since the land-owner withdrew the compensation without any protest, he had no longer any right to object to the award by reason of the provisions of the second proviso to section 31(2) of the Act. This argument prevailed upon the Supreme Court and it was held that a person, who had taken payment without protest, would be deemed to have waived his objections to the award, if any, and could not thereafter claim a reference under section 18 of the Act. It is pertinent to mention here that this principle has been repeated in Government of N.W.F.P. and others v. Akbar Shah and others[2].

7. We now consider another case. This is Wali Ahmad v. Collector, Land Acquisition and others[3] wherein the land-owner had requested to make a reference to the Court before getting payment of compensation under the award. The facts of that case are that the award had been made by the Collector on 29th July, 1970 but before any compensation could be paid, the land-owner on 24th August, 1970 applied under section 18 for making reference to the Court. The reference was received by the Court on 22nd April, 1971. It was after this that the land-owner received compensation on 30th May, 1971 on furnishing requisite bond. However, there was no mention in Qabzul Wasool that the amount had been received under protest. The Collector, therefore, opposed the reference on the ground, inter alia, that the land-owner was estopped from claiming enhancement of the compensation. An issue was framed on this point. The findings returned by the Supreme Court were that the fact that the land-owner had already applied for reference, showed that he had not accepted the award and that he had taken the amount under protest and that being so, the absence of a mention of the same in the receipt register was mere inadvertence and a technicality.

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*1 PLD 1967 Supreme Court 191*
*2 2010 SCMR 1408*

8. There is yet another dimension of the matter and it came up in Zardad Khan and others v. Government of N.W.F.P. and others[4] . What happened in it was that the land-owner, feeling dissatisfied with the award, made an application under section 18 of the Act to the Collector requiring him to refer the matter to the Court for determination of the amount of compensation. While the application for reference was still pending, the land-owner applied to the Collector for disbursement of the amount of compensation as determined in the award. The land-owner's objection petition was later referred to the Court for decision. The objection petition was dismissed on the ground that it was not maintainable in view of the provisions contained in the second proviso to subsection (2) of section 31 of the Act, as the land-owner had, without protest, accepted and withdrawn the compensation amount accessed by the Collector in respect of his land. This decision was challenged before the Supreme Court with the contention that since the land-owner had filed application under section 18 of the Act regarding inadequacy of the compensation amount, he should be deemed to have lodged protest within the meaning of the second proviso to subsection (2) of section 31 of the Act. This argument was approved and it was held that in the circumstances where a land-owner had already filed his application for reference of his claim, the receiving of the amount of compensation subsequently would be deemed to be under protest, even though the land-owner may not have mentioned the words "under protest" in his application for withdrawal of the amount, if any such application was to be at all made, or in the receipt granted showing that the amount had been received and accepted.

9. Before proceeding further, it is important to note that precedents are the anchors of the law and thus, respect and adherence to them is the rule rather than the exception. Inasmuch as the Supreme Court is unquestionably the ultimate expositor of law, the High Courts and other Courts are absolutely bound by its precedents. It is not only a matter of owing obedience but also of developing consistency in the evenhanded administration of justice in the Courts[5] . So on careful examination of the case-law, we can confidently say that underlined wisdom of the provisions of section 18 read with section 31 of the Act is that the concept of consent and protest cannot go together, and thus, it is essential, that whenever a person feels dissatisfied with the amount of compensation determined in the award, it ought to first raise its protest either by making an application before the Collector asking him to send reference to the Court for determination of his objections or in the alternative receive the amount of compensation under protest otherwise, it shall be precluded to make any grouse and taking out any proceeding. This principle furnishes a basis for determining the present issue. In the case at hands, we feel that the appellants at first while not accepting the award (Ex.R.1) had raised their objections to it and also stated the grounds for the objection. They had asserted their right to require a

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*3 1985 SCMR 224*

*4 1987 SCMR 1387*

*5 Muhammad Saif Ullah v. Lahore Development Authorities and others PLD 2021 Lahore 168*

reference under section 18 of the Act for determination by the Court. The applications were competently entertained and lawfully forwarded. The appellants had clearly expressed their dissatisfaction and disapproved the Collector's award (Ex.R.1) and then claimed more compensation. In such a set of circumstances, the entire conduct of the appellants cannot even by implication be inferred to amount to consent, acceptance of award or conscious waiver of their existing rights. We would thus, repel the respondents' preliminary objection by holding that receiving of compensation amount by the appellants would be deemed to be under protest and the absence of a mention of the same in the cash register or Qabzul Wasool was mere inadvertence. Issue No.1 is accordingly settled against the respondents.

10. The respondents had two other preliminary objections. One was that the appellants had not come to the Reference Court with clean hands and the other was that the appellants' petition was frivolous, and respondents were entitled to special costs. Issues Nos.2 and 3 were framed on these two objections but they were not pressed before us and thus, there is no need to dilate upon them.

11. We may now turn our attention to the main question that arises in these two appeals is whether the compensation awarded by the Land Acquisition Collector is correct. It will be noticed that when the case falls under the Act, the question to determine in connection with the compensation payable is the market value at the relevant time. The Land Acquisition Collector in his award dated 11th December, 2009 (Ex.R.1) had fixed the compensation of the appellants' land at Rs.2.500 million per acre. The objection of the appellants to the said compensation was that since the land adjacent to their land was sold on 17th May, 2007 at Rs.7.500 million per Kanal, the compensation of their land, which had an orchard on it and had also come into the commercial area, should have been fixed at Rs.9.000 million per acre. This objection was denied by the respondents with the assertion that the compensation was correctly assessed considering all the potential and relevant factors. The above-stated divergent stances led the Reference Court to frame issue No.4 whereby the appellants were burdened to prove that the award pertaining to their land had determined the low amount of compensation than the actual market value. It is to be noted that though section 23 of the Act does not provide any method to be adopted for arriving at the market value of the land compulsorily acquired, but the study of different precedents of the superior courts suggests that the best method of fixing the market value is to find what a willing purchaser would pay a willing seller. An instance of a sale which is proximate in time to the date of the notification under section 4 of the Act in respect of land similarly situate and with similar advantages and which is proved to be a transaction between a willing vendor and a willing purchaser form a reliable guide for determining the market value. It need hardly be said that the evidence produced in Court to prove the market value must be in conformity with the standard laid down by the Qanun-e-Shahadat, 1984. Sub-clause (4) of clause (d) of Article 2 of the Qanun-e-Shahadat, 1984 says that a fact is said to be proved when, after considering the matters before

it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In the light of the legal position stated above, when we look at the record of this case, it is clear that the appellants presented some documentary evidence consisting of different mutations before the Reference Court in their counsel's simple statement, without administering an oath to him, so as to prove that the compensation of their acquired land was not correctly determined. The first document that was presented to the Reference Court was mutation No.1475 dated 30th May, 2007 (Ex.A.1) and its contents stated that land measuring 27 Kanals and 2 Marlas was sold for Rs.750,000/-. The second document was mutation No.1978 dated 10th June, 2010 (Ex.A.2) and it indicated that land measuring 1 Kanal and 3 Marla was sold at Rs.300,000/-. The third document was mutation No.2131 dated 6th June, 2011 (Ex.A.3) which evidenced sale of 4 Kanals 9 Marlas land at Rs.25,000,000/-. We cannot bring all these documents into our deliberation as the first reason is that they are not close in time to the notification dated 8th January, 2004 under section 4 of the Act (Ex.R.3)[6] and the second is that the manner in which the above-mentioned documentary evidence was presented in the Reference Court has not only been disapproved by our Supreme Court but also held that such documents which are not brought on record through witnesses cannot be taken into consideration[7]. We are bound to follow this principle and thus, would exclude these documents from our consideration.

12. There is another good reason to ignore the above-stated documentary evidence. In Nirman Singh and others v. Lal Rudra Partab Narain Singh and others[8] it has been observed that it is an error to suppose that proceedings for the mutation of names are judicial proceedings in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid. This being the well settled principle of law, it is clear that before the three mutations (Ex.A.1 to Ex.A.3) could be relied upon by the Reference Court, it was the duty of the appellants (land-owners) to prove mutations by adducing evidence either of vendor or vendee or the witnesses of passing of the consideration under the mutations, to prove that the sale transactions are genuine transactions between the willing vendor and willing vendee; that the consideration had in fact been passed, represent the prevailing market value; and also the lands under acquisition and the lands concerning the sale

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6 **The Land Acquisition Collector v. Ch. Muhammad Ali (1979 CLC 523)**
**Hyderabad Development Authority through M.D., Civic Centre, Hyderabad v. Abdul Majeed and others (PLD 2002 Supreme Court 84)**

7 **Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others (PLD 2010 SC 604) and Manzoor Hussain (Deceased) through L.Rs. v. Misri Khan (PLD 2020 SC 749)**

8 **AIR 1929 PC 100**

are similarly situated and possessed of same or similar nature, advantages, etc.[9] . The rationale of the foregoing duty is that empirical study suggests a common practice that persons buying property have a higher price mentioned in the document evidencing the sale in order to discourage the pre-emptors and it is clear that suspicion that a higher price has been mentioned in the relevant document should at once arise if one finds that the price has suddenly shot up. Another thing that cannot be lost sight of is that as soon as information that Government is about to acquire land in that vicinity reaches the owners of property in that locality, prices go up. Since in this case the appellants (land-owners) had not made any attempt to bring on record any kind of evidence for meeting the above-stated requirements of law, it could not be held that through mutations (Ex.A.1 to Ex.A.3) the appellants, in terms of Article 2(4)(d) of the Qanun-e-Shahadat, 1984, had been able to prove that the award (Ex.R.1) pertaining to their land had determined the low amount of compensation than the actual market value.

13. Now adverting towards oral evidence led by the appellants, it is to be noted that it is identical in both cases and it consists of the statements of two witnesses, one of whom is Muhammad Yaqoob (appellant of R.F.A. No.781 of 2014) and the other is Nasir Mahmood (appellant of R.F.A. No.957 of 2014). No evidence had been brought on record from independent source that the land had an orchard and had also come into commercial area. Thus, on the basis of mere oral assertion on behalf of the land-owners/appellants of both the appeals, the potential value of the land could not be determined[10] . As such we are of the opinion that inasmuch as the appellants had failed to discharge the burden of proving the market value as well as potential value of the land, the Reference Court was justified in declining the objections by maintaining the compensation determined in the award (Ex.R.1).

14. In the end the appellants' counsel, realizing the above-stated shortcomings of the case, made a feeble attempt to persuade us to enhance the compensation, pleading an argument that the land of the appellants and the land classified as Category-A in the award (Ex.R.1) are identical and thus, the appellants are at least entitled to compensation which has been determined for Category-A, that is, at the rate of Rs.4.000 million per acre. To substantiate his argument, he drew our attention to the statement made by the Land Acquisition Collector (RW-1) in his cross-examination when he said that the area that abutted on the metaled road was put in Category-A and it was correct that the area of the appellants abutted on the bypass. This

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**9** **North West Frontier Province v. Shad Mohammad Khan and others (1975 Law Notes 338)**
**Land Acquisition Collector-II Tarbela Dam Resettlement Organisation, WAPDA and 2 others (PLD 1976 Peshawar 50)**
**Government of Sindh and 2 others v. Muhammad Usman and 2 others (1984 CLC 3406)**
**Liyar Khan v. Land Acquisition Collector/A.C., Swabi (2003 YLR 3287)**

**10** **Hyderabad Development Authority through M.D., Civic Centre, Hyderabad v. Abdul Majeed and others (PLD 2002 Supreme Court 84)**
**Saeedur Rehman and others v. Assistant Commissioner/Collector Acquisition, Swabi (2004 CLC 378)**
**Abdul Sattar v. Land Acquisition Collector Highways Department and others (2010 SCMR 1523)**

argument carries no weight and we reject it on the grounds that firstly, although it has been stated in the oral evidence that the land of the appellants is adjacent to the bypass, no witness has stated that the bypass road had already been constructed before the date of notification under section 4 of the Act or award; secondly, the appellants had not brought on record any evidence to prove the exact location of their land and that of the land of category-A and thirdly, this was neither an objection of the appellants nor was it a claim in the reference made under section 18 of the Act.

15. The net result is that the impugned judgments are maintained and these appeals fail and are hereby dismissed. There will, however, be no order as to costs.
Appeal dismissed.

**P L D 2021 Lahore 688**
**Before Shahid Waheed, J**
**Syed AAKIF ALI SHAH---Petitioner**
**Versus**
**MUHAMMAD IJAZ and others---Respondents**

Civil Revision No. 13840 of 2021, decided on 23rd June, 2021.

**(a) Administration of justice---**

----High Court observed that technicality was a ploy to stultify course of justice as its use did not unredeemed the wrong and the right was left unenforced---While observance of rules of procedure was fundamental to course of litigation, however, Courts must also be aware that too rigid adherence to such rules in certain circumstances may inappropriately and unjustly deprive a party of his/her rights---Fact cannot be ignored that counsel/lawyers sometimes do make mistakes while conducting their cases, which ordinarily attracted sanctions or penalties, however in trying to give life to substantial justice, some mistakes or errors which, if not fraudulent or intended to overreach, may be overlooked in order not to allow strict compliance to suffocate the process of delivery of justice---Judges must not act as judicial technicians and courts ought not to present themselves as workshops of technical justice and must endeavor to grant reasonable opportunity all parties in a litigation to put up their respective best cases.

Cropper v. Smith (1884) 26 Ch. D. 700; Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382; Muhammad Azam v. Muhammad Iqbal and others PLD 1984 SC 95; Syed Phul Shah v. Muhammad Hussain and 10 others PLD 1991 SC 1051 and Khurshid Ali and 6 others v. Shah Nazar PLD 1992 SC 822 rel.

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

----O. I, R. 10 & O. VII, R. 17---Amendment of plaint---Voluntary amendment to plaint by plaintiff---Amendment in plaint on direction of Trial Court under O. I, R. 10, C.P.C.---Nature of such amendments---Consequences of non-compliance---Scope---During trial of a suit, necessity for making amendment in plaint arose when plaintiff thought that material facts or material particulars already stated in plaint required rectification or elucidation; or further facts or materials were necessary and in such a case, amendment to plaint was allowed under O. VII, R. 17, C.P.C., which was called voluntary amendment---When court, on such terms as it thought just, either on its own motion or on application, ordered any person to be added as a defendant who ought to have been joined as a defendant or whose presence before court was necessary then in such a case, plaint was compulsorily amended under O. I, R. 10(4) of C.P.C., in such manner as was deemed necessary---Nature of the said two types of amendments was not only different but also consequences of failure to

make such amendments after order were also not the same---Plaintiff if, after obtaining leave to amend his plaint, failed to amend it within time, then he would not be permitted to amend it afterwards, but such failure did not render suit liable to dismissal---Consequence of failure to amend plaint, therefore, was that suit would go to trial on original pleadings, but such suit could not be dismissed---Trial Court had no power to compel a plaintiff to amend his plaint and failure to make either type of amendment did not result in dismissal of suit.

Dr. Thakur Das and others v. The President, Municipal Committee of Simla (Punjab Record No.36 of 1890); Gaj Kumar Chand v. Lachman Ram (1911) 10 IC 503; Govinda Goundar and another v. Ramien and others AIR 1915 Mad 335(1); Vice-Chancellor, University of Azad Jammu and Kashmir, Muzaffarabad and 3 others v. Muhammad Shahzad Khalid PLD 2001 SC (AJ&K) 21 and Khalid Mahmood v. Asghar Ali Bhatti 2005 CLC 1821 rel.

**(c) Civil Procedure Code (V of 1908)---**

----O. VII, R.11 & O. I, R. 10 & O. VII, R. 17---Rejection of plaint---Rejection of plaint upon failure of plaintiff to amend plaint---Scope---Order VII, R.11, C.P.C., gave instances of cases where plaint could be rejected and grounds given therein were not exhaustive and plaint could also be rejected under inherent powers of a court, however, defect due to which rejection was deemed necessary should not be such as was curable by amendment in plaint and plaint could not be rejected in cases where defect was nothing more than an error of procedure.

Mrs. Tomlinson v. Musammat Goran 60 IC 376; Govinda Goundar and another v. Ramien and others AIR 1915 Madras 335(1); Maulvi Abdul Aziz Khan v. Mst. Shah Jahan Begum and 2 others PLD 1971 SC 434; Messrs PAN Century Edible Oils SDN BHD through Authorized Representative v. Fatima Enterprises Ltd. 1999 MLD 3193 and M. Waseem Zakai v. Mst. Mumtaz Mirza and others 2000 YLR 453 rel.

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

----O.XVII, R. 3 & O. I, R. 10---Adjudication and exercise of power by court under O. XVII, R. 3, C.P.C.---Dismissal of suit under O. XVII, R. 3, C.P.C.---Scope---Question before High Court was whether upon failure of plaintiff to amend plaint in terms of O. I, R. 10, C.P.C.; could the court dismiss suit under O. XVII, R. 3, C.P.C., on the ground that such amendment was necessary for progress of suit and failure to amend plaint entitled court to dismiss suit under said provision---Held, that failure to amend plaint and to pay costs of adjournment did not justify dismissal of suit under O. XVII, R. 3, C.P.C.---Words "decide the suit" used in O. XVII, C.P.C., could not be taken as tantamount to dismissing the suit for default and

meant that court under O. XVII, R. 3, C.P.C., could only decide suit on merits on material available before it.
Rahman v. Ahmad Din AIR 1926 Lahore 571; Amanullah Khan and 3 others v. Akhtar Begum 1993 SCMR 504; Syed Haji Abdul Wahid and another v. Syed Sirajuddin 1998 SCMR 2296 and Muhammad Aslam v. Nazir Ahmed 2008 SCMR 942 rel.

**(e) Civil Procedure Code (V of 1908)---**

----S. 151---Inherent powers of court---Scope---Every court was deemed to possess all powers which are necessary to do the right and to undo the wrong, in the course of administration of justice and law recognized and left unfettered inherent powers of a Court to act ex debito justitiae.

Khawaja Mohsin Abbas and Muhammad Zahid Sadiq for Petitioner.
Sardar Muhammad Ramzan for Respondent No.1.
Shahid Aziz Anjum for Respondents Nos.2 to 7.
Mian Abdul Aziz, Rana Zia Abdul Rehman, Nayab Karim Rana and Rana Intizar for Respondent No.8.
Nawab-ur-Rehman Mian for Respondent No.9.
Ihtisham-ud-Din, Muhammad Arif Raja, Addl. Advocate General for Respondent No.10/L.D.A.
Date of hearing: 23rd June, 2021.

**JUDGMENT**

**SHAHID WAHEED, J**.---It is a trite that technicality is a ploy to stultify the course of justice because its use does not unredeem the wrong and the right is left unenforced. The case at my hands is a best example of procedural gamesmanship and poses the question whether a person who knocks at the doors of the Court, hoping to find justice, be punished for mistakes, when it is common that human beings have a propensity to commit errors? Should every slight aberration of the law, be visited with a denial of justice?

2. In this order, I am considering application filed by the unsuccessful plaintiff under section 115, C.P.C., alleging that his suit was illegally dismissed on technical ground by the Courts below. The matter arises in this way that on 7th August, 2006, the plaintiff instituted a suit for specific performance of an agreement regarding House No.323-C, Faisal Town, Lahore. Respondent No.1 filed his contesting written statement while respondents Nos.2 to 7 and 10 neither submitted written statement nor took part in the proceedings so they were proceeded against ex-parte. Considering the pleadings, the Trial Court framed issues and fixed the date for recording the evidence. At this stage, respondents Nos.8 and 9 filed an application to become a party in the suit stating that they had bought the property. The

application was granted vide order dated 7th of May, 2019 and the petitioner-plaintiff was directed to file an amended plaint by making the respondents Nos.8 and 9 as defendants. Against this order, the petitioner filed an application for revision before the Addl. District Judge, Lahore. As the interim relief was not granted in the revisional application, the Trial Court continued its proceedings. The petitioner, however, continued to pursue the revisional application and at the same time sought time from the Trial Court to file an amended plaint. The Trial Court granted the first opportunity on 30th May, 2019, the second on 26th June, 2019 and the third on 13th July, 2019. The fourth opportunity was given on 29th July, 2019 with costs of Rs.500/-, followed by the fifth opportunity on 21st September, 2019, the sixth on 26th September, 2019 and the seventh on 30th September, 2019. On 7th October, 2019 the petitioner's revision was declined by the Addl. District Judge and the next day, on 8th October, 2019, the Trial Court without going into the merits of the suit, dismissed the same under Order XVII, Rule 3, C.P.C. on the ground of non-compliance with its order and non-filing of amended plaint. The petitioner was unhappy with the technical dismissal and appealed against the decree of the Trial Court but failed and the Addl. District Judge maintained the decree not only under Order XVII, Rule 3, C.P.C. but also under Order VI Rule 18, C.P.C. through his judgment and decree dated 17th February, 2021.

3. The petitioner has now come before me under section 115, C.P.C. with the request to revise the proceedings of the two lower courts and the decrees issued under their judgments and send the case to the Trial Court for a fresh decision on its merits. The grounds on which this request has been made are that, as I understand, by the time the petitioner's suit was heard, he was before the Addl. District Judge, with the prayer to quash the order to make subsequent purchasers (respondents Nos.8 and 9) a party to the suit, and that immediate upon its refusal, no opportunity to file the amended plaint was given and the Trial Court without examining the merits of his suit dismissed it on technical objection, relying on the provisions of Order VI, Rule 18 and Order XVII, Rule 3, C.P.C., which was totally inappropriate, and that even if there would have been some force in the technical objection that the petitioner's conduct had been contumacious and he had unnecessary delayed the filing of the amended plaint, justice could not have been sacrificed, on the altar of the technicality which does not go to the root of the case, insofar as the fairness thereof is concerned.

4. The first thing that caught my attention was the Addl. District Judge's observation that since the petitioner had not filed the amended plaint, adding subsequent purchasers as defendants despite having availed several opportunities, the Trial Court rightly closed his right under Order VI, Rule 18, C.P.C. I was unable to understand at all how the Addl. District Judge could observe that non-compliance with the order made by the Trial Court under Order I, Rule 10, C.P.C., could have resulted in the closure of the right to file the amended plaint, under Order VI, Rule 18, C.P.C. So, I sought assistance from the respondents' lawyers, but they without

citing any precedent, or canvassing any cogent argument, pleaded that the observation made by the Addl. District Judge was correct. I cannot agree with the observation made by the Addl. District Judge and it seems to me be the result of misunderstanding of the intent, scope and extent of the above two procedural provisions of the law. It is well settled position of law that during the trial of any suit the necessity for making amendment in the plaint arises on two occasions. First, when the plaintiff thinks that the material facts or material particulars already stated in his plaint require rectification or elucidation; or further facts or materials which are necessary for the purpose of determining the real questoins in controversy between the parties, he may accordingly amend the plaint but, of course, after getting leave of the Court. This type of amendment is allowed to be made under Order VI, Rule 17, C.P.C. so as to facilitate the plaintiff for the due presentation of his case, and that is why it is called voluntary amendment. Second occasion for amendment arises (as happened in the present case) when the Court on such terms as it thinks just, either of its own motion or on application, orders any person to be added as a defendant who ought to have been joined as a defendant or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. In such eventuality the plaint, unless the Court otherwise directs, is compulsorily amended under sub-rule (4) of Rule 10, of Order I, C.P.C. in such manner as may be necessary. It necessarily implies that it will not be sufficient to amend the cause title, but all consequential amendments in the body of the plaint should also be made so as to show the nature of claim made against the newly added defendant. Here it may also be noted that the nature of the above two types of amendment is not only different but also the consequences of failure to make such amendments after the order are also not the same. As regards the first type of amendment, the law provides[1] that when the plaintiff obtains leave to amend his plaint, he must amend it within such time as is allowed by the Court while giving leave to amend, or, when no time is fixed by the Court, within 14 days from the date of order. If the plaintiff after obtaining leave to amend his plaint fails to amend it within such time, he shall not be permitted to amend it afterwards, but the failure does not render the suit liable to dismissal. The consequence of failure to amend the plaint, therefore, is that the case will go to trial on the original pleadings, but the suit cannot be dismissed. In simple words a Court has no power to compel a plaintiff to amend his plaint. Insofar as the effect of failure to make second type of amendment is concerned, I will discuss about it in the later part of this judgment; however, suffice it to say here that upon failure to make even such type of amendment by the plaintiff after order does not result in the straightway dismissal of the suit.

5. On being faced with the above position of law, the respondents' counsel tried to persuade me with the argument that if I do not approve the dismissal of suit upon failure of the plaintiff (petitioner) to amend the plaint as per requirement of Rule

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1 **Order VI, Rule 18, C.P.C.**

10(4) of Order I, C.P.C., in the alternative, the appropriate course would have been to reject the plaint under Order VII, Rule 11, C.P.C. With regard to this argument the counsel stated that he had a ruling made in Dr. Thakur Das and others v. The President, Municipal Committee of Simla (Punjab Record No.36 of 1890). I do not agree with this argument. I may at this stage point out that under section 54 of the old Civil Procedure Code (Act XIV of 1882) there was a special provision for rejection of the plaint on failure to amend the plaint, but there is no such provision in the present Code of Civil Procedure (Act V of 1908) and thus, the said ruling is of no avail so far as the point in question is concerned. Nevertheless it is true that Order VII, Rule 11 of the present Code gives instances of the rejection of the plaint in cases of non-disclosure of cause of action, undervaluation of the relief claimed, insufficiency of court-fee or claim being barred by any law. It is also equally true that the above grounds for rejection are not exhaustive, and the plaint can still be rejected under the inherent powers of the Court[2] for the reasons not specified in clauses (a) to (d) of Rule 11, but then, defect for which it is rejected should not be such as is curable by amendment and nothing more than an error of procedure.[3] Considering the circumstances of the present case, I am of the opinion, that failure of the petitioner to amend the plaint after order was not a fatal defect constituting a ground for rejection of plaint and, at the most, it was a mere irregularity, and did not affect the jurisdiction of the Court, and could be cured by the Court exercising its suo motu powers.

6. The next question which arises for consideration is whether under the circumstances it was competent for the Trial Court to have dismissed the suit under Rule 3 of Order XVII, C.P.C. It is argued on behalf of the respondents that filing of amended plaint in terms of Rule 10(4) of Order I, C.P.C. was an act necessary to the further progress of the suit for which time had been allowed by the Court. The petitioner failed to perform that act and that, therefore, Rule 3 of Order XVII, C.P.C. was properly applied. Different precedents [4] were also put forward to substantiate this argument, but from their study it is clear that the contentious issues involved in them were not related to the filing of the amended plaint, so I cannot rely on them to propose an answer to the present question. Nevertheless, I mulled over the above argument and I am not satisfied that the suit could be dismissed under Rule 3 of Order XVII, C.P.C. Fortunately, while writing this opinion my hands reached out to an old case wherein somewhat the same question was examined. That is a case of Rehman v. Ahmad Din[5] and it was held therein that failure to amend the plaint and to pay costs of adjournment did not justify dismissal of the suit under Order IX, Rule 8, C.P.C. nor could such dismissal be considered as

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2 **Section 151, C.P.C.**

3 **Mrs. Tomlinson v. Musammat Goran 60 IC 376**
**Govinda Goundar and another v. Ramien and ithers [AIR 1915 Madras 335 (1)]**

4 **Maulvi Abdul Aziz Khan v. Mst. Shah Jahan Begum and 2 others (PLD 1971 SC 434)**
**Messrs PAN Century Edible Oils SDN BHD through Authorized Representative v. Fatima Enterprises Ltd. (1999 MLD 3193)**
**M. Waseem Zakai v. Mst. Mumtaz Mirza and others (2000 YLR 453)**

5 **Rahman v. Ahmad Din (AIR 1926 Lahore 571)**

one under Order XVII, Rule 3, C.P.C. where there was no judgment on merits. Mindful of this principle, I am of the view that the respondents' arguments obviously overlook the words "the Court may, notwithstanding such default, proceed to decide the suit forthwith". These words of Rule 3 suggest that the case must be one where in spite of the default of a party it must have been possible for the Court to come to a decision of the suit. The words "decide the suit" cannot be taken as tantamount to dismissing the suit for default. It can only mean decide the suit on merits on the material available before the Court .[6] But in the present case the suit was in the very preliminary stage. Respondent No.1 had filed his written statement, ex-parte proceedings had been initiated against respondents Nos.2 to 7 and 10, though the issues had been settled on the basis of unamended pleading, but with the addition of respondents Nos. 8 and 9 (subsequent purchasers), some new issues were yet to be framed; that evidence was yet to be recorded, therefore, there was no question of deciding the suit forthwith on merits. The obvious duty of the Court, therefore, was to proceed to try the suit and decide it on the merits by returning issue-wise findings. This was not done and the suit was dismissed without giving findings on any issue. From the proceeding-sheet it does not appear that the petitioner-plaintiff absented himself from the Court and declined to go on with the suit. In these attending circumstances, it seems to me that the Trial Court did not apply its mind at all to decide the suit at least to the extent of respondent No.1 who had filed his written statement or those who had been proceeded against ex-parte. I, therefore, do not think, it will be right to say that justice had been done, and the Courts below acted legally under Rule 3, C.P.C. of Order XVII, C.P.C. in dismissing the suit.

7. What then is the position of law about the conduct of the petitioner which he demonstrated during the trial? How the Trial Court should have proceeded further? These are the questions to which I now turn my attention. Before looking for the answers to these questions, as a prelude, I would say that while observance of the rules of procedure is fundamental to the course of litigation for they provide the necessary framework for the achievement of justice between the parties, the Courts, at the same time, must also be aware that too rigid adherence to the rules in certain circumstances may inappropriately and unjustly deprive a party of his right. We cannot lose sight of the fact that lawyers do make mistakes while conducting their cases which ordinarily attract sanctions or penalties. But in trying to give a life to substantial justice to live, some mistakes or errors which, if not fraudulent or intended to overreach, may be overlooked in order not to allow the strict compliance to suffocate the process of justice delivery. Judges must not act as judicial technicians and the Courts ought not to present themselves as a workshop of technical justice and thus, they must make an endeavour to grant reasonable opportunity to both the parties to litigation to put up their respective best cases.[7]

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6 **Amanullah Khan and 3 others v. Akhta Begum (1993 SCMR 504)**
**Syed Haji Abdul Wahid and another v. Syed Sirajuddin (1998 SCMR 2296)**
**Muhammad Aslam v. Nazir Ahmed (2008 SCMR 942)**

7 **Cropper v. Smith (1884) 26 Ch. D. 700**

Now, from this standpoint, let us review the facts of this case and the provisions of procedural law applicable to them to find the answer to the above questions.

8. When I look at the circumstances of the present case, I realize that the petitioner has lost due to the mistake of his lawyer and his claim has not been appraised. It is an admitted fact that when the Trial Court had framed issues in the petitioner's suit for specific performance of agreement, and the case was at the stage of recording evidence, the subsequent purchasers (that is, respondents Nos. 8 and 9) made an application for their impleadment as defendants stating that since they had purchased the property, they should be impleaded as defendants. The petitioner contested this application saying that the property was purchased during the trial and too in the presence of the stay order, therefore, the sale, if any, was void and there was no need to add subsequent purchasers as defendants. On consideration, the Trial Court granted the application and directed the petitioner under rule 10(4) of Order I, C.P.C. to add the names of subsequent purchasers and file amended plaint describing the facts related to them. It was compulsory to amend the plaint as per the order. As the petitioner was unhappy with the order, he went to the Addl. District Judge under section 115, C.P.C. to have it revised. He did not get any interim relief from the revisional Court and for this reason the Trial court did not stop its proceedings and granted the petitioner opportunities to file amended plaint. At this stage, it appears, that the petitioner's lawyer gave him an improper advice that if the amended plaint was filed during the revisional proceedings, then perhaps the Trial Court's order would attain finality, and that the petitioner, following the advice of his lawyer, did not file the amended plaint despite taking several opportunities with the clear and cautionary orders of the Trial Court. By all means this conduct was not good, but still it was not so that it be construed contumacious. If the Trial Court's order was not suspended, then the petitioner must have complied with it and his lawyer should have known that, in these circumstances, obeying an order of the Court did not amount to acquiescence and did not estop the petitioner from contending that he could not be ordered to implead subsequent purchasers as defendants in the suit.[8] However, the record suggests that the petitioner appeared before the Trial Court on every date and he never said that he did not want to participate in the Court proceedings, and that he had no malice in disobeying court orders in not filing the amended plaint. Since this seems to me to be a misunderstanding of the law, I do not think the petitioner should have been punished so harshly that not only he was deprived of the opportunity to properly present his case but also without examining the merits of his claim, his suit was dismissed solely on the ground of default and disobedience. In no way can it be said that justice has been done. Such decisions are never considered appropriate as they

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**Imtiaz Ahmad v. Ghulam Ali (PLD 1963 SC 382)**
**Muhammad Azam v. Muhammad Iqbal and others (PLD 1984 SC 95)**
**Syed Phul Shah v. Muhammad Hussain and 10 others (PLD 1991 SC 1051) and Khurshid Ali and 6 others v. Shah Nazar (PLD 1992 SC 822)**

**8 Fargo Freight Ltd. V. Commodities Exchange Corporation and others (AIR 2004 SC 4109)**

negate the principle of fair trial which is a fundamental right under Article 10-A of our Constitution.

9. Let's now look at the way forward. It is quite clear from the record that on 7th October, 2019, the Addl. District Judge dismissed the petitioner's revision and upheld the Trial court's order to add subsequent purchasers as defendants, and that the next day the petitioner had the last chance to file an amended plaint in term of sub-rule (4) of rule 10 of Order I, C.P.C. before the Trial Court. Inasmuch as it was compulsory to make this amendment not only for the purpose of determining the real question in controversy between the parties but also to make it known to the newly added defendants that what claim had been made against them, the Trial Court was insisting upon the filing of amended plaint. It would have been better if the petitioner had filed the amended plaint in compliance with the order but he did not do so. This was an irregularity. Of course, there is no express provision in the Civil Procedure Code as to what steps the Court should take to cure such type of procedural irregularity. But this does not mean that the Court will take action as has been done in this case. It is now well settled that every Court is deemed to possess all powers which are necessary to do the right and to undo the wrong in the course of administration of justice. The law recognizes and leaves unfettered the inherent powers of a Court to act ex debito justitiae. Following this principle, I am of the view that since the obvious duty of the Court was to proceed to try the suit and decide it on the merits, the Court in such like situation, particularly when it had got knowledge of all the matters upon which it was called upon to adjudicate, exercising its inherent and suo moto powers should have itself added the names of the subsequent purchasers (i.e. respondents Nos.8 and 9) in the cause-title and proceeded further in the matter treating the petitioner's reply, which he had submitted to the application filed by the respondents Nos.8 and 9 under Order I, Rule 10, C.P.C., as part of the plaint.[9] By adopting this procedure, not only would the defendants (respondents herein) know what the plaintiff (petitioner) had made full claim against them, but there would have been no stumbling block in the trial and the case would have been decided on merit but it was conveniently ignored by both the Courts below and thus, failed to exercise the jurisdiction that was vested in them by law to try the suit.

10. For what has been discussed above and to firmly secure the ends of justice, the revision sought for is allowed, both the impugned judgments and decrees are set

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[9] **Gaj Kumar Chand v. Lachman Ram (1911) 10 IC 503**
**Govinda Goundar and another v. Ramien and others (AIR 1915 Mad 335(1)**
**Vice-Chancellor, University of Azad Jammu and Kashmir, Muzaffarabad and 3 others v. Muhammad Shahzad Khalid (PLD 2001 SC (AJ&K) 21**
**Khalid mahmood v. Asghar Ali Bhatti (2005 CLC 1821)**

aside and the case is remanded to the Trial Court with the direction to give the petitioner one last opportunity to file the amended plaint and if he does not do so then take further steps following the procedure outlined above and decide the suit afresh in accordance with law. Since the conduct of the petitioner in not filing the amended plaint has resulted in undue delay, he will not only pay the costs that was imposed by the Trial Court but will also pay the additional costs of Rs.10,000/- Parties are directed to appear before the Trial Court on 7th September, 2021.

Order accordingly.

**PLJ 2021 Lahore (Note) 21**
***Present:* SHAHID WAHEED, J.**
**ABDUL RASHEED--Petitioner**
**versus**
**LAL DIN etc.--Respondents**

C.R. No. 426 of 2010, heard on 26.6.2013.

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

----S. 115 & O.XLI R. 27--Application for production of additional evidence during pendency of appeal--Main appeal was dismissed--Direction to--Counsel for petitioner submits that petitioner filed an application production of additional evidence in appeal but Addl. District Judge without deciding same, dismissed main appeal which irregularity vitiates judgment and decree passed by him--Counsel for respondent does not controvert this fact but submits that a direction be issued to Addl. District Judge, Sialkot to decide petitioner's application under Order XLI Rule 27, CPC and appeal afresh within a specified period of time--This offer is not opposed by counsel for petitioner--Case is remanded to Addl. District Judge, Sialkot who is directed to decide petitioner's application under Order XLI Rule 27 CPC; and, appeal afresh within a period of three months from receipt of certified copy of this order--Revision petition was accepted. [Para 1 & 2] A & B

*Mr. Shah Nawaz Khan Niazi,* Advocate for Petitioner.
*Mr. Salim Khan Chechi,* Advocate and *Mr. M. Akmal Saleemi,* Advocate for Respondents.

Date of hearing: 26.6.2013.

**JUDGMENT**

Petitioner through this petition has called in question the judgment and decree dated 22.12.2009, passed by the learned Addl. District Judge, Sialkot. Learned Counsel for the petitioner submits that the petitioner filed an application under Order XLI, Rule 27 CPC for production of additional evidence in appeal but the learned Addl. District Judge without deciding the same, dismissed the main appeal which irregularity vitiates the judgment and decree passed by him. Learned counsel for the respondent does not controvert this fact but submits that a direction be issued to the learned Addl. District Judge, Sialkot to decide the petitioner's application under Order XLI Rule 27, CPC and the appeal afresh within a specified period of time. This offer is not opposed by the learned counsel for the petitioner.

2. In view of consensus reached between the parties, this petition is accepted, the judgment and decree dated 22.12.2009, passed by the learned Addl. District Judge, Sialkot is set aside. The case is remanded to the learned Addl. District Judge, Sialkot who is directed to decide the petitioner's application under Order XLI Rule 27 CPC; and, the appeal afresh within a period of three months from the receipt of certified copy of this order. Parties are directed to appear before the learned Addl. District Judge, Sialkot on 10.7.2013.

Revision petition accepted

**PLJ 2021 Lahore 294**
***Present:*** **SHAHID WAHEED, J.**
**SAJAWAL, etc.--Petitioners**
**versus**
**SECRETARY LOCAL GOVERNMENT, etc.--Respondents**

W.P. No. 39226 of 2020, decided on 7.9.2020.

**Constitution of Pakistan, 1973--**

----Art. 199--Petitioners were employees of municipal committee--Non-implementation of instructions of Govt.--Issuance of letter--Non-regularization of service--Representation of petitioners--Opportunity of hearing--Direction to--In first instance respondent should address grievance voiced in instant petition--Office is, therefore, directed to remit a copy of instant petition to respondent with a direction to treat it as representation of petitioners and decide same strictly in accordance with law, after affording opportunity of hearing to all concerned; and, through a well-reasoned speaking order as expeditiously as possible preferably within a period of four weeks--Petition disposed of. [P. 295] A

*Ch. M. Ghazanfar Ali Bhatti*, Advocate for Petitioners.
Date of hearing: 7.9.2020.

**ORDER**

Petitioners are employees of Municipal Committee Sheikhupura.

2. Grievance voiced through this petition is that Respondent No. 2 without any lawful excuse is not implementing the instructions of Government of the Punjab, Local Government and Community Development Department issued through letter dated 27.12.2019 and, thus, inaction on the part of Respondent No. 2 not regularizing services of the petitioners is not sustainable in the eye of law.

3. After hearing, I am of the view that in the first instance Respondent No. 2 should address the grievance voiced in this petition. Office is, therefore, directed to remit a copy of this petition to Respondent No. 2 with a direction to treat it as representation of the petitioners and decide the same strictly in accordance with law, after affording opportunity of hearing to all concerned; and, through a well-

reasoned speaking order as expeditiously as possible preferably within a period of four weeks.

4. Petitioners are directed to appear before Respondent No. 2 on 14.09.2020.

5. Disposed of.

Petition disposed of

**PLJ 2021 Lahore (Note) 68**
***Present:*** **SHAHID WAHEED, J.**
**AHSAN JAVED--Petitioner**
**versus**
**ADDITIONAL DISTRICT JUDGE, LAHORE etc.--Respondents**

W.P. No. 9127 of 2012, decided on 30.4.2012.

**West Pakistan Family Courts Act, 1964--**

----S. 17-A--Constitution of Pakistan, 1973, Art. 199--Muslim Family Law Ordinance, 1961, S. 9--Suit for recovery of maintenance allowance and delivery charges--Non-payment of interim maintenance allowance--Defence of petitioner was struck of--Decreed--Appeal--Dismissed being time barred--Writ petition--Allowed--Direction to Additional Session Judge to decide appeal--Appeal was accepted and case was remanded to trial Court by Additional Session Judge--Interim order--Tentative finding--Challenge to--Trial Court has only made an interim arrangement for maintenance of minors till finalization of main suit--Quantum of maintenance allowance is yet to be determined by Family Court alter evidence of parties keeping in view financial status of petitioner--Trial Court has fixed interim maintenance keeping in view financial status of petitioner and this tentative finding cannot be substituted in constitutional jurisdiction of this Court--At this stage I find no reason to interfere with impugned orders--Petition dismissed. [Para 5 & 6] A & B

*Mr. Muhammad Shahbaz Rana*, Advocate for Petitioner.
*Mr. Muhammad Zaman Bhutta*, Advocate for Respondent Nos. 2 to 4.
Date of hearing: 30.4.2012

**ORDER**

The petitioner, Ahsan Javed has moved the instant constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 calling in question the judgment dated 28.3.2012 passed by the learned Additional District Judge, Lahore and order dated 17.6.2010 passed by Judge Family Court, Lahore

whereby the interim maintenance of the minors has been fixed at Rs. 4000/- per month per child.

2. Briefly stated the facts of the case are that Respondent No. 2, *Mst.* Mehwish Ikhlaq, instituted a suit for recovery of maintenance allowance, recovery of deliver allowance amounting to Rs. 25000/- and recovery of dowry articles against the petitioner before the learned Judge Family Court at Lahore. In response to summons issued by the learned trial Court, the petitioner appeared and submitted written statement. On 17.6.2010 the learned trial Court passed an order whereby an interim arrangement of monthly maintenance of two minors, namely, Raman Ahsan and Haida Ahsan was fixed at Rs. 4000/- per month per head and the petitioner was directed to pay the interim maintenance by 14th of each month till the final disposal of the case. The petitioner did not pay the interim maintenance as directed by the learned trial Court and resultantly on 16.7.2010 the learned Judge Family Court Lahore struck off the defence of the petitioner under Section 17-A of the West Pakistan Family Courts Act, 1964 and decreed the suit for recovery of maintenance of minors Respondent No. 3 and 4 Raman Ahsan and Haida Ahsan, at the rate of Rs. 4000/- per month per head alongwith 10% annual increase since the institution of the suit and till their marriages/change of custody. Feeling aggrieved the petitioner moved an appeal before the learned Additional District Judge, Lahore and it was dismissed *vide* order dated 21.8.2010 being time barred. The petitioner moved this Court through W.P. No. 19674/2011 and challenged the legality of the order dated 21.8.2010 passed by the learned Additional District Judge, Lahore. On 15.9.2011 W.P. No. 19674/11 came up for hearing before this Court and the petition was allowed by setting aside order dated 21.8.2010 passed by the learned Additional District Judge with direction to the learned Additional District Judge to decide the appeal on merits. Consequent upon order dated 15.9.2011 passed in W.P. No. 19674/2011, the learned Additional District Judge accepted the appeal and remanded the case to the trial Court with the direction to provide two clear opportunities to the petitioner for payment of interim maintenance of minors fixed *vide* order dated 17.6.2010. , Being dissatisfied by the judgment dated 28.3.2012 passed by the learned Additional District Judge, Lahore instant petition has been moved.

3. Learned counsel for the petitioner submits that the impugned order is harsh and interim maintenance has been fixed at an exorbitant rate; and, that the petitioner is not in a capacity to pay interim maintenance as fixed by the learned trial Court. In support of his contentions he relied upon the cases of *M. Saleem Ahmad Siddique v. Mst. Sabira "Begum and others* (2001 YLR 2329), *Makhdoom Ali v Mst. Razia Sultana and other* (2007 MLD 41) and *Muhammad Khalid Javecd v Mst. Shahida Parveen* (2007 YLR 1366). Conversely, learned counsel for respondents submits that the instant petition is not maintainable; and that the learned trial Court has fixed interim maintenance allowance of the minors keeping in view the financial status of the petitioner. He relied upon an un-reported order passed in W.P. No. 2076/2012.

4. I have heard the learned counsel for the parties and perused the record appended with this petition.

5. A perusal of the record reveals that the learned trial Court fixed interim maintenance of the minors @ Rs. 4000/- per month per head on the basis of following undisputed fact recorded in order dated 17.6.2010.

> *However photo copy of nikahnama appended with the file shows that the dower of the plaintiff No. 1 was fixed as 70 tolas of gold ornaments which was not only paid but also received back by the defendant at the time of decree of suit for dissolution of marriage on the basis of khula of the plaintiff No. 1. This indicates towards the financial status of the defendant."*

The afore stated observations have not been controverted by the learned counsel for the petitioner. It is suffice to say that the learned trial Court has only made an interim arrangement *vide* order dated 17.6.2010 for maintenance of minors till the finalization of the main suit. The quantum of maintenance allowance is yet to be determined by the Family Court alter the evidence of the parties keeping in view the financial status of the petitioner.

6. The judgments cited by the learned counsel for the petitioner arc distinguishable as in the instant case the learned trial Court has fixed the interim maintenance keeping in view the financial status of the petitioner and this tentative finding

cannot be substituted in constitutional jurisdiction of this Court. At this stage I find no reason to interfere with the impugned orders.

7. The petition being without any merit is dismissed *in limine*.
Petition dismissed

**PLJ 2021 Lahore 614**
***Present:*** **SHAHID WHEED AND CH. MUHAMMAD IQBAL, JJ.**
**ZUBAIR AHMAD--Appellant**
**versus**
**GOVERNMENT OF PUNJAB and others--Respondents**

I.C.A. No. 6458 of 2020, decided on 23.11.2020.

**Law Reforms Ordinance, 1972--**

----S. 3--Appointment as Elementary School Educator on contract basis--Non-eligibility for regularization--Termination of service--Writ petition--Dismissed--Compromise between parties--Opportunity of hearing--Direction to--Counsel for parties have entered into a compromise and jointly submitted that by setting aside order dated 31.01.2020 passed by Single Judge in Writ Petition No. 5538 of 2020 and order dated 18.11.2019 made by Secretary School Education Department, Govt. of Punjab, matter be remitted to Respondent No. 1 with a direction to decide same afresh strictly in accordance with law, after affording opportunity of hearing to all concerned and through a well-reasoned speaking order as expeditiously as possible preferably within a period of two months--Order accordingly. [P. 615] A

*Mr. Muhammad Zaman Bhutta*, Advocate for Appellant.
*Mr. Gohar Nawaz Sindhu*, A.A.G. with *Syed Amir Ali Shah*, D.E.O. (M.E) Sheikhupura and Muhammad Usman Sabir, Law Officer for Respondents.
Date of hearing: 23.11.2020.

**ORDER**

The appellant was appointed as Elementary School Educator (Science-Math) in Government Elementary School Keelay Distt. Sheikhupura on contract basis *vide* letter dated 10.2.2012. Subsequently, at the time of regularization of his services the appellant was not found eligible for the said post and thus, his services were terminated *vide* order dated 12.3.2019. The order of termination was maintained by the Secretary School Education Department, Govt. of Punjab through order dated 18.11.2019. Feeling aggrieved, the appellant challenged the said order through constitutional petition that is, W.P. No. 5538 of 2020. The said constitutional petition was dismissed by the learned Single Judge through order dated 31.01.2020. Hence, this Appeal.

2. During the course of arguments, learned counsel for the parties have entered into a compromise and jointly submitted that by setting aside the order dated 31.01.2020 passed by the learned Single Judge in Writ Petition No. 5538 of 2020 and the order dated 18.11.2019 made by the Secretary School Education Department, Govt. of the

Punjab, the matter be remitted to Respondent No. 1 with a direction to decide the same afresh strictly in accordance with law, after affording opportunity of hearing to all concerned and through a well-reasoned speaking order as expeditiously as possible preferably within a period of two months.

3. Order accordingly.

Order according

**2021 M L D 354**
**[Lahore]**
**Before Shahid Waheed and Ch. Muhammad Iqbal, JJ**
**NADEEM AHMAD---Appellant**
**Versus**
**SAIF-UR-REHMAN and 8 others---Respondents**

R.F.A. No. 29853 of 2019, heard on 11th November, 2020.

**(a) Malicious prosecution---**

----Reputation and dignity of man---Safeguard---Object of law is to prevent the evil, that is to say, the commission of crime so as to safeguard reputation and dignity of man---Such is possible only when a duty is laid on citizen to state to the authorities what he knows respecting the commission of crime---Duty is thus a primary concept, indeed the main focus of law, which often takes priority over right---For the sake of public justice, charges and communications which would otherwise be slanderous and actionable, are protected if bona fide for prevention of crime.

**(b) Malicious prosecution---**

----False implication---Impact---Innocent stigmatized by false implication has to carry such irreparable stigma throughout his life span and its shadow on his next generation also leave dark impressions---People make false accusation for having feeling of enmity towards someone being jealous, getting rid of someone, taking revenge or attaining cheap fame---Such people after making false accusation become busy with their matters but the person against whom false accusation has been made falls into disgrace and infamy for the rest of his life.

**(c) Civil Procedure Code (V of 1908)---**

----O.VII, R.11---Suit for recovery of damages---Malicious prosecution---Rejection of plaint---Cause of action absence of---Framing of issues---Criminal case registered against plaintiff was cancelled by police during investigation---Trial Court after framing of issues rejected plaint summarily without recording of evidence on the plea that plaintiff did not face prosecution---Validity---Principle governing such type of circumstances was that where issues were framed, parties must be allowed to lead evidence and plaint could not be summarily rejected---Trial Court did not take such principle into account and without recording evidence granted application stating its finding on preliminary issues and rejected the plaint under O.VII, R.11, C.P.C.---Such judgment and decree passed by Trial Court was not outcome of fair trial as neither justice was done nor it seemed to have been done---High Court set aside judgment and decree passed by Trial Court and

remanded same for decision afresh on merits after recording of evidence on issues already framed---Appeal was allowed, in circumstances.

**(d) Co-operative Societies Act (VII of 1925)---**

----Ss. 70 & 70-A---Jurisdiction of Civil Court---Principle---Where controversy involved in matter does not pertain to affairs of society there compliance with the provisions of Ss.70 & 70-A of Co-operative Societies Act, 1925, is not called for.

**(e) Malicious prosecution---**

----Term "prosecution"---Scope---Foundation of action for damages for malicious prosecution lies not in abuse of process of Court but in abuse of process of law.

Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh and another 35 IA 189; C.H.Crowdy v. L.O.Reilly (1912) 17 CWN 555; Narendra Nath De v. Jyotish Chandra Pal (1922) ILR 49 Cal 1035; Balbhaddar Singh and another v. Badri Sah and another AIR 1926 PC 46; Gur Saran Dass v. Israr Haider (1927) ILR 2 Luck 746; Rabindra Nath Das v. Jogendra Nath Deb (1928) ILR 56 Cal 432; Nayeb Ali Dafadar v. Abdul Gani alias Gutu MIA PLD 1969 Dacca 985; Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh and another 35 IA 189 and Niaz and others v. Abdul Sattar and others PLD 2006 SC 432 rel.

Muhammad Javaid Iqbal Qureshi for Appellant.
Iftikhar Ahmad Mian and Hassan Raza Sheikh for Respondents Nos. 1 to 8.

Raja Muhammad Arif, Addl. Advocate General for Respondent No.9.

Date of hearing: 11th November, 2020.

**JUDGMENT**

**SHAHID WAHEED, J**.---The plaintiff has brought this appeal under Section 96, C.P.C. raising a question as to whether the plaint of his suit seeking a decree against the defendants for recovery of damages amounting to Rs.200,725,000/- on account of malicious prosecution could be rejected under Order VII, Rule 11, C.P.C. Ostensibly it seems to be a simple question of civil law, but deep down inside it is being complained that when the law is set in motion on the basis of false accusation, does the legal system provide any remedy to palliate the injury caused to human dignity and reputation of a person. The immediate response that comes to mind for this question is that the legal system is rooted in the values of our society that believe in promotion of good and prevention of evil. And human dignity is the foundation of promotion of good. Inasmuch as the human dignity is the image of Allah Almighty in each human being, it is inherent and inborn. That is why on the

one hand our Constitution says that no action detrimental to the life, liberty, body or reputation of any person shall be taken[1] and the dignity of man shall be inviolable[2] and on the other hand, at the same time, this right has been made subject to law. Whereas the object of the law is to prevent the evil, that is to say, the commission of crime so as to safeguard the reputation and dignity of man and this is possible only when a duty is laid on the citizen to state to the authorities what he knows respecting the commission of crime. Duty is thus a primary concept, indeed the main focus, of the law and it often takes priority over right. For the sake of public justice, therefore, charges and communications which would otherwise be slanderous and actionable, are protected if bona fide made for the prevention of crime. Indubitably, an information provides clue to the police on the basis of which it starts investigations into a case and, therefore, its importance cannot be denied. However, empirical study suggests that people are not afraid of lodging false report, which in common parlance is known as FIR, as it is a non-cognizable offence. The false and frivolous case lodged against a person causes a great injury to the human dignity and reputation of the person, although under the law, the person is presumed to be innocent until proven guilty but the society in which we live today, presumes a person guilty once he is accused of an offence irrespective of whether false FIR has been filed or later he gets discharged or acquitted by the Court, but he cannot get that respect in the society as earlier. An innocent stigmatized by false implications have to carry this irreparable stigma throughout his life span and its shadow on his next generations also leave dark impressions. On the other hand those responsible for bringing such treachery enjoy all the best in their life. Such type of dichotomy creates imbalance between rights and duties causing injury to the human dignity. This is highly abominable and, therefore, courts always loathe approving it. And so we must appreciate the quintessence of law and the general sociological background for the resolution of all such disputes. It is from this legal standpoint we shall now proceed to examine the present case.

2. The relevant facts giving rise to the question for our consideration may be shortly stated. The plaintiff is a resident of the Co-operative Model Town Society, Lahore ("the Society") while some of the defendants at the relevant time were the office-bearers of the Society and some are its employees. The contents of the plaint unfold that there was some tussle between the plaintiff and the defendants on the affairs of the Society. The plaintiff alleges that he received an electricity bill of excessive amount for the month of July, 2015 and went to the Society's office for its rectification, but the defendants demanded bribe to correct it, upon which he protested and raised voice through complaints before different fora; and, that on this protest the defendants became inimical against him and maliciously lodged false report at the Police Station Model Town, Lahore. This report was recorded by the

1 **Article 4 (2) (a)**
2 **Article 4 (1)**

police under Section 39-A of the Electricity Act, 1910 read with section 462, P.P.C. vide FIR No.253 dated 23rd May, 2016. It is an admitted fact that the police after investigation recommended cancellation of FIR No.253, that was approved by the Area Magistrate vide order dated 7th of February, 2017 and which, upon challenge by defendant No.4 through a constitutional petition, that is, W.P.No.10463 of 2017, was maintained by this Court through its order dated 12th June, 2017. Upon dismissal of the constitutional petition, the plaintiff instituted a suit for recovery of damages. The defendants traversed the allegations and contested the claim of the plaintiff by filing a joint written statement taking preliminary objections, which inter alia, included that the plaintiff had no cause of action; that the suit was premature; that the suit was barred due to non-compliance with the mandatory provisions of sections 70 and 70-A of the Cooperative Societies Act, 1925; that the suit in its present form was not maintainable and proceedable; and, that plaint was liable to be rejected under Order VII, Rule 11, C.P.C. being barred by law.

3. On pleadings the Trial Court vide order dated 9th January, 2018 settled the following issues:

1. Whether the plaintiffs are entitled for decree of declaration, as prayed for OPP.

2. Whether the suit is not maintainable in its present form? OPD

3. Whether the plaintiff has not come to the court with clean hands and the suit is liable to be dismissed? OPD

4. Whether the suit in hand is false, frivolous, and vexatious and liable to be dismissed? OPD

5. Relief.

4. It is to be noted that the suit was for recovery of damages, so it appears that the use of words "of declaration" in Issue No.1 is an inadvertent error. Since this is a clerical error, it can be ignored for the present moment, but it does not mean that it should not be corrected. The order we are going to make in this appeal will give the Trial Court a chance to rectify this error. So there is no need to comment further on this error. The other important thing that becomes apparent after reading the issues framed by the Trial Court is that though not every preliminary objection that the defendants have taken in their written statement has been made a separate issue but the ones that have been made are comprehensive and covers all. Notwithstanding the above, the defendants did something mischievous. Before the plaintiff could produce his evidence, the defendants presented a separate application under Order VII, Rule 11, C.P.C. to the Trial Court, consisting of all their preliminary objections, which were selfsame and in the same order as in the written statement, and thereby sought rejection of the plaint. It was in every sense an abuse of the

court process and should have been given short shrift, but on the contrary, the Trial Court sought response from the plaintiff. The plaintiff accordingly submitted reply and denied the objections. In our opinion, this reply of the plaintiff, at the most, could have been taken on record as replication but the Trial Court proceeded in novel way and for determination of the application framed as many as five preliminary issues, which read as under:

1. Whether the plaintiff has no cause of action to file the instant suit against the defendants? OPD

2. Whether the instant suit is pre-mature in nature? OPD

3. Whether the suit is being barred keeping in view the mandatory provision of sections 70 and 70-A of Cooperative Society Act, 1925? OPD

4. Whether the instant suit is not maintainable and proceedable in its present form? OPD

5. Relief.

Only a cursory study of these preliminary issues reveals that their subject matter directly and substantially involved in the issues that the Trial Court had already framed on the pleadings vide order dated 9th January, 2018. This exercise of framing of issues was neither in accord with the procedure suggested in Rule 2 of Order XIV, C.P.C. nor in harmony with the provisions of Order XV, Rule 3, C.P.C. The principle governing such type of circumstances is that where issues have been framed, the parties must be allowed to lead evidence and the plaint cannot be summarily rejected[3] . The Trial Court did not take this principle into account and without recording evidence granted the application stating its finding on the above preliminary issues and rejected the plaint under Order VII, Rule 11, C.P.C. through impugned judgment and decree dated 28th February, 2019. Since this decree is not the outcome of fair trial, it can be held without hesitation that neither justice has been done nor it seems to have been done. This aspect of the matter is sufficient to set aside the decree, but we have also seen that even on merits, the findings of the Trial Court suffer from misapplication of law, so we consider it necessary to point out those flaws as well.

5. Before proceeding further it is apposite to state here that the controversy involved in the matter did not pertain to the affairs of the Society and, thus, compliance with the provisions of sections 70 and 70-A of the Cooperative Societies Act, 1925 was

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**3 M/s. Hoehst Pakistan Limited v M/s. Cooperative Insurance Societies and others (1993 MLD 2464)**

not called for. During arguments both the learned counsel conceded this fact and thus, finding returned by the Trial Court on issue No.3 is hereby reversed.

6. Let us now examine the other preliminary issues. We reiterate that these issues are, in fact, matters which the Trial Court, after recoding the evidence, had to examine under the issues which it had already framed in view of the contents of the plaint and its written statement. Thus, for the order that we want to propose in this case, we will not examine these preliminary issues in detail, but will only point out the flaws in the Trial Court's decision and explain the principles that apply to such type of cases. In the present case the cause which led the plaintiff to institute the suit for recovery of damages is FIR No.253 recorded under section 39-A of the Electricity Act, 1910 read with section 462, P.P.C. It is an admitted fact that upon investigation, the police recommended its cancellation, which was accordingly approved by the Area Magistrate vide order dated 7th February, 2017. On the basis of these facts, different precedents[4] were cited before the Trial Court calling upon it to reject the plaint on the ground that it did not meet the essential ingredients to claim damages on account of malicious prosecution. Evaluating this ground, the Trial Court first deemed it appropriate to look at the essential ingredients of the suit for damages for malicious prosecution. This approach of the Trial Court was correct and we see that in its judgments it has rightly mentioned, on the basis of precedents, the ingredients which are essential for this type of cases and they are as follows:
i. The prosecution of the plaintiff by the defendant;

ii. There must be a want of reasonable and probable cause for that prosecution;

iii. The defendant must have acted maliciously i.e. with improbable motive and not to further the ends of justice;

iv. The prosecution must have ended in favour of the person proceeded against; and,

v. It must have caused damage to the party proceeded against.

7. In the above mentioned ingredients one legal term has been used and that is "prosecution" and the Trial Court construing it as "criminal trial" has stated in its judgment that "the suit for malicious prosecution is maintainable, where the plaintiff has faced a full criminal trial. Where the prosecution ends in his favour and he is acquitted by the Trial Court with the observation that the prosecution was without reasonable and probable cause and it was also malicious and the plaintiff also suffered damages, whereas, in present case only FIR was lodged against the plaintiff which later on cancelled by the Area Magistrate." This understanding of

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**4 Abdul Majeed Khan v Tawseen Abdul Haleem and others (PLD 2012 SC 80) Alam Din v Muhammad Hussain and others (PLD 2012 Lah.279) Abdul Majeed and others v Manzoor Hussain and others (PLD 2013 Lah. 170) In addition, two more precedents have been cited by the Trial Court, but the citation of one of them is incorrect and the other is related to bail under the National Accountability Ordinance, 1999, so they are not being mentioned.**

law led the Trial Court to conclude that the essential ingredients were missing in the case, therefore, plaintiff had no cause of action. On the basis of this conclusion preliminary Issues Nos.1, 2 and 4 were decided against the plaintiff. In our opinion, the Trial Court has gone in the wrong direction here. Nowhere in the precedents on which the Trial Court has relied it has been stated that the term "prosecution" refers to a criminal trial, but in fact, no interpretation of "prosecution" has been made. So we are obliged to examine it. In this regard, it should first be borne in mind that although malicious prosecution is a tort for which no statute has so far been enacted in our country to regulate it,[5] yet our legal system recognizes that calmness of mind, unsullied reputation, and bright character, which are not only highly and heartily desired, strenuously acquired but also conscientiously retained by every discreet man, should be protected from false accusations[6]. Nothing could be more important than to underscore and defend the dignity of human person. As we have observed at the beginning of our judgment and that is also matter of common knowledge that one of the evils which is spreading in our society is "false accusation". People make false accusation for having the feeling of enmity towards someone, being jealous, getting rid of someone, taking revenge or attaining cheap fame. Such people after making false accusation become busy with their matters, but the person against whom the false accusation has been made falls into disgrace and infamy for the rest of his life. Thus, in order to curb this social evil it would be expedient to read and interpret the word "prosecution" in the sense of criminal proceedings instead of its technical sense which it bears in criminal law[7] . Such use of the term "prosecution" will result that the foundation of the action for damages for malicious prosecution would lie, not in the abuse of the process of court, but in the abuse of the process of law.[8] From this consideration, to found an action for damages for malicious prosecution based upon criminal proceedings the test would not be whether the criminal proceedings instituted on false and frivolous allegations had reached the court; the test would be whether such proceedings had reached a stage at which damage to the plaintiff resulted. The test expounded by us hereinabove has yet to be applied by the Trial Court and, therefore, prior to that stage it can neither be held that the plaintiff had no cause of action nor the suit was

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**5** **Muhammad Yousaf v Syed Ghayyur Hussain Shah and 5 others (1993 SCMR 1185)**

**6** **Muhammad Yousaf v Abdul Qayyum (PLD 2016 SC 478)**

**7** **Mohamed Amin v Jogendra Kumar Banner jee and others (AIR 1947 PC 108)**

**8** **Pandit Gaya Parshad Tewari v Sardar Bhagat Singh and another (35 IA 189) C.H.Crowdy v L.O.Reilly (1912) 17 CWN 555 Narendra Nath De v Jyotish Chandra Pal (1922) ILR 49 Cal 1035 Balbhaddar Singh and another v Badri Sah and another (AIR 1926 PC 46) Gur Saran Dass v Israr Haider (1927) ILR 2 Luck 746 Rabindra Nath Das v Jogendra Nath Deb (1928) ILR 56 Cal 432 Rabindra Nath Das v Jogendra Nath Deb (1928) ILR 56 Cal 432 Nayeb Ali Dafadar v Abdul Gani alias Gutu MIA (PLD 1969 Dacca 985) Pandit Gaya Parshad Tewari v Sardar Bhagat Singh and another (35 IA 189) Niaz and others v Abdul Sattar and others (PLD 2006 SC 432)**

premature and thus not proceedable. We will thus, make an order of remand for redetermination of issues.

8. In the result this appeal is accepted and while setting aside the judgment and decree dated 28th February, 2019 the application filed by the defendants under Order VII, Rule 11, C.P.C. is dismissed and consequently the matter is remitted to the Trial Court with a direction to decide the suit afresh after recording evidence on the issues already framed by it vide order dated 9th January 2018. Parties are directed to appear before the Trial Court on 10.12.2020. No order as to costs.

Case remanded.

**P L D 2022 Lahore 188**
**Before Shahid Waheed and Ch. Muhammad Iqbal, JJ**
**THREE STARS HOSIERY MILLS LIMITED and others---Appellants**
**Versus**
**FEDERATION OF PAKISTAN and another---Respondents**

I.C.As. Nos. 66182 and 66178 of 2021, heard on 17th November, 2021.

**(a) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---**

----Ss. 7 & 8(3)---Natural Gas Tariff Rules, 2002, R. 3(1)---Notification dated 18-7-2006, Item No.9 category A---Late Payment Surcharge (LPS)---Maxim 'actus curiae neminem gravabit' (act of the Court shall prejudice no man)---Applicability---Appellants were consumers of natural gas supplied by respondent company---Grievance of appellants was that respondent company could not charge Late Payment Surcharge as the matter was pending before Court---Validity---Liability to pay Late Payment Surcharge was imposed under item No.9, category A of Notification dated 18-7-2006, in the event of any bill not paid by due date---Whether the delay in making payment within time was deliberate and conscious or not was not relevant as liability to Late Payment Surcharge was attracted immediately after due date for payment expired---Reasons for non-payment by consumers were not relevant---Appellants were ongoing business concerns and had utilized money saved on account of interim order, gainfully in their commercial activities---Respondent company had to suffer financial loss because of the interim order---Respondent company required funds to meet its expenses for supply of gas---Appellants were consumers of respondent company and were required to pay bills promptly any delay in making payment caused loss to the company---Interim order was granted by Single Judge of High Court and by that order respondent company could not get payment of gas as per revised tariff from appellants by due date---After the petition was dismissed and Notification in question was upheld by High Court, respondent company was entitled not only to balance of gas charges but also to Late Payment Surcharge to meet its financial commitments---Maxim actus curiae neminem gravabit could not be pressed into service in favour of appellants, rather it was to be applied to protect interest of respondent company---Intra Court Appeal was dismissed, in circumstances.

Messrs Suraj Cotton Mills Ltd. through Mr. Adil Bashir and others v. Federation of Pakistan and others PLD 2021 Lah. 483; Kanoria Chemicals and Industrial Ltd. and others v. U.P. State Electricity Board and others (1997) 5 SCC 772; Messrs R.C.D. Ball Bearing Ltd. v. Sindh Employees Social Security Institution, Karachi PLD 1991 SC 308; Quinn v. Leathem (1901 AC 495); Style (Dress Land) v. Union Territory, Chandigarh (1999) 7 SCC 89 and Baz Muhammad Kakar and others v. Federation of Pakistan PLD 2012 SC 870 rel.

**(b) Maxim---**

----Actus curiae neminem gravabit (act of the Court shall prejudice no man)---Connotation---Factor attracting applicability of restitution is not the act of being wrongful or a mistake or error committed by Court---Test is whether an act of party persuading Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party suffering an impoverishment which it would not have suffered but for the order of the Court and the act of such party---Nothing is wrong in parties demanding to be placed in the same position in which they would have been, had the Court not intervened by its interim order, when at the end of the proceedings, Court pronounces its judicial verdict which does not match with and countenance its own interim order---Injury, if any, caused by act of Court then the same has to be undone and gain which the party would have earned unless it was interdicted by the order of Court would be restored to or conferred on the party by suitably commanding the party liable to do so, otherwise party would continue to get benefit of interim order even after losing the case in Court.

Rodger v. Comptoir D' Escompte de Paris (1871) LR 3 PC 465; Peel (Regional Municipality) v. Canada (1992) 3 SCR 762 and Kingstreet Investments Ltd. v. New Brunswick 2007 SCC 1 rel.
Anis-ur-Rehman for Appellants.
Usman Arif, Deputy Attorney General and Khawar Bashir, Assistant Attorney General for Pakistan for Respondent No.1.
Imran Khan Klair for Respondent No.2.
Date of hearing: 17th November, 2021.

## JUDGMENT

**SHAHID WAHEED, J**.---In this judgment, we will consider these two appeals from different companies as not only their facts are the same but also the orders that are attacked by them are selfsame which raise a common question, and that is, whether the appellants, who are consumers of natural gas, are liable to pay late payment surcharge (LPS) on the natural gas dues, payment of which was not made on or before the due date in view of interim orders passed by the learned Single Bench of this Court in the writ petitions filed by them challenging the Notification enhancing the natural gas tariff rates, after the writ petitions have been dismissed.

2. The facts bringing forth the above-stated question are not in dispute. The appellants are industrial concerns and consumers of the Sui Northern Gas Pipelines Ltd. (the SNGPL), a licensee under the Oil and Gas Regulatory Authority Ordinance No.XVII of 2002 (the Ordinance). In 2013, the SNGPL under Section 8 of the Ordinance applied to the Oil and Gas Regulatory Authority (the OGRA) for review of its total revenue requirement and determination of prices of natural gas.

On review, the OGRA advised the Federal Government for revision of pricing for retail consumers for natural gas. The Federal Government rendered its advice and acting upon it, the OGRA in exercise of the powers conferred by subsection (3) of section 8 of the Ordinance issued Notification dated 31st August, 2015 prescribing the sale prices and minimum charges in respect of natural gas sold by the SNGPL to various categories of its retail consumers. As the appellants are industrial consumers, it is important to mention that with this Notification the sale price for them had been increased from Rs.464.940 per MMBTU to Rs.600.000 per MMBTU. This price hike was challenged through Writ Petition No.15645 of 2015 which was disposed of vide order dated 1st February, 2017 by remitting a copy thereof to the OGRA with the direction to treat it as review in terms of Section 13 of the Ordinance and decide it within six weeks. It was also observed in that order that the SNGPL would continue to issue gas bills to the consumers on the basis of the previous year subject to deposit of surety bonds by them with the SNGPL. On remand, the OGRA reviewed the matter but decided to uphold its earlier determination of sale price vide decision dated 6th July, 2020. The consumers/appellants then challenged the Notification dated 31st August, 2015 and the decision dated 6th July, 2020 through number of writ petitions before this Court. At the peremptory hearing, this Court had suspended the said notification and the decision of the OGRA, but after about a year, the petitions were dismissed through a consolidated judgment dated 19th February, 2021 made in Writ Petition No.35089 of 2020[1] . Upon dismissal of writ petitions, the SNGPL remitted bills to the appellants against tariff difference arrears which included LPS. Now comes the third round of litigation. The appellants brought fresh petitions (i.e. W.Ps. Nos.19011 of 2021 and 16802 of 2021) voicing that they were ready to pay tariff difference arrears but the SNGPL had arbitrarily levied LPS on them in respect of the period during which their previous petitions remained pending in this Court and payment of the gas bills were not made on account of stay/interim order. The contentions raised by the appellants were found misconceived, for, their basic claim against Notification dated 31st August, 2015 and the decision dated 6th July, 2020 had been dismissed, and resultantly their failure to pay as per revised gas tariff entailed their liability to pay LPS. The petitions were dismissed vide two orders of even date, that is, 21st September, 2021, and so these appeals, which have been filed after paying the difference amount between pre-revised and the revised gas tariff but without depositing LPS.

3. As the question to be answered and the facts from which it emerges are all related to the levy of LPS, it is important to state, at the outset, its rates and the conditions under which it applies, and for it, a reference to the Notification dated 18th July, 2006 will become essential because through it the OGRA in exercise of the powers conferred by Section 7 of the Ordinance read with sub-rule (1) of rule 3 of the Natural Gas Tariff Rules, 2002 has prescribed both of them in the following terms: -

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*1 Messrs Suraj Cotton Mills Ltd. Through Mr. Adil Bashir and others v. Federation of Pakistan and others (PLD 2021 Lahore 483)*

"1.5% per month of the amount overdue during the first year in default and 2% per month of the amount overdue thereafter."

4. The appellants are aggrieved by the levy of LPS at the above-stated rate and have sought from us to set aside the orders of the learned Single Bench by canvassing a quadruple argument, to wit, firstly, as the operation of the Notification dated 31st August, 2015 and decision dated 6th July, 2020, whereby the sale price and minimum charges in respect of natural gas were enhanced, were suspended by this Court, the appellants were not liable to pay LPS; secondly, the delay under the Notification dated 18th July, 2006 means deliberate and conscious delay and it does not contemplate delay which is caused due to the orders of the Court; thirdly, as the Notification dated 31st August, 2015 and decision dated 6th July, 2020 were suspended by this Court, the rate/price prescribed by the earlier Notification stood revived and remained in operation during the effectiveness of the interim order on account of which there was no default on the part of the appellants; and lastly, the appellants could not be made to suffer for the acts of the Court.

5. In opposition to the above-stated argument, the respondents, relying upon the case of Kanoria Chemicals and Industrial Ltd. and others v. U.P. State Electricity Board and others[2] , have taken the stance that (a) after the writ petitions brought by the appellants were dismissed and the interim orders, whereby the operation of the Notification dated 31st August, 2015 and decision dated 6th July, 2020 were suspended, were discharged, liability of the appellants to pay revised price/rates for natural gas stood revived, and (b) the principle that no man can suffer for the acts of the Court, can be pressed into service in favour of the SNGPL only and this cannot be taken advantage of by the appellants, otherwise the appellants will be getting benefit of their wrongful acts.

6. Before we go any further, it will be important to point out that the set of appellants' arguments derives its origin from an unreported judgment dated 21st November, 2021 of another learned Single Bench of this Court, made in W.P.No.16071 of 2021 (titled Suraj Cotton Mills Ltd. and 6 others v. Federation of Pakistan and others), in which, while dealing with similar facts and by deducing analogy from Messrs R.C.D. Ball Bearing Ltd. v. Sindh Employees Social Security Institution, Karachi[3] it has been held that in such like situation the consumer could not be asked to pay LPS.

7. Inasmuch as the decision in the case of R.C.D. Ball Bearing (supra) constitutes the sheet-anchor of the appellants' case, we are obliged to closely examine the facts and ratio of the said decision. Before doing so, there are two observations of a general character which we wish to make, and one is that every judgment must be

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*2 (1997) 5 SCC 772*
*3 PLD 1991 SC 308*

read as applicable to the particular facts proved or assumed to be proved, since the generality of the expansions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides[4] . Now, we go over to the case of R.C.D. Ball Bearing, which was a public limited company and it had raised a dispute over the demand of contribution in respect of certain payments being made by it to its workers, with the Sindh Employees' Social Security Institution (SESSI). Upon the dismissal of its complaint, the matter came in appeal before the High Court, which initially stayed the recovery of disputed amount subject to furnishing of security but eventually dismissed the appeal, and the company tendered the payment due on account of the disputed item of contribution. The SESSI, provisionally accepting the amount, demanded the increased amount payable on account of failure on the part of the company to pay the contribution on the due date. And that demand gave rise to a fresh round of litigation between the parties for the determination of the question whether an aggrieved party who withheld the payment of disputed amount of contribution claimed to be payable to the SESSI, after obtaining a proper stay order from the Appellate Court exercising jurisdiction under the Social Security Ordnance, 1965 could be held to have failed to pay the amount so as to be liable to the payment of increase as provided by section 23 of the said Ordinance, in case the appeal was subsequently dismissed. The argument of the company was that since the Appellate Court had stayed the recovery of the contribution, it could not justifiably be held that there was deliberate or willful failure on its part to pay the amount on the clue date during the operation of the stay, so as to be burdened by the penalty provided by section 23 of the Social Security Ordinance, 1965. Agreeing with the argument of the company, it was held that reading the provisions of section 23 of the Social Security Ordinance, 1965 with sections 64 and 65, it became abundantly clear that the scheme of the said Ordinance itself provided that in case of a stay, until the final adjudication of the dispute, the obligation to pay the dues did not arise and thus, the company was not liable to pay the increased amount during the period in which the stay order was in force. Now, this round-up brings us to mull over whether the judgment in the case of R.C.D. Ball Bearing Ltd. could be considered as the relevant authority for determining the question before us in the present case. We do not think so, for, the one obvious reason that the scheme of law, under which the case of R.C.D. Ball Bearing Ltd. was decided by the Supreme Court, provides a provision for the stay of payment pending appeal, and that had become the pivot to hold that the company was not liable to pay increased amount during the period in which stay order was in force, while on the contrary, the law applicable to the question posed in the present appeals is the Oil and Gas Regulatory Authority Ordinance, 2002 and the rules and regulations made thereunder, which though envisage the hierarchy of authorities and Courts for correction of errors and redress of grievance made by the consumer, but does not

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*4 Quinn v. Leathem (1901 AC 495)*

provide such like provision for staying of payment pending appeal before the High Court, and thus any analogy drawn from the said precedent would be imperfect, and its application to the facts of the case in hands would be erroneous.

8. We now turn to the merits of each facet of the argument presented by the appellants. The admitted facts are that by virtue of Notification dated 31st August, 2015 and decision dated 6th July, 2020 the sale price and minimum charges in respect of natural gas were enhanced by the OGRA and that the appellants had been able to obtain interim orders, from this Court by filing writ petitions, by which the said Notification and decision were suspended. Based on these facts the first argument of the appellants is that since the non-payment of the amount as per the revised rates was on account of the interim order granted by this Court, there could be no question of failure on their part to pay the amount on due date and, therefore, levy and demand of LPS was illegal. We find no weight in this argument. It is a well-settled principle of law that whenever a party applies and obtains an interim/stay order from a Court, it is always at the risk and responsibility of the party applying. Mere passing of an interim/stay order cannot be construed as granting any additional rights to the litigant, but rather it ceases with the dismissal of substantive proceedings, and then becomes the duty of the Court in such cases to ensure that a party who had suffered on account of a decision that is finally reversed should be put back in the same position as far as the same is practicable, in which it would have been if the decision of the Court adversely affecting it had not been passed[5] . In the light of the above-stated principle, when we look at the facts of the present case, it appears that the obligation of the appellants to pay the gas bills as per the new rates had come into play, the moment Notification/decision enhancing price/tariff was issued but they resorted to challenging it through writ petitions and thus, put off the payment. Although the Notification/decision was initially suspended, this Court, after final hearing, dismissed the writ petitions on merits, and consequently the effect of restraint placed by the interim order on the recovery of the amount, totally disappeared and was wiped out, with the result, we are of the view, the liability of the appellants, as it existed on the day of the grant of the interim order, stood revived, and since it was not liquidated on the due date, they were under a burden to pay it along with LPS and no leniency could be shown for this because otherwise it would seriously affect the credibility of the judicial system. Needless to observe here that litigation should not be permitted to turn into a fruitful industry, and perhaps for this reason, the Ordinance also does not confer any power or jurisdiction on any authority to condone the failure on any ground whatsoever or to extend the time so as to prevent devious litigants from taking undue advantage by invoking jurisdiction of the Court.

9. The second argument is that the LPS could have been imposed only if the bill as per revised rates had not been paid deliberately and maliciously on the due date. We

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5 ***Rodger v. Comptoir D' Escompte de Paris (1871) LR PC 465***
***Stylle (Dress Land) v. Union Territory, Chandigarh (1999) 7 SCC 89***

are not impressed by this argument, and we are of the view that this submission also lacks merit. Item No.9 of Category-A of the Notification dated 18th July, 2006, which has been reproduced hereinabove in para 3, imposes liability to pay LPS in the event of any bill not being paid by the due date. Whether the delay in making the payment within time is deliberate and conscious or not is not relevant because liability to LPS is attracted immediately after due date for payment expires. The reasons for non-payment by the consumers are not relevant. As mentioned earlier the effect of the interim/stay order was that the Notification dated 31st August, 2015 and the decision dated 6th July, 2020 became inoperative, but after dismissal of the writ petitions their liability revived with retrospective effect.

10. The next plea also deserves the same fate. In the instant case the latter Notification of the OGRA dated 31st August, 2015 was not declared ultra vires and in fact its validity was upheld and the writ petitions were dismissed. In such a situation the principle of revival of the old Rule/Law[6] cannot be applied. It is true that the learned Single Bench while initially entertaining the writ petitions had suspended the Notification dated 31st August, 2015, but it did not mean that it was wiped out. It had just become inoperative, and continued to exist despite the interim order. As the Notification dated 31st August, 2015 continued to exist in spite of interim order, passed by the learned Single Bench, the principle of repeal and revival cannot be extended to the present case.

11. Lastly, it was passionately argued that the appellants could not be made to suffer for the acts of the Court and they could not be compelled to pay LPS on the gas dues, the payment of which was not made within time. The underpinning for this argument is the maxim "Actus Curiae Nemi-nem Gravabit" which means that the act of the Court shall prejudice no man. This contention is totally misconceived and thus, liable to be rejected. The quintessence of the above-stated maxim is to undo the wrong done to a party by the act of the Court, for, by the law of nature it is fair that no one becomes richer by the loss and injury of another. In legal parlance, this is called restitution and sometimes this is expressed as reversing a transfer of value. This is a tool of corrective justice. The factor attracting the applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party suffering an impoverishment which it would not have suffered but for the order of the Court and the act of such party. There is nothing, wrong in the parties demanding to be placed in the same position in which they would have been, had the Court not intervened by its interim order, when at the end of the proceedings, the Court pronounces its judicial verdict which does not match with and countenance its own interim order. The injury, if any, caused by the act of the Court then shall be undone and the gain

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*6 Baz Muhammad Kakar and others v. Federation of Pakistan (PLD 2012 SC 870)*

which the party would have earned unless it was interdicted by the order of the Court would be restored to or conferred on the party by suitably commanding the party liable to do so, otherwise the party would continue to get benefit of the interim order even after losing the case in the Court[7] . Mindful of the above position of law, we now have to see who had suffered due to the interim order granted by the learned Single Bench in the writ petitions, filed by the appellants challenging the Notification dated 31st August, 2015 and the decision dated 6th July, 2020 made by the OGRA. The answer is obvious, it is the SNGPL and not the appellants. It now stands established that though the appellants had liability to pay on the basis of revised tariff, they had not paid on such basis because of the interim order of the learned Single Bench. The appellants are ongoing business concerns and must have utilized the money, saved on account of the interim order, gainfully in their commercial activities. The SNGPL had to suffer financial loss because of the interim order. The SNGPL required funds to meet its expenses for supply of the gas. The appellants being consumers of the SNGPL were required to pay the bills promptly and any delay in making the payment caused loss to the SNGPL. By the interim order granted by the learned Single Bench, the SNGPL could not get the payment of gas as per revised tariff from the appellants by the due date. After the writ petitions were dismissed and the Notification dated 31st August, 2015 was upheld by this Court, the SNGPL was entitled not only the balance of the gas charges but also to LPS to meet its financial commitments. The above-stated maxim, as such, cannot be pressed into service in favour of the appellants, rather it is to be applied to protect the interest of the SNGPL.

12. In the result, these appeals fail and are hereby dismissed.

Appeals dismissed.

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7 ***Rodger v. Comptoir D' Escompte de Paris (1871) 3 PC 465***
***Peel (Regional Municipality) v. Canada (1992) 3 SCP 762***
***Kingstreet Investments Ltd. V. New Brunswick 2007 SCC 1***

**P L D 2022 Lahore 288**
**Before Shahid Waheed, J**
**INDEPENDENT MEDIA CORPORATION (PVT.) LTD. and another---Petitioners**
**versus**
**FEDERATION OF PAKISTAN and others---Respondents**

Writ Petitions Nos. 100 and 1524 of 2022, decided on 24th January, 2022.

**(a) Constitution of Pakistan---**

----Art. 199---Writs of mandamus and certiorari---Government corporations and agencies---Factors that determine whether such a corporation or agency was a person performing functions in connection with affairs of the Federation or Province against which writs of mandamus or certiorari could be issued stated.

For determining whether a Government corporation or agency is a person performing functions in connection with affairs of the Federation or Province against which writs of mandamus or certiorari could be issued, the diagnostic tool is functional realism and not facial cosmetics.

It is immaterial whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry is not as to how the juristic person is born but why it has been brought into existence. There is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not. Notwithstanding the above, few things are clear, firstly, if the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government; secondly, if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government; thirdly, where the financial assistance of the Government is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character, and fourthly, existence of deep and pervasive Government control may afford an indication that the corporation is a Government agency or instrumentality.

The Constitutional Law of the "Security State" by Arthur S. Miller (10) Stanford Law Review 620 at 664; Salahuddin and 2 others v. Frontier Sugar

Mills and Distillery Ltd., Tokht Bhai and 10 others PLD 1975 SC 244; R.D. Shetty v. The International Airport Authority of India and others (1979) I S.C.R. 1042 and Echo West International (Pvt.) Ltd. Lahore v. Government of Punjab through Secretary and 4 others PLD 2009 SC 406 **ref.**

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

----Art. 199---Writs of mandamus and certiorari---Pakistan Television Corporation Limited ('the PTVC')---Instrumentality or agency of the Government---Pakistan Television Corporation Limited performed functions in connection with affairs of the Federation against which a writ of mandamus or certiorari can be issued.

Perusal of the Memorandum and Articles of Association of the Pakistan Television Corporation Limited ('the PTVC') showed that its Board of Directors are appointed by the Government of Pakistan. The PTVC is a public limited company with an authorized capital of Rs.3.000 billion and the Government holds entire paid up share capital of Rs.1529.300 million. The objective of the PTVC is to establish a network of television stations in Pakistan by erecting, constructing, maintaining and improving television stations at places approved by the Government of Pakistan, and to carry out instructions of Government of Pakistan with regard to general pattern of policies of programmes, announcements and news etc. It will thus, be seen that the Government of Pakistan has full control of the working of the PTVC and it would not be incorrect to say that in the affairs of the PTVC, the voice and hands are of the Government of Pakistan. The PTVC is an instrumentality or agency of the Government and qualifies as a person performing functions of the Federation against which a writ of mandamus or certiorari can be issued.

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

----Art. 199---Government instrumentalities or agencies---Commercial and contractual transactions and administrative decisions---Judicial review---Principles governing judicial review of commercial/contractual transactions and administrative decisions undertaken by Government instrumentalities or agencies stated.

Following are principles governing judicial review of commercial/contractual transactions and administrative decisions undertaken by Government instrumentalities or agencies stated:

(i) The basic requirement is fairness in action by the Government, and non-

arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to judicial review only to the extent that the Government must act validly for a discernible reason and not whimsically for any ulterior purpose. If the Government acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(ii) In the matter of awarding a contract, greater latitude is required to be conceded to the Government. Unless the action of the Government is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(iii) If the Government or its instrumentalities act reasonably, fairly and in public interest in awarding a contract, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government;

(iv) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made;

(v) The Court does not have the expertise to correct an administrative decision. If a review of an administrative decision is permitted the court will be substituting its own decision, without the necessary expertise which itself may be fallible, and;

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation (1947) 2 All ER 680; Chief Constable of the North Wales Police v. Evans (1982) 3 All ER 141; Regina v. Monopolies and Mergers Commission, Ex parte ARGYLL GROUP PLC (1986) 1 W.L.R 763; Regina v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd. (1988) AC 858; Regina v. Secretary of State for the Home Department, Ex parte Brind and others (1991) AC 696; Tata Cellular v. Union of India (UOI) (AIR 1996 SC 11); Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others 1998 SCMR 2268; Messrs Ittehad Cargo Service and 2 others v. Messrs Syed Tasneem Hussain Naqvi and others PLD 2001 SC 116; Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others 2012 SCMR 455; Habibullah Energy Limited and another v. WAPDA through Chairman and others PLD 2014 SC 47 and Premier Battery Industries Private Limited v. Karachi Water and Sewerage Board and others 2018 SCMR 365 **ref.**

**(d) Public Procurement Regulatory Authority Ordinance (XXII of 2002)---**

----S. 5(1)---Public Procurement Rules, 2004, R. 4---Constitution of Pakistan, Art. 199---Partnership/joint venture agreement between Pakistan Television Corporation Limited ('the PTVC') and two private entities, ARY Communications Limited (the ARY) and Group M Pakistan Private Limited ('Group M') for broadcasting rights of a cricket league---Legality---Plea of petitioner-company that PTVC without asking it or other broadcasters whether they were interested in collaborating with the PTVC, could not contract directly with ARY/Group M---Validity---Petitioner-company has a personal interest in the present litigation as it is motivated purely by its own economic interest, which fact was evident from its own letter asking the Managing Director, PTVC to cancel the agreement with the ARY/Group M and enter into partnership with it on the same terms---Petitioner-company has no cause of complaint and since it was not treated unfairly, there was no need to comment upon the application or otherwise, of the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 and the Rules made thereunder, to the present case---Decision of the PTVC relating to execution of agreement forming business partnership/joint venture with the ARY/Group M, is bona fide and in public interest.

Pakistan Television Corporation Limited ('the PTVC') is a State-owned corporation and in order to bring transparency in its commercial affairs, it is imperative that it should provide a level playing field to all public and private entities. Looking at the record of the present case, it is clear that the PTVC, complying with the said requirement of law, had solicited proposals for public-private partnership through a newspaper advertisement. This was a sufficient notice to the public at large.

The petitioner-company should have been vigilant for the growth of its business and taking advantage of this opportunity, should have submitted its proposal to the PTVC. It did not do so and wasted its time and thus is protesting at a belated stage. It is also on record that in response to newspaper advertisement, four companies ventured their proposals and the PTVC entered into business agreement with the ARY/Group M through a competitive bidding process and thus, the complaint of the petitioner-company is not justified and as a result, it also cannot be permitted to invoke the discretionary power of the High Court for the grant of an order in the nature of a writ of certiorari or mandamus as it has failed to show that the agreement forming business

partnership/joint venture between the PTVC and ARY/Group M, has occasioned some injustice to it.

The Queen v. Lord Newborough (1869) LR 4 Q B 585 and Nawab Syed Raunaq Ali and others v. Chief Settlement Commissioner and others PLD 1973 SC 236 **ref.**

On the contrary, in the present case, the petitioner-company has a personal interest in the present litigation as it is motivated purely by its own economic interest and this is evident from its own letter asking the Managing Director, PTVC to cancel the agreement with the ARY/Group M and enter into partnership with it on the same terms. It means that the terms on which the PTVC has agreed to form partnership/joint venture with the ARY/Group M are flawless and financially sound, and that the present petition is not in the public interest but for personal economic interest of the petitioner-company. Petitioner-company just wants the entire process reversed so that it can get the contract of broadcasting rights for the cricket league. By all means, this is a malicious attack, and given such circumstances, the exercise of constitutional jurisdiction would amount to allowing the petitioner-company to throw spanner in the economic affairs of the PTVC. The petitioner-company has no cause of complaint and since it was not treated unfairly, there was no need to comment upon the application or otherwise, of the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 and the Rules made thereunder, to the present case.

Javed Ibrahim Paracha v. Federation of Pakistan and others PLD 2004 SC 482; Moulvi Iqbal Haider v. Capital Development Authority and others PLD 2006 SC 394; Echo West International (Pvt.) Ltd. Lahore v. Government of Punjab through Secretary and 4 others PLD 2009 SC 406; Petrosin Corporation (Pvt.) Ltd., Singapore and 2 others v. Oil and Gas Development Company Ltd. through Managing Director, Islamabad 2010 SCMR 306; Muhammad Shafique Khan Sawati v. Federation of Pakistan through Secretary Ministry of Water and Power, Islamabad and others 2015 SCMR 851 and Premier Battery Industries Private Limited v. Karachi Water and Sewerage Board and others 2018 SCMR 365 **ref.**

It is clear that the decision of the PTVC relating to execution of agreement forming business partnership/joint venture with the ARY/Group M, is bona fide and is in public interest. Constitutional petitions were dismissed.

**(e) Constitution of Pakistan---**

----Art. 199---Public interest litigation---"Aggrieved person"---Scope---'Public spirited person' litigating in public interest---Meaning of "aggrieved person" included a public spirited person who brings to the notice of the High Court a matter of public importance requiring enforcement of Fundamental Rights---Public interest litigation undertaken by a person must in the first place clearly demonstrate its complete bona fide that such litigation is not being undertaken to serve a private interest but is aimed at serving a public interest, good or welfare---Judicial review cannot be permitted to be invoked to protect private interest at the cost of public interest.

Bahzad Haider and Salman Faisal for Petitioners (in Writ Petition No. 100 of 2022).

Khawar Bashir, Assistant Attorney General for Pakistan (in Writ Petition No. 100 of 2022).

Ahmad Pansota, Shah Jahan Khan and Ahtasham Mukhtar for Respondent No.2/PTV (in Writ Petition No. 100 of 2022).

Aitzaz Ahsan and Shahid Saeed for Respondent No.3/ARY (in Writ Petition No. 100 of 2022).

Taffazal Haider Rizvi and Haider Ali Khan for Respondent No.4/PCB (in Writ Petition No. 100 of 2022).

Mehmood Ali and Farah Malik for Petitioners (in Writ Petition No. 1524 of 2022).

Khawar Bashir, Assistant Attorney General for Pakistan for Respondent No.1 (in Writ Petition No. 1524 of 2022).

Ahmad Pansota, Shah Jahan Khan and Ahtasham Mukhtar for Respondent No.2/PTV (in Writ Petition No. 1524 of 2022).

Aitzaz Ahsan and Shahid Saeed for Respondent No.3/ARY (in Writ Petition No. 1524 of 2022).

Taffazal Haider Rizvi and Haider Ali Khan for Respondent No.4/PCB (in Writ Petition No. 1524 of 2022).

Date of hearing: 24th January, 2022.

## JUDGMENT

**SHAHID WAHEED, J.---**The petitioner of the first petition, that is, W.P. No. 100 of 2022, namely Independent Media Corporation (Pvt.) Ltd., (the IMC) is one of the companies of Geo Group which owns and operates the widely watched TV channels whereas the second petition (W.P. No. 1524 of 2022) is from Blitz Advertising (Pvt.) Ltd. (Blitz), which deals in the business of sports

marketing and management. The allegations made in both the petitions and the arguments presented in support of them suggest that the petitioners are piqued by the business partnership agreement that the Pakistan Television Corporation Limited (the PTVC) has entered into to form a joint venture with two private entities, to wit, ARY Communications Limited (the ARY) and GroupM Pakistan Private Limited (GroupM) to obtain the contract of PSL TV Broadcast Rights for 2022-2023 (for Pakistan Region only). Inasmuch as these two petitions aim to target the same object, they are amenable to common disposal.

2. The decision of these two petitions will become easy when we understand their keynote thought and that will come to fore automatically when the facts will be stated in chronological order till the recourse of this Court. So, I am resorting to the same modus operandi. The facts, to the extent necessary to appreciate the issues canvassed, are brief and may be conveniently stated from 10th August, 2021, when the PTVC issued an advertisement in the daily "Business Recorder", inviting the private/public sector organizations to share their proposals for potential software and infrastructural (equipment) based Public Private Partnership business models/ideas in specialized sports genre including (a) acquisition of rights (international and domestic), (b) marketing of PTV Sports, (c) specialized programming entailed (during live events) and for non-live FPC for PTV Sports including awards and reality shows etc., (d) brand collaborations and media partnerships, or any other innovative Collaboration Partnership proposals. The eligibility criteria for making expression of interest was that the organization or an individual should be eligible for entering a business arrangement as per the applicable laws in Pakistan, have strong professional credentials and a solid financial profile, and was not or had never been defaulter of the PTVC. While the terms and conditions of submission of proposals, inter-alia, included that they would be evaluated considering the PTVC's Standard Operating Procedures, Policy Guidelines, the PTVC would reserve the right to accept or decline any proposal, and the proposing party would not have the right to challenge the PTVC's decision about accepting or rejecting any proposal without any justification whatsoever, the PTVC would hold complete editorial control over the content (entailed programing during live shows and shows on the non-live FPC) and, that the PTVC would hold the rights they had already acquired (broadcast or digital) other than when used as a carrier. Subsequently some new conditions for submission of proposals were added through Addendum dated 13th August, 2021 and it was made clear that the interested parties should ensure availability of Cable and Satellite specialized sports broadcast (channel) in lieu of the partnership for the ICC Rights (2020-2023), that the proposals for PTV Sports infrastructural enhancement would be evaluated based on equipment, upgradation (from SD to HD) requirements of the PTVC, that the proposals should be comprehensive, and the upgradation part would be assessed by the technical team at the PTVC, and that overall experience, financial strength, profile, investment in technical

upgradation of PTV Sports, financial and partnership models of the interested parties would be considered as a benchmark for acceptance of proposal(s). In response to the above-stated advertisement, the PTVC received four proposals from (a) GroupM/ARY (consortium), (b) Blitz, (c) Tower Sports, (d) Trade Chronicle. The Evaluation Committee formed by the Managing Director of the PTVC (comprising Director Sports and Syndication, Chief Commercial Officer, Director Finance, Director Engineering and Director Administration and Personnel) reviewed the proposals, shortlisted Blitz and ARY/GroupM, and then, after negotiating with them, approved the proposal made by ARY/GroupM, and in pursuance whereof agreement forming business partnership/joint venture was executed on 16th September, 2021 between the PTVC, GroupM and ARY.

3. Henceforth the facts triggering the cause of filing the present petitions will start. It is an admitted fact that the Pakistan Cricket Board (the PCB) on 1st December, 2021 for 2022 Edition of the Pakistan Super League (the PSL), scheduled to commence from 27th January, 2022, through publication in daily newspapers invited bids for the award of PSL TV Broadcast Rights for 2022-2023 (for Pakistan Region only), to which IMC and the Joint Venture of the PTVC submitted their bids. At this stage, the IMC for the first time through its letter dated 27th December, 2021 challenged the legality of the Joint Venture on the ground that it was formed surreptitiously and without any competitive bidding process. The object of the challenge was so obvious, and that was to make itself sole bidder for PSL broadcast rights. The challenge, however, turned out to be an abortive attempt and the contract was awarded to the PTVC's Joint Venture. The IMC thereupon brought two constitutional petitions before this Court, the first was W.P. No. 99 of 2022 assailing the validity of the decision rejecting its bid by the PCB and the other was W.P. No. 100 of 2022 questioning the validity of the Joint Venture formed by the PTVC. Both the petitions came up for peremptory hearing before this Court on 4th January, 2022, when the IMC after arguing the matter and giving second thought opted to withdraw W.P. No.99 of 2022 so that it could avail its remedy before the Grievance Committee, constituted by the PCB, while in the other petition i.e. W.P. No.100 of 2022 notices were issued to the other side for their report and parawise comments. It is pertinent to note that on the first date of hearing, during preliminary arguments, the objection was raised by the other side that since the IMC had not expressed interest to the PTVC, it could not be heard saying that the Joint Venture was not valid nor could it be treated as whistleblower in the public interest. It appears that this objection might have given a fillip to the IMC to seek the support of Blitz, so the second petition (i.e. W.P. No.1524 of 2022) was got filed from it to challenge the Joint Venture of the PTVC. 4. Before I proceed further, two points need to be mentioned as some reference was made to them at the Bar. First, since both of these petitions seek orders in the nature of writ of mandamus and certiorari against the PTVC, a public limited company, it

must be settled at the outset whether it should be regarded as a person performing functions in connection with the affairs of the Federation or a Province. The diagnostic tool for such like issue is functional realism and not facial cosmetics. It is a matter of common experience that the Government ordinarily acts through the instrumentality or agency of natural persons or it employs the instrumentality or agency of juridical persons to carry out its functions. In the early days when the Government had limited functions, it could operate effectively through natural persons constituting its civil service. But as the tasks of the Government multiplied with the advent of the Welfare State, it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks which were often specialized and highly technical in character and thus, it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances the corporation came into being as the third arm of the Government and over the years it has been increasingly utilized by the Government for setting up and running public enterprises and carry out other public functions. It is apposite to state that it is immaterial for the issue, under discussion, whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. There is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not. Notwithstanding the above, few things are now clear, that is, firstly, if the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government, secondly, if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government, thirdly, where the financial assistance of the Government is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character, and fourthly, existence of deep and pervasive Government control may afford an indication that the corporation is a Government agency or instrumentality[1]. It is in the light of this discussion that we must now proceed to examine whether the PTVC is an instrumentality or agency of the Government? The answer must obviously be in the affirmative if we have regard to the Memorandum and Articles of Association of the PTVC. The Board of Directors of the PTVC is appointed by the Government of Pakistan. The PTVC is a public limited company with an authorized capital of Rs.3.000 billion and the

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[1] **The Constitutional Law of the "Security State" by Arthur S. Miller (10) Stanford Law Review 620 at 664, Salahuddin and 2 others v. Frontier Sugar Mills and Distillery Ltd., Tokht Bhai and 10 others (PLD 1975 SC 244), R.D. Shetty v. The International Airport Authority of India and others (1979) I S.C.R. 1042 Echo West International (Pvt.) Ltd. Lahore v. Government of Punjab through Secretary and 4 others (PLD 2009 SC 406)**

Government holds entire paid up share capital of Rs.1529.300 million. The objective of the PTVC is to establish a network of television stations in Pakistan by erecting, constructing, maintaining and improving television stations at places approved by the Government of Pakistan, and to carry out instructions of Government of Pakistan with regard to general pattern of policies of programmes, announcements and news etc. It will thus, be seen that the Government of Pakistan has full control of the working of the PTVC and it would not be incorrect to say that in the affairs of the PTVC, the voice is of the Government of Pakistan and the hands are also of the Government of Pakistan. I must, therefore, hold that the PTVC is an instrumentality or agency of the Government and does fulfill the above-stated diagnostic test to qualify as a person performing functions of the Federation.

5. The second preliminary issue to be determined is whether the commercial transactions of the Government or its instrumentalities or agency can be brought under judicial review. There is no need for a detailed discussion on this issue, for, the principles governing it are now well settled. A study of case-law suggests certain principles relating to scope of judicial review of administrative decisions and exercise of contractual process by government bodies and they are: (a) the basic requirement in fairness in action by the Government, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to judicial review only to the extent that the Government must act validly for a discernible reason and not whimsically for any ulterior purpose. If the Government acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities, (b) in the matter of awarding a contract, greater latitude is required to be conceded to the Government unless the action of the Government is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted, (c) if the Government or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government, (d) the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made, (e) the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible, and (f) quashing decisions may impose heavy administrative burden on

the administration and lead to increased and unbudgeted expenditure[2].

6. Based on the above-stated two preliminary points, the IMC has called upon this Court to review the legality of the joint venture formed by the PTVC with the plea that the PTVC without asking it or other broadcasters whether they were interested in collaborating with the PTVC, could not contract directly with ARY/GroupM. This argument suggests that having a partnership with the PTVC was a lucrative business so every broadcaster should have equal opportunities to benefit from it. It is true that the PTVC is a State-owned corporation and in order to bring transparency in its commercial affairs, it is imperative that it should provide a level playing field to all public and private entities. Looking at the record of the present cases, it is clear that the PTVC, complying with the above requirement of law, had solicited proposals for public-private partnership through a newspaper advertisement. This was a sufficient notice to the public at large. So, in Shakespeare's[3] words, this opportunity was like a tide in the affairs of the IMC, which taken at the flood, could lead it on to fortune. Therefore, the IMC should have been vigilant for the growth of its business and taking advantage of this opportunity, should have submitted its proposal to the PTVC. It did not do it and wasted its time and thus, protesting at this belated stage is like crying over spilled milk. It is also on record that in response to newspaper advertisement, four companies ventured their proposals and the PTVC entered into business agreement with the ARY/GroupM through a competitive bidding process and thus, the complaint of the IMC is not justified and as a result, it also cannot be permitted to invoke the discretionary power of this Court for the grant of an order in the nature of a writ of certiorari or mandamus as it has failed to show that the agreement dated 16th September, 2021, forming business partnership/joint venture between the PTVC, ARY/GroupM, sought to be set aside has occasioned some injustice to it[4].

7. This brings me to the point that, in spite of the above-mentioned laxity in not proposing to the PTVC, the IMC can, in the public interest, be heard to say that the agreement, firming joint venture, is not only non-transparent due to non-compliance with the Public Procurement Rules, 2004 but through it huge financial loss has been caused to the public exchequer. This requires reviewing the scope and limitation of public interest litigation. Such type of litigation does not strictly fall under any provisions of Article 199 of the Constitution of the

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[2] **Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation (1947) 2 All ER 680,**
**Chief Constable of the North Wales Police v. Evans (1982) 3 All ER 141,**
**Regina v. Monopolies and Mergers Commission, Ex parte ARGYLL GROUP PLC (1986) 1 W.L.R 763,**
**Regina v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd. (1988) AC 858,**
**Regina v. Secretary of State for the Home Department, Ex parte Brind and others (1991) AC 696,**
**Tata Cellular v. Union of India (UOI) (AIR 1996 SC 11),**
**Messrs Airport Support Services v. The Airport Manager, Quaid-E-Azam International Airport, Karachi and others (1998 SCMR 2268),**
**Messrs Ittehad Cargo Service and 2 others v. Messrs Syed Tasneem Hussain Naqvi and others (PLD 2001 SC 116),**
**Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455),**
**Habibullah Energy Limited and another v. WAPDA through Chairman and others (PLD 2014 SC 47), and**
**Premier Battery Industries Private Limited v. Karachi Water and Sewerage Board and others (2018 SCMR 365)**

[3] **Julius Caesar Act-IV, Scene-III.**

[4] **The Queen v. Lord Newborough (1869) LR 4 Q B 585, and Nawab Syed Raunaq Ali and others v. Chief Settlement Commissioner and others (PLD 1973 SC 236).**

Islamic Republic of Pakistan, 1973. Even so, it has received judicial recognition enabling this Court to enlarge the scope of the meaning of "aggrieved person" to include a public spirited person who brings to the notice of this Court a matter of public importance requiring enforcement of fundamental rights. It is, therefore, important that public interest litigation undertaken by a person must in the first place clearly demonstrate its complete bona fide that such litigation is not being undertaken to serve a private interest but is aimed at serving a public interest, good or welfare. On the contrary, in the present case, the IMC has a personal interest in the present litigation as it is motivated purely by its own economic interest and this is evident from its own letter dated 27th December, 2021 asking the Managing Director, PTVC to cancel the agreement with the ARY/GroupM and enter into partnership with it on the same terms. It means that the terms on which the PTVC has agreed to form partnership/joint venture with the ARY/GroupM are flawless and they are sound financially, and the second is that the present petition is not in the public interest but for personal economic interest of the IMC. It is now pellucid that the IMC just wants the entire process reversed so that it can get a contract of PSL broadcasting rights. By all means, this is a malicious attack, and given these circumstances, the exercise of constitutional jurisdiction would amount to allowing the IMC to throw spanner in the economic affairs of the PTVC. I will thus, not examine the case from that standpoint. I have already held that the IMC has no cause of complaint and since it was not treated unfairly, I need not comment upon the argument on the application or otherwise, of the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 and the rules made thereunder, to the present case[5].

8. I may now turn to Blitz's petition. First of all, three things are to be noted, firstly, that Blitz has not filed its petition in the public interest, secondly, except for one new objection, its contents are the same as that of the IMC's petition, and the third is that Blitz submitted its proposals to the PTVC in response to newspaper notice dated 10th August, 2021, but it was not approved. Now let's look at the new objection raised by Blitz. That is, since the PSL rights were neither mentioned in the notice, nor in all the decision-making process undertaken thereunder, the agreement of the PTVC forming partnership/a joint venture with the ARY/GroupM is illegal, and thus, by setting aside it, an opportunity be granted to it to make a fresh offer to the PTVC for the purchase of broadcasting rights of PSL. There is no merit in this objection. The notice dated 10th August, 2021, inviting expression of interest, clearly stated that the PTVC was looking for workable proposals for potential software and

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[5] **Javed Ibrahim Paracha v. Federation of Pakistan and others (PLD 2004 SC 482),**
**Moulvi Iqbal Haider v. Capital Development Authority and others (PLD 2006 Supreme Court 394),**
**Echo West International (Pvt.) Ltd. Lahore v. Government of Punjab through Secretary and 4 others (PLD 2009 SC 406)**
**Petrosin Corporation (Pvt.) Ltd., Singapore and 2 others v. Oil and Gas Development Company Ltd. through Managing Director, Islamabad (2010 SCMR 306),**
**Muhammad Shafique Khan Sawati v. Federation of Pakistan through Secretary Ministry of Water and Power, Islamabad and others (2015 SCMR 851) and**
**Premier Battery Industries Private Limited v. Karachi Water and Sewerage Board and others (2018 SCMR 365)**

infrastructural (equipment) based Public Private Partnership business models/ideas in specialized sports genre, in which, acquisition of rights (international and domestic) was included, and PSL, according to the PCB, is an annual domestic Twenty-20 tournament. There was thus, no confusion, ambiguity or omission in the notice. It was clear in the notice that proposal was also invited for domestic sports. There is also nothing on record to show that Blitz had made any complaint as to vagueness or lack of specific details of the specialized sports genre for which the offers were invited. The record presented by the PTVC, during the course of hearing, indicates that Blitz was one of the parties that was shortlisted and with whom terms/proposals were negotiated. The said record contains a letter/report (Ref. No.DS/E01-2021) dated 6th September, 2021, which unfurls that Blitz had made its proposals under two heads, one was about the acquisition cost of ICC rights, and the second related to the acquisition cost of other rights, that possibly included domestic sports. All the above facts lead me to believe that Blitz knew very well the details about which the proposals were invited by the PTVC, and that it was neither treated unfairly nor discriminately. It appears that filing of this petition is an attempt by Blitz with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade this Court to exercise power of judicial review. This attempt should be resisted, for, power of judicial review cannot be permitted to be invoked to protect private interest at the cost of public interest, particularly when it is clear that the decision of the PTVC relating to execution of agreement dated 16th September, 2021, forming business partnership/joint venture with the ARY/GroupM, is bona fide and is in public interest.

9. There is another good ground upon which the petition filed by Blitz must fail. There is no denying that the notice inviting expression of interest stipulated that the proposing party would have no right to challenge the PTVC's decision about accepting or rejecting any proposal. Blitz knowing this condition had submitted its proposal and thus, upon being declared unsuccessful, it could not be held to be clothed with any right conferring locus standi to present unattested or unverified photostat private document, showing privileged communication purportedly with a representative of the PTVC through WhatsApp, to challenge the terms of the notice inviting expression of interest and the entire decision-making process, on the ground, that it was an outcome of the non-competitive process and discriminatory treatment[6]. Such afterthought action can never be entertained by the Courts.

10. Considering the judicial pronouncements and the grounds raised on behalf of the petitioners and the respondents, I am of an undoubted opinion that both the petitioners have not made out any valid ground for the purpose of

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[6] **Munshi Muhammad and another v. Faizanul Haq and another (1971 SCMR 533)**
**Rehmat Ali and 2 others v. The Revenue Board, West Pakistan, Lahore and another (1973 SCMR 342)**
**Babu Parvez Qureshi v. Settlement Commissioner, Multan and Bahawalpur Divisions, Multan and 2 others (1974 SCMR 337)**

interfering with the process of award of business partnership agreement. Thus, both the petitions are devoid of merits and accordingly, the same stand dismissed.

MWA/I-5/L Petitions dismissed.

**PLJ 2022 Lahore 97**
***Present:*** **SHAHID WAHEED AND CH. MUHAMMAD IQBAL, JJ.**
**PAKISTAN RAILWAYS through CEO/G.M--Appellant**
**versus**
**DILAWAR HUSSAIN and others--Respondents**

I.C.A. No. 57486 of 2021, decided on 21.9.2021.

**Railway Servants (Efficiency & Discipline) Rules, 1975--**

----R. 10--Pakistan Railway Establishment Code, 1940, Rs. 1717, 1723, 1731, 1731--Law Reforms Ordinance, 1972, S. 3(2)--Compulsory retirement--Remedy of appeal--Question of whether Respondent No. 1 has any remedy of appeal against punishment of compulsory retirement--Responding to this question, he made reference to Railway Servants (Efficiency &v Discipline) Rules, 1975 which contemplates that a person on whom a penalty is imposed shall have such right of appeal as prescribed in rules 1717, 1731 and 1723, 1732 of Pakistan Railways, Establishment Code--This reply suggests that W.P. No. 250500 of 2018 had arisen out of proceedings in which a remedy of appeal was provided--Instant appeal by virtue of bar provided in proviso to sub-section (2) of Section 3 of Law Reforms Ordinance, 1972 is not competent--Petition dismissed. [P. 97] A

*Mr. Jawad Mahmood Pasha*, Advocate for Appellant.
Date of hearing: 21.9.2021.

**ORDER**

This Intra Court Appeal has arisen out of a petition brought by Respondent No. 1 under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 (*i.e.* W.P.No. 250500 of 2018) challenging the punishment of compulsory retirement.

2. At the outset of hearing, we asked the appellant's counsel as to whether the Respondent No. 1 had any remedy of appeal against the punishment of compulsory retirement. Responding to this question, he made reference to rule of the Railway Servants (Efficiency & Discipline) Rules, 1975 which contemplates that a person on whom a penalty is imposed shall have such right of appeal as prescribed in Rules 1717, 1731 and 1723, 1732 of the Pakistan Railways, Establishment Code. This reply suggests that W.P. No. 250500 of 2018 had arisen out of the proceedings in which a remedy of appeal was provided. That being so, the instant appeal by virtue

of bar provided in proviso to sub-section (2) of Section 3 of the Law Reforms Ordinance, 1972 is not competent.

3. Dismissed.
(Y.A.) Petition dismissed

**2022 C L D 279**
**[Lahore]**
**Before Shahid Waheed and Ch. Muhammad Iqbal, JJ**
**STATE LIFE INSURANCE CORPORATION OF PAKISTAN and another---Appellants**
**Versus**
**Mst. SHAMA FATIMA---Respondent**

Insurance Appeal No. 50534 of 2020, decided on 2nd November, 2021.

**Insurance Ordinance (XXXIX of 2000)---**

----Ss. 118 & 124---Life Insurance---Accidental death indemnity and death benefit, claim of---Payment of liquidated damages on late settlement of claims---Scope---Appellant Insurance Corporation impugned order of Insurance Tribunal whereby application of claimant under S. 118 of the Insurance Ordinance, 2000 was allowed and she was held entitled to receive insurance claim along with liquidated damages on account of accidental death of her husband/deceased---Contention of Insurance Corporation, inter alia, was that claimant had not provided FIR, post-mortem report and other documents to prove that the insured deceased had died in a road accident, therefore impugned order of Insurance Tribunal ought to be set aside---Validity---Contention of Insurance Corporation was not tenable as sole witness for the Insurance Corporation stated that he had investigated death of the insured and found it to be due to road accident---Appellant Insurance Corporation had not made the case that the said witness was in league with claimant or that he made statements against the facts, so statement of said witness excluded necessity of the documents required by the appellant Insurance Corporation and was therefore sufficient to conclude that the insured had met an accidental death---Claimant was therefore entitled to receive accidental death indemnity and death benefit---No illegality existed in impugned order---Appeal was dismissed, in circumstances.Sheikh Shahzad Ahmad Pasha for Appellants.Liaqat Ali Butt for Respondent.Date of hearing: 2nd November, 2021.

## JUDGMENT

**SHAHID WAHEED, J**.---This appeal under section 124 of the Insurance Ordinance, 2000 is of the insurer and arises out of the application brought by the widow of the insured, namely, Muhammad Ramzan, before the Insurance Tribunal, Gujrat seeking an order for recovery of Rs.1,000,000/- on account of

accidental indemnity and death benefit (AIB) under the Insurance Policy No.507879613-9 along with liquidated damages with the assertion that the insured had died in a road accident. The insurer contested the claim on the ground that the widow of the insured despite reminders vide letter dated 2nd April, 2016 (Ex.A1) and letter No.33395/11 dated 2nd July, 2018 (Ex.A2) did not provide copy of FIR/police report, postmortem certificate, passport and news clippings and thus, it could not be said that Muhammad Ramzan died in a road accident.

2. On pleadings, the Insurance Tribunal vide order dated 6th April, 2019 framed as many as six issues and one of them was whether the respondent-applicant was entitled to the decree for recovery of an amount of Rs.1,000,000/- as accidental indemnity and death benefit along with liquidated damages. This was issue No.1. The respondent-applicant in support of her claim produced Zia Ullah (AW-1) who was driver in the Falah-i-Insaniat Ambulance Service, Mandi Bahauddin. This witness in his examination-in-chief stated that on 23rd May, 2004, he received information about the motorcycle accident at Kelanwala Shareef, District Gujranwala, so he rushed to the spot along with one Muhammad Jameel and Abdul Rehman and found Muhammad Ramzan dead and then he took the dead body to the applicant-respondent's house in his ambulance. This witness in his statement produced his affidavit (Mark-A) and the receipt showing payment of ambulance service (Mark-B). The second witness who appeared on behalf of the respondent-applicant was Muhammad Jameel (AW-2). He stated that death of Muhammad Ramzan was unnatural. The respondent as her own witness appeared before the Tribunal as AW-3 and reiterated the assertions made in her application and produced death-certificate (Mark-C) wherein the reason of death of Muhammad Ramzan was stated to be unnatural. On the other hand the insurer produced only one witness and that was its Deputy Manager, namely, Mumtaz Ahmad (RW-1), who in his examination-in-chief admitted that he had investigated the death and according to his inquiry Muhammad Ramzan had died in an accident. On consideration of the matter and appraising the evidence, the Insurance Tribunal decided issue No.1 in favour of the respondent-applicant and held that she was entitled to get a sum of Rs.1,000,000/- along with liquidated damages w.e.f. 18th August, 2014. Issue No.2 was whether the respondent-applicant had no cause of action to file application before the Insurance Tribunal. This issue was decided in favour of the respondent-applicant whereas the other issues were decided against the present appellants, for, that they had not produced any evidence to prove them.

On the basis of above-stated findings, the Insurance Tribunal through its order dated 21st January, 2020 allowed the prayer of the respondent and directed the present appellants to make payment of accidental indemnity and death benefit (AIB) amounting to Rs.1,000,000/- under Policy No.507879613-9 along with liquidated damages under section 118 of the Insurance Ordinance, 2000. So, this appeal.

3. Through this appeal we have been called upon to examine only issue No.1 and determine whether the evidence on record suggests that the insured died in an accident. The answer to this question is important because that alone will be suffice to decide the fate of applicant-respondent's claim for recovery of accidental indemnity and death benefit (AIB). Impeaching the findings of the Insurance Tribunal the appellants' counsel submitted that these were not sustainable in the eyes of law because these without any justified reason discounted the implication of non-compliance of the direction contained in two letters i.e. Ex.A1 and Ex.A2 whereby the respondent-applicant was required to furnish mandatory documents such as FIR, postmortem certificate, passport and news clippings so as to determine the cause of death of the insured. This argument has not impressed us for the reason that the sole witness of the appellants in his statement said that he had investigated the death of the insured and found that it was due to an accident. It is to be noted that it is not the case of the appellants that their sole witness was in league with the respondent-applicant and that he made the statements against the facts, so his statement, in our opinion, excludes the necessity of above-stated documents and is sufficient to conclude that the death of respondent-applicant's husband was accidental and thus, she was entitled to get payment of accidental indemnity and death benefit (AIB) amounting to Rs.1,000,000/- under the policy purchased by her deceased husband, Muhammad Ramzan. We, therefore, do not find any misreading and non-reading of evidence by the Insurance Tribunal while returning findings on issue No.1 and thus, interference therewith is uncalled for.

4. Since other issues were not pressed before us, there is no need to dilate upon them.

5. In the result, this appeal fails and accordingly dismissed with the direction to the Deputy Registrar (Judicial) of this Court to pay the amount deposited by the present appellants in pursuance of our order dated 14th October, 2020 made in

C.M. No. 01-C of 2020 to the respondent along with profit, if any, accrued thereon after due verification and receipt. No order as to costs.

KMZ/S-111/L Appeal dismissed.

**2022 M L D 884**
**[Lahore]**
**Before Shahid Waheed, J**
**MUHAMMAD IMTIAZ KHAN---Petitioner**
**Versus**
**MEMBER, BOARD OF REVENUE and others---Respondents**

Writ Petition No.195623 of 2018, heard on 22nd February, 2022.

**Punjab Consolidation of Holdings Ordinance (VI of 1960)---**

----Ss.3, 5 & 15---Constitution of Pakistan, Art.10-A---Consolidation of holdings---Review of mutation by Consolidation Officer---Jurisdiction---Petitioner was aggrieved of review of mutation in his favour on the application of respondents---Plea raised by petitioner was that respondents did not have any locus standi to assail mutation in question---Validity---Previous owner of land never raised any objection to transfer of land in favour of petitioner---Petitioner was never got involved in any inquiry into demarcation of land---Orders made in revenue hierarchy were not outcome of fair trial---High Court set aside the orders passed by revenue authorities and remanded the matter to Consolidation Officer to decide the matter afresh through a well-reasoned order---Constitutional petition was allowed, in circumstances.

Ch. Nisar Ahmed Seikhhu for Petitioner.
Muhammad Arif Raja, Addl. A.G. for Respondents Nos.1 to 5.
Malik Sarbuland for Respondents Nos.6 to 7.
Date of hearing: 22nd February, 2022.

**JUDGMENT**

**SHAHID WAHEED, J**.---Dispute in this case relates to land measuring 43-kanals 6-marlas situated within the revenue estate of Isa Khel, Tehsil Isal Khel, District Mainwali. The petitioner purchased the said land from one Muhammad Khan against a consideration of Rs.2000/-, and that was incorporated in the revenue record vide mutation No.17 dated 14.01.1993. After a lapse of more than a decade, the respondents Nos.6 and 7 made a compliant before the Collector (Consolidation), Mianwali for review of the said mutation on the ground since the land came under Municipal limits after consolidation, it could only be transferred through a registered sale-deed. The said application was disposed of by the Collector (Consolidation) vide his order dated 14.09.2013 by giving direction to the Tehsildar/Consolidation Officer to first examine as to whether the land mentioned in the Mutation No.17 was situated within the Municipal limits or not and then decide the matter after hearing the parties. The petitioner appealed against the said order before the Addl. Commissioner (Consolidation) Sargodha. This appeal was rejected vide order dated 04.06.2015

and that was maintained by the Board of Revenue, Punjab through order dated 16.11.2016. So this constitutional petition.

2. Impeaching the orders made in the revenue hierarchy the petitioner's counsel submits that the Revenue Officers while passing the impugned orders had neither taken into consideration the locus standi of the respondents Nos.6 and 7 nor appraised the question of limitation. It is further contended that the Consolidation Officer under the law had no lawful authority to review the mutation and thus, the impugned orders are liable to be set aside. He further submitted that till date the pettioner has not been heard or associated by any officer/authority in any inquiry for demarcation of land. He, therefore, requests that by setting aside the impugned orders the matter be remitted to the Collector (Consolidation) for a fresh decision in accordance with law.

3. The above noted request made by the petitioner's counsel has not been opposed by the learned Addl. A.G.

4. Learned counsel appearing on behalf of respondents Nos.6 and 7, however, opposes this petition and submits that since the land falls within the territorial limits of the Municipal Committee it could not be transferred in the name of the petitioner through Mutation No.17 and thus, the orders made in the revenue hierarchy do not warrant any interference.

5. After hearing and perusing the record I find substance in this petition. It is clear that none of the above-stated arguments canvassed on behalf of the petitioner was appraised by the revenue officers. It is also admitted that the land was originally owned by Muhammad Khan and he never raised any objection to the transfer of his 43-kanals 6-marlas land to the present petitioner. It is also not denied that the petitioner was never got involved in any inquiry into the demarcation of the land. All these omissions lead me to believe that the orders made in the revenue hierarchy are not the outcome of fair trial. I have, therefore, no option but to make an order of remand.

6. In view of above, this petition is allowed and all the impugned orders passed by the revenue hierarchy are hereby set aside and declared to have been passed without lawful authority and of no legal effect, and consequently, the matter is remitted to respondent No.3 i.e. Collector (Consolidation), Mianwali with a direction to decide the same afresh strictly in accordance with law, after affording opportunity of hearing to all concerned and through a well-reasoned speaking order.

7. Parties are directed to appear before respondent No.3 on 07.03.2022.

MH/M-56/L Case remanded.

**P L D 2022 Lahore 495**
**Before Shahid Waheed and Faisal Zaman Khan, JJ**
**YASMIN JANG---Appellant**
**Versus**
**ADVOCATE GENERAL, PUNJAB and others---Respondents**

Intra Court Appeals Nos. 37924 and 42321 of 2021, decided on 18th April, 2022.

**(a) Mental Health Ordinance (VIII of 2001)---**

----S. 29---Consent Application---Applicant, residence of---Scope---Applicant of Consent Application does not have to be a resident of area which falls within the jurisdiction of Court---Place of residence is one of the factors on which Court, determines suitability of a person, including applicant, and appoints him/her as guardian or manager of mentally disordered person.

Ahsin Arshad and others v. Advocate General, Punjab and others PLD 2018 Lah. 9 distinguished.

**(b) Mental Health Ordinance (VIII of 2001)---**

----S. 29---Advocate General, consent of---Object, purpose and scope---Advocate General is the highest law officer at the level of Province, who is virtually interested in the purity of administration of justice and preserving dignity of courts---With such presumption in mind and also that swift dispensation of justice is one of the essential elements of a fair trial, which gets more importance when the matter is connected with the person and property of a mentally disordered person, the legislature has made it a condition of obtaining consent of Advocate General in S.29 of Mental Health Ordinance, 2001---Advocate General acts as a medium, to filter out cases which are found to be vexatious, malicious or motivated by personal vendetta and not in the interest of mentally disordered person, and also saves the Court time squandered in handling such type of case, so that the Court can conveniently focus on the serious issues.

**(c) Mental Health Ordinance (VIII of 2001)---**

----S. 29---Appointment of administrator/manager---Proceedings---Consent of Advocate General---Function, nature of---Appellant was aggrieved of appointment of administrator/manager to look after the affairs of person and properties of the patient through a law firm appointed in that respect---Mother of the patient assailed judgment of Single Judge of High Court directing Advocate General to give his consent to approach Court of Protection---Validity---Granting or refusing consent by Advocate General under S. 29 of Mental Health Ordinance, 2001,was no judicial

determination of any legal rights of parties to intended action---All questions relating to appointment of guardian of person and manager of property of mentally disordered had to be decided only by Court which was to entertain petition---Even if Advocate General was to hold an enquiry, he was merely to see whether there was a prima facie case that should be allowed---Appointment of an advocate through a Wakalatnama gave him power to appear and act for any person in any Court, but not before any office such as Advocate General---Application made by law firm/advocate to Advocate General without signature of respondent was not proper and competent, nor the same could be considered that it was filed by any relative of the patient---Petition of respondent under Art. 199 of the Constitution, was not rightly allowed by Single Judge of High Court and Constitutional petition filed by respondent was dismissed---Intra Court Appeal was allowed accordingly.

Ahsin Arshad and others v. Advocate General, Punjab and others PLD 2018 Lah. 9; Padfield and others v. Minister of Agriculture, Fisheries and Food and others (1968) AC 997; The Queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras (1890) 24 QBD 371; Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation (1947) 2 ALL England Law Reports 680; Swami Shantanand Sarswati v. Advocate- General, U.P.,Allahabad and others AIR 1955 Allahabad 372; Miss. Anita Ghulam Ali and 2 others v. Abdul Rehman and 4 others PLD 1972 Kar. 649; Mayer Simon Parur v. Advocate General of Kerala and others AIR 1975 Kerala 57; Raju and another v. Advocate- General H.C. Buildings, Madras and others AIR 1962 Madras 320; Pitchayya and another v. Venkatakrish Namacharlu and others AIR 1930 Madras 129; Managing Committee of Syed Salar Endowment Bahraich, through Sardar Ali and others v. Hakim Mohd and others AIR 1947 Oudh 22; Islamuddin and others v. Ghulam Muhammad and others PLD 2004 SC 633; A.Razzak Adamjee and another v. Messrs Datari Construction Company (Pvt.) Limited and another 2005 SCMR 142 and Dhian Das v. Jagat Ram [(1910) 8 Indian case 1160 (Lahore)] ref.

**(d) Administration of justice---**

----"Executive" and "judicial" acts---Distinction---Executive act with trappings of a judicial procedure is still an executive act, though overlaid with a judicial cover and it cannot be invested with judicial character.

**(e) Legal Practitioners and Bar Councils Act (XXXV of 1973)---**

----S. 22 (3)---Civil Procedure Code (V of 1908), O.III, R.4---Appointment of advocate---Power of attorney (Wakalatnama)---Scope---Provisions of R. 4 of O. III C.P.C. read with S.22(3) of Legal Practitioners and Bar Councils Act, 1973, power of attorney (Wakalatnama) is a document in writing signed by a person or by his

recognized agent or some other person duly authorized by him appointing an advocate to appear or act on his behalf in any Court.

Hfeez Saeed Akhtar for Appellant (in Intra Court Appeal No.37924 of 2021).

Jam Khalid Farid, Assistant Advocate General, Punjab for Respondent No.1 (in Intra Court Appeal No.37924 of 2021).

Muhammad Haroon Mumtaz and Shehryar Khurram for Respondent No.2 (in Intra Court Appeal No.37924 of 2021).

Jam Khalid Farid, Assistant Advocate General, Punjab for Appellant (in Intra Court Appeal No.42321 of 2021).

Muhammad Haroon Mumtaz and Shehryar Khurram for Respondent No.1 (in Intra Court Appeal No.42321 of 2021).

Hfeez Saeed Akhtar for Respondent No.2 (in Intra Court Appeal No.42321 of 2021).

Date of hearing: 18th April, 2022.

## JUDGMENT

**SHAHID WAHEED, J**.---The order sought to be set aside, in these two intra court appeals, is of the Single Bench, whereby the petition brought by Saqib Jang, respondent herein, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution"), that is to say, W.P. No. 28055 of 2021, was allowed and the Advocate General, Punjab was directed to give his consent, within the contemplation of Section 29 of the Mental Health Ordinance, 2001, so that he could approach the Court of Protection.

2. The cause of initiating legal proceedings, up to these appeals, is the health of Aamir Jang, who is allegedly suffering from schizophrenia-paranoid, a disease that falls under the category of "mental disorder" as provided under Section 2(m) of the Mental Health Ordinance, 2001 ("the Ordinance"). Aamir Jang ("the patient") is 67 years old and is currently living with his mother, Mst. Yasmin Jang, who is appellant before us. Saqib Jang is one of the patient's two younger brothers, and he lives abroad. Saqib Jang ostensibly with the view that his mother at the age of 85 years is weak and unable to properly look after the patient's health affairs and property issues, hired the services of a law firm, by executing Wakalatnama, for

appointment of guardian and manager over the person and property of the patient. The law firm accordingly applied to the Advocate General, Punjab, to obtain his consent, so as to move the Court of Protection ("the Court") for appointment of any suitable person as the guardian/manager. On this application, the Advocate General, Punjab through his letter No. 4875/AG-Pb dated 25th February. 2020 asked the Medical Superintendent of the Punjab Institute of Mental Health, Lahore to examine the patient and issue medical certificate. The Medical Superintendent, in reply, requested the Advocate General, Punjab, to direct the concerned to present the patient before him for assessment. The patient's mother was accordingly asked to do so, but she claimed through her counsel that the Advocate General, Punjab had no authority to issue such a directive, and this led to an impasse. To untangle the issue, Saqib Jang filed his constitutional petition seeking an order in the nature of writ of mandamus directing the Advocate General, Punjab to grant him consent in terms of Section 29 of the Ordinance for approaching the Court. On consideration of the matter, the Single Bench allowed the petition through its order dated 31st May, 2021 with the observation that the Advocate General could not withhold his consent on the plea that an inquiry was being conducted, for, if this was to be permitted, then this would become a two tier process and would confer jurisdiction on two parallel forums to conduct an inquiry regarding a person being mentally disordered or not.

3. Based on the given facts, a twofold challenge has been thrown to the order dated 31st May, 2021 of the Single Bench. First is that the impugned order is diametrically opposed to the judgment rendered by another Single Bench of this Court in Ahsin Arshad's case[1] in which it was held that the requirement of giving consent could not be considered mechanical as it required some degree of probe and reasoning, and, in this regard, the consent sought for under Section 29 of the Ordinance was limited to three aspects, first to ensure that the mentally disordered person and the relative who sought guardianship resided within the jurisdiction of the Court, secondly that there was a mentally disordered person for whose property an application under Section 32 or 33 of the Ordinance had been made, and finally that relatives of such person had moved the application. The second objection of the appellant is that the Advocate General, Punjab, could not be ordered to process the application which was not signed by the patient's brother and was filed before him by his counsel solely on the basis of Wakalatnama. The above-taken exceptions oblige us to examine the scope and role of the Advocate General within the regime provided in the Ordinance vis-a-vis the appointment of any suitable person to be

[1] **Ahsin Arshad and others Vs. Advocate General, Punjab and others(PLD 2018 Lahore 9)**

made by the Court as guardian of a mentally disordered person or manager of such person to look after his property, and for that matter, a careful look at Chapter-V of the Ordinance is essential.

4. It is to be noted that earlier the law regulating the affairs of mentally disordered persons was the Lunacy Act, 1912. That law was not comprehensive enough and did not adequately meet the requirements of the United Nations Convention on the Rights of the Persons with Disabilities (UNCRPD); particularly, the command of the Constitution which guarantees the social and economic well-being of all citizens including mentally disordered persons, regardless of sex, caste, creed, race, or any other basis. The Constitution, with a comprehensive catalogue of fundamental rights, is the basic source to protect human rights and it serves as a shield against any infringement of the rights of mentally disordered persons. Being sensitized of its duty, it appears, the Government repealing the Lunacy Act, 1912 made and promulgated the Ordinance (i.e. the Mental Health Ordinance, 2011) for the treatment and care of mentally disordered persons, to make better provision of their care, treatment, management of properties and affairs and to provide for matters connected therewith or incidental thereto and to encourage community care of such mentally disordered persons and further to provide for the promotion of mental health and prevention of mental disorder. We are here concerned with Chapter-V of the Ordinance which deals with judicial proceedings for appointment of guardian of person and manager of the property of the mentally disordered. It consists of eighteen sections and their underlined intent is to swiftly attend to all the issues relating to a mentally disordered person, and their conjoint reading suggests that the legislature has prescribed a four-steps procedure for appointment of guardian of a person and manager of the property of the mentally disordered person. The first step is to apply for the consent of the Advocate General, Punjab. This may be called Consent Application step. According to Section 29 of the Ordinance there are four mandatory prerequisites for filing the Consent Application, and that is, it must be about a person who (i) possesses property, (ii) is alleged to be mentally disordered, (iii) resides within the jurisdiction of the Court, and (iv) it must be from any of the relatives of such person. It is important to clarify here that the applicant of the Consent Application does not have to be a resident of the area which falls within the jurisdiction of the Court, as the place of residence is one of the factors on which the Court, determines the suitability of a person, including the applicant, and appoints him/her as the guardian or manager of the mentally disordered person. We, therefore, with respect, disagree with the observation recorded in Ahsin Arshad's case (supra) that the relative who seeks guardianship/ managership must also be

resident of the area falling within the jurisdiction of the Court. The second step is to file a petition in the Court. Any relative who has obtained the consent of the Advocate General, Punjab may file a petition before the Court, on which the Court will, in the first instance, by order direct an inquiry, for the purpose of ascertaining whether a person, for whom the petition has been filed, is mentally disordered and incapable of managing himself, his property and his affairs. In the third step, the Court, after assessing the mental capacity, shall proceed to determine the suitability of a person to be appointed as guardian/manager, and in this process, the Court will observe the principle of welfare of the mentally disordered person. And in the fourth and last step, the Court in respect of a mentally disordered person may under section 32 of the Ordinance appoint suitable person to be his guardian, or order him to be looked after in a psychiatric facility and order for his maintenance, and for management of property of such person the Court under section 33 shall appoint manager. These steps of judicial proceedings, we think, are sufficient to conclude that the law has ensured a fair trial for the protection of all kinds of interests of the mentally disordered person. Now from this standpoint, we proceed further and examine why the legislature has made it mandatory to obtain the consent of the Advocate General, Punjab before approaching the Court, and also the mechanism which the Advocate General, Punjab is supposed to observe while granting consent.

5. The Advocate General is a limb of the executive qua his official capacity. The requirement of obtaining his consent, where any of the relatives of the mentally disordered person wants to move the Court for appointment of guardian of person and manager of the property of such person, is not a mere formality; it has a salutary purpose. The Advocate General being the highest law officer at the level of the Province, is virtually interested in the purity of the administration of justice and preserving the dignity of the courts. With this presumption in mind and also that swift dispensation of justice is one of the essential elements of a fair trial, which gets more importance when the matter is connected with the person and property of a mentally disordered person, the legislature appears to have made it a condition of obtaining the consent of the Advocate General in section 29 of the Ordinance, which acts as a medium, to filter out cases which are found to be vexatious, malicious or motivated by personal vendetta and not in the interest of mentally disordered person, and also saves the Court time squandered in handling such type of case, so that the Court could conveniently focus on the serious issues.

6. Now it is to be seen what basic questions the Advocate General will address himself when considering an application for his consent, and on what principles his

powers will be governed. This proposition may be examined in the light of the judgment of the House of Lords in Padfield's case[2]. In that case the Minister had a general duty under the Agriculture Marketing Act, 1958 to decide whether to refer certain complaints to a committee of investigation, and refused to do so in the case of a particular complaint because he found it unsuitable for investigation by means of this procedure. Padfield applied to the Divisional Court for an order of mandamus commanding the Minister to refer his complaint to the committee of investigation, and the House of Lords, reversing the Court of Appeal, allowed the appeal and remitted the matter to the Divisional Court to require the Minister to consider Padfield's complaint according to law. The case is relevant to the function of the Advocate General in considering consent request since it recognized that statute had given an executive officer a discretion regarding the reference of complaints to a given tribunal, and considered the principle governing the exercise of this discretion and accordingly the measures of judicial control of the Minister. Speaking of the power to refer a complaint to the committee, Lord Reid proposed that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court," adding that "if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court."

7. Applying the implications of Padfield's case, it becomes explicit that the authority of the Advocate General, when considering an application for his consent, is by no means ministerial one, nor is his power unfettered. It is important to bear in mind, first, that the sole purpose of his consideration is to decide whether the matter is one which he thinks ought to be dealt with by the procedure of the Court under the Ordinance, and secondly, that it is to his discretion and not that of anyone else that legislature has entrusted the decision whether or not any particular matter should be so dealt with. In reaching his decision, he must take into consideration the policy and object of the Ordinance. Thus, for the purposes of grant of consent to allow the matter to go to the Court, he needs to confine himself only to four questions, that is,

[2] **Padfield and others v. Minister of Agriculture, Fisheries and Food and others (1968) AC 997**

first whether the person about whom proceedings are to be initiated possesses any property, secondly, whether such person is alleged to be mentally disordered, thirdly, whether alleged mentally disordered person resides within the jurisdiction of the Court, and lastly, whether the applicant is a relative of the alleged mentally disordered person?[3] Indeed, save in so far as may be necessary to make some inquiries into the above questions to satisfy himself, the Advocate General is not at this stage concerned with the merits of the case at all. These will be for the Court to consider if he decides to refer the case to it[4]. It is pertinent to clarify here that although it is salutary to follow the judicial forms of procedure in the investigation of the above questions, indeed advisable, to dispel fear or apprehension of arbitrariness in the mind of the aggrieved person, there is no compelling statutory obligation on the part of the Advocate General to hear witnesses, to admit documentary evidence ete. when he is moved under section 29 of the Ordinance,[5] but as the Principal Law Officer of the Provincial Government and closely associated with its agencies or instrumentalities, it is incumbent upon him to make an inquiry, at least by getting a verification report from all concerned about the supporting documents of the Consent Application, such as the Family Registration Certificate (FRC), property documents, medical certificate of a Psychiatrist, and certificate issued by the concerned agency relating to the place of residence of the alleged mentally disordered person, and then grant his consent, and doing so, will establish that the applicant has disclosed a prima-facie case to be referred to the Court for trial[6], which in turn, will also facilitate the Court to speedily attend to all the issues relating to the appointment of a guardian/manager of the mentally disordered person. Given the above exposition, we are poised to conclude that the observations recorded by the Single Bench in its order dated 31st of May, 2021 about the nature of duty and function of the Advocate General do not match with the intent of section 29, and they are too far from the policy of the Ordinance.

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**[3] The Queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras [1890)24 QBD 371] Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation (1947) 2 ALL England Law Reports 680**
**Swami Shantanand Sarswati , v. Advocate- General, U.P.,Allahabad and others (AIR 1955 Allahabad 372) Miss. Anita Ghulam Ali and 2 others v. Abdul Rehman and 4 others (PLD 1972 Karachi 649).**
**[4] Mayer Simon. Parur. V. Advocate General of Kerala and others (AIR 1975 Kerala 57)**
**[5] Raju and another v. Advocate- General H.C. Buildings, Madras and others (AIR 1962 Madras 320)**
**[6] Pitchayya and another v. Venkatakrish namacharlu and others (AIR 1930 Madras 129) Managing Committee of Syed Salar Endowment Bahraich, through Sardar Ali and others v. Hakim Mohd and others (AIR 1947 Oudh 22)**
**Islamuddin and others v. Ghulam Muhammad and others (PLD 2004 Supreme Court 633) A.Razzak Adamjee and another v. Messrs Datari Construction Company (Pvt.) Limited and another ( 2005**
**SCMR 142)**

8. In the end, we look at the second objection of the appellant. The stance of the appellant is that the Consent Application filed in the office of the Advocate General, purportedly on behalf of Saqib Jang, was not maintainable. The rationale of this objection, as we understood it, is that no advocate or law firm, solely based on Wakalatnama (power of attorney), could apply to the Advocate General for obtaining his consent, and thus, the application that was filed by the law firm without the signature of Saqib Jang, could not, in any way, be construed as an application of the patient's relative, and therefore, no directive could be issued to the Advocate General to grant his consent on it. In order to find out the answer to this objection, it is essential to, firstly, clear whether the power exercisable by the Advocate General under section 29 of the Ordinance is a judicial power and whether the resultant act is a judicial order. We have no doubt in our minds that the granting or refusing consent by the Advocate General under section 29 of the Ordinance is no judicial determination of any legal rights of the parties to the intended action, for, all the questions relating to appointment of guardian of person and manager of the property of the mentally disordered have to be decided only by the Court which entertains the petition. Even if the Advocate General has to hold an enquiry, he is merely to see whether there is a prima facie case that should be allowed to go to the Court. When he gives his consent to the filing of petition he does nothing more than this. Needless to observe here that an executive act with the trappings of a judicial procedure is still an executive act, though overlaid with a judicial cover, and it cannot be invested with judicial character. For all these reasons we think that the decision of the Advocate General cannot be called a judicial or quasi-judicial one. It is, for all intents and purposes, merely an administrative or executive act or decision.[7] To fortify this opinion, it is important to mention this here that the Advocate General is appointed by the Governor under Article 140 of the Constitution, and it is his duty to give advice to the Provincial Government upon such legal matter, and to perform such other duties of a legal character, as may be referred or assigned to him by the Provincial Government. The above-mentioned nature of duties suggests that the forum of the Advocate General is not a Court nor is it similar to any other judicial authority. It is a purely government office, and that is why in the Punjab Government Rules of Business, 2011 it has been given the status of a special institution of the Law and Parliamentary Affairs Department.

9. The above clarification brings us to consider another point in order to provide complete answer to the second objection of the appellant, and that is, whether any law firm or advocate on the basis of Wakalatnama alone could apply to the

[7] **Dhian Das v. Jagat Ram [(1910) 8 Indian case 1160 (Lahore)]**

Advocate General for obtaining his consent within the scope of section 29 of the Ordinance. The essence of this point raises the need to understand what is meant by Wakalatnama. No statutory law defines Wakalatnama. However, given the provisions of Rule 4 of Order III, C.P.C. read with subsection (3) of section 22 of the Legal Practitioners and Bar Councils Act, 1973, it can be safely said that it is a document in writing signed by a person or by his recognized agent or some other person duly authorized by him appointing an advocate to appear or act on his behalf in any Court. This means that the appointment of an advocate through a Wakalatnama gives him the power to appear and act for any person in any Court, but not before any office such as the Advocate General, and if so, we can safely conclude that the second objection of the appellant is valid, and the application made by the law firm/advocate to the Advocate General without the signature of Saqib Jang was not proper and competent, nor it can be considered that it was filed by any relative of the patient.

10. For all these reasons we are of the opinion that the petition of the respondent-Saqib Jang under Article 199 of the Constitution, that is, W.P. No.28055 of 2021 was not rightly allowed by the Single Bench. We accordingly accept both these appeals, set aside the order dated 31st May, 2021, and dismiss writ petition with the observation that the respondent-Saqib Jang shall be at liberty to file a fresh application in terms of section 29 of the Ordinance, if he so desires, which once filed, shall be entertained and decided by the Advocate General, Punjab expeditiously and in accordance with the law.

11. Office is directed to place the Photostat copy of this judgment in the file of I.C.A. No.42321 of 2021.

**PLD 2022 Lahore 635**

**Zainab Umair---Appellant**
**Versus**
**Election Commission of Pakistan & others---Respondents**

**Writ Petition No.34648 of 2022**

| | |
|---|---|
| Petitioner by:- | M/s M. Azhar Siddique, Ahmad Imran Ghazi, Fareeha Arif, Barrister Nudrat B. Majeed and Dr. Ali Qazalbash, Advocates. |
| Federation of Pakistan by: | Mr. Nasar Ahmad, Additional Attorney General for Pakistan. |
| | Mr. Khawar Bashir, Assistant Attorney General for Pakistan. |
| Province of Punjab by: | Mr. Muhammad Shahzad Shaukat, Advocate General. |
| | Mr. Muhammad Arif Raja, Additional Advocate General, Punjab. |
| ECP by: | M/s Barrister Haris Azmat, Barrister Mariam Riaz and Sarim Shahid, Advocates. |
| | Mr. Imran Arif Rnjha, Advocate/Legal Advisor of ECP with Umar Hayat, Director (Legal) and Hafiz Adeel Ashraf, Legal Assistant, ECP. |
| PML(N) by: | Mr. Khalid Ishaq, Advocate. |

**Writ Petition No.34645 of 2022**

**Samuel Yaqoob & another---Appellants**

**Versus**
**Election Commission of Pakistan & others---Respondents**

| | |
|---|---|
| Petitioners by:- | M/s Syed Ali Zafar, Amir Saeed Rawn and Zahid Nawaz Cheema and Fareeha Arif, Advocates. |
| Petitioner No.2 by: | M/s Malik Zeeshan Ahmad and Rao Zafar Iqbal, Advocates. |
| Federation of Pakistan by: | Mr. Nasar Ahmad, Additional Attorney General for Pakistan.<br><br>Mr. Khawar Bashir, Assistant Attorney General for Pakistan. |
| Province of Punjab by: | Mr. Muhammad Shahzad Shaukat, Advocate General.<br><br>Mr. Muhammad Arif Raja, Additional Advocate General, Punjab. |
| ECP by: | M/s Barrister Haris Azmat, Barrister Mariam Riaz and Sarim Shahid, Advocates.<br><br>Mr. Imran Arif Rnjha, Advocate/Legal Advisor of ECP with Umar Hayat, Director (Legal) and Hafiz Adeel Ashraf, Legal Assistant, ECP. |
| PML(N) by: | Mr. Khalid Ishaq, Advocate. |
| Date of hearing: - | 27.06.2022 |

**JUDGMENT**

**SHAHID WAHEED, J:-** These two constitutional petitions are amenable to common disposal as they aim to target the consolidated order dated 2nd of June, 2022 which was issued by the Election Commission of Pakistan ("ECP") on three different applications in which the matter directly and substantially in issue excited the construction of the provisions of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") about the procedure of filling the seats reserved for women and non-Muslims in the Provincial Assembly, Punjab.

2. It will conduce to analytical clarity of the moot if I briefly relate the occurrences giving rise to these two petitions. So I do it. In 2018, a general election to the Provincial Assembly, Punjab was held in which the Pakistan Tehreek-e-Insaf (PTI) secured 142 general seats and the Pakistan Muslim League (N) [PML(N)] secured 130 general seats. It is apposite to state here that the said result included those independent candidates who had joined political parties within three days in terms of Article 106(3)(c) of the Constitution. Based on these results, the ECP worked out quota of reserved seats for women and non-Muslims of the political parties. The PTI bagged 33 seats reserved for women and 4 seats for non-Muslims, while the PML(N)

seized 30 seats reserved for women and 4 seats for non-Muslims. These reserved seats were accordingly filled from the list of candidates provided by the PTI and the PML (N). Since the PTI had won a majority of the total membership of the Punjab Provincial Assembly, it formed the government. The PTI government served until 28th March, 2022, when its Chief Minister resigned. The Governor of Punjab accepting the resignation summoned the Punjab Provincial Assembly to elect a new Chief Minister. In this election, 25 members of the PTI voted against the direction of their party, and thus, they were declared to have defected, as a result of which they ceased to be members of the Provincial Assembly and their seats became vacant. Accordingly, the ECP on 23rd May, 2022 de-notified these defected members under Article 63A(4) of the Constitution through three different notifications. It is important to note that out of the 25 who defected, 5 were elected to reserved seats. The PTI then applied to the ECP for the issuance of notification of members against reserved seats from its priority list. The PTI Parliamentary Leader, Punjab also filed a separate application for the issuance of notification of PTI's nominees for the seats reserved for women and non-Muslims. On the contrary, the PML(N) also filed an application asking the ECP to recalculate the quota of reserved seats. All these applications sparked controversy as to whether the vacant reserved seats would be filled from the party list or on the basis of the changed strength of political parties in the Assembly.

3. To untangle the controversy, the ECP first consolidated the three above-stated applications and then framed the following questions to make it more easier, and to find out a comprehensive answer: -

i. Whether the reserved seats for women and non-Muslims in an Assembly won by each political party on the basis of general seats in a general election are subject to change on account of subsequent increase or decrease of general seats of a political party in an Assembly due to death, resignation or disqualification of members of a political party?
ii. Whether the electoral college in the Provincial Assembly, Punjab is complete for the purpose of filling of vacant reserved seats after the de-notification of twenty members of the Assembly?
iii. Whether the proportional representation mentioned in Article 106(3)(c) will not be defeated if the vacant reserved seats are filled despite change in the strength of general seats of the political parties in the Assembly?

4. The questions formulated by the ECP made the true construction of Article 106 and Article 224(6) of the Constitution critically important as their fate depended on it. I think so too. So let's take a look at them. The provisions of Article 106 of the Constitution are like this:

> 106. (1) Each Provincial Assembly shall consist of general seats and seats reserved for women and non-Muslims as specified herein below: -

| | General Seats | Women | Non-Muslims | Total |
|---|---|---|---|---|
| Balochistan | 51 | 11 | 3 | **65** |
| Khyber Pakhtunkhwa | 115 | 26 | 4 | **145** |
| The Punjab | 297 | 66 | 8 | **371** |
| Sindh | 130 | 29 | 9 | **168** |

(1A) ……;

(1B) ……;

(2) ……-

(a) ……..;

(b) ……..;

(c) ……..;

(d) ……...

(3) For the purpose of election to a Provincial Assembly,-

(a) ……;

(b) each Province shall be a single constituency for all seats reserved for women and non-Muslims allocated to the respective Provinces under clause (1);

(c) the members to fill seats reserved for women and non-Muslims allocated to a Province under clause (1) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of the total number of general seats secured by each political party in the Provincial Assembly;

Provided that for the purpose of this sub-clause, the total number of general seats won by a political party shall include the independent

returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

The second Article is in the following terms:

**224. ……**

(1A) ……;

(1B) ……;

(2) …….

(3) …….

(4) …….

(5) …….

(6) When a seat reserved for women or non-Muslims in the National Assembly or a Provincial Assembly falls vacant, on account of death, resignation or disqualification of a member, it shall be filled by the next person in order to precedence from the party list of the candidates to be submitted to the Election Commission by the political party whose member has vacated such seat.

Provided that if at any time the party list is exhausted, the concerned political party may submit a name for any vacancy which may occur thereafter.

5. Mindful of the above provisions of the Constitution the lawyers for both sides ventured their respective arguments before the ECP. Incidentally, save the one argument about which I will refer to in the latter part of this judgment, the lawyers have presented the same set of arguments to me. The standpoint of the PTI was that the quota of reserved seats is calculated once after every general election, and is not subject to change subsequently notwithstanding an increase or decrease in the strength of general seats of a political party, whereas the stance of the PML(N), in contrast to the PTI, was that the Constitution does not bar recalculation of quota at a subsequent stage due to the increase or decrease of general seats of a parliamentary party in the

Assembly. The ECP, however, espoused the argument of the PML(N) and concluded that, firstly, Article 224(6) of the Constitution does not provide any methodology for filling of vacancies of reserved seats on account of mass scale de-seating of the members of the general seats in the Provincial Assembly, and it is not automatic and is dependent upon strength of general seats in the Provincial Assembly, secondly, in the present scenario the electoral college of the Punjab Assembly is not complete due to disqualification and subsequent de-seating of twenty members of general seats of the PTI, and thirdly, the proportional representation of political parties, election and filling of reserved seats have close nexus with each other, and thus, if the number of general seats goes down then it directly affects the proportional representation of the political party mentioned in Article 106(3)(c) of the Constitution. Based on the above conclusion, the ECP through its consolidated order dated 2nd June, 2022 deferred the filling of the vacant reserved seats till the outcome of bye-election on twenty general seats in the Punjab Provincial Assembly, and accordingly disposed of the said three applications.

6. After hearing the lawyers of the parties as well as the Additional Attorney General for Pakistan and the Advocate General, Punjab and reviewing the provisions of the Constitution, I do not agree with the opinion expressed by the ECP in its order dated 2nd June, 2022. The first question to be determined in this case is whether the reserved seats for women and non-Muslims in the Assembly won by each political party on the basis of general seats in a general election are subject to change on account of subsequent increase or decrease in general seats of a political party in the Assembly due to death, resignation or disqualification of members of a political party. It can be easily gleaned from the order dated 2nd June, 2022 that the ECP agreeing with the argument of the PML(N) returned its answer to this question in the affirmative on the ground that the Constitution does not prohibit recalculation of quota at a subsequent stage due to an increase or decrease of a political party in the Assembly. This answer, in my view, is not consistent with the letter and spirit of the Constitution; particularly with its substantive provisions of Articles 106(3)(c) and 224(6). It is putative principle that public bodies and private persons are both subject to the Rule of Law. For private persons, the rule is that everything that is not forbidden is allowed[1]. But for public bodies like the ECP, the rule is opposite. It is that everything that is not allowed by the substantive provisions of the law and the Constitution is forbidden[2]. In the light of this position of law, when we make a conjoint reading of Article 106(3)(c) and Article 224(6), it emerges that they suggest three things, that is to say, firstly, calculation of quota for the seats reserved for women and non-Muslims shall be made on the basis of the total number of general seats secured by each political party in the general election to the Provincial Assembly, secondly, the members to fill seats reserved for women and non-Muslims shall be elected through proportional representation system of political parties' lists of candidates, and thirdly, when a seat reserved for women or non-Muslims in a

[1] **R v. Somerset County Council ex p Fewings (1995) 1 All ER 513**
[2] **The Constitutional Balance by John Laws, Edition 2021, Page 80**

Provincial Assembly falls vacant, on account of death, resignation or disqualification of a member, it shall be filled by the next person in order of precedence from the party list of the candidates, submitted to the ECP in terms of Article 106(3)(c) upon the compilation of the results of general seats secured by each political party in the general election, whose member has vacated such seat. So, the mention of these three things in clear terms in the Constitution necessarily implies that due to subsequent variation in the strength of the political party on the general seats, the recount or recalculation of quota at any later stage is excluded[3].

7. There is another good reason on which the opinion of the ECP must be repelled. The ECP is of the opinion, and so are the arguments of its lawyer, supported by the Additional Attorney General for Pakistan and Advocate General, Punjab, that if mass scale de-seating reduces the strength of a political party in general seats, it necessarily requires a recount of its quota of reserved seats. That begs the question. Suppose that two years after the commencement of the term of the Provincial Assembly or in its last year only the members elected to the general seats of a political party are largely de-seated. Does that mean that the quota of reserved seats of this party will be re-fixed and if it is reduced then the members elected to the reserved seats will have to be automatically de-seated? The answer is definitely "No", because the principle of retrenchment does not apply to members of the Assembly, nor does the Constitution support the idea that any member should be de-seated before the end of the tenure of the Provincial Assembly when he or she does not exhibit any of the conduct that falls under Article 63 or 63A of the Constitution, and, in the result, it underpins the stance of the PTI that the quota of reserved seats is calculated once after every general election, and any subsequent variation in the strength of general seats of a political party cannot be allowed to be made a basis to change it, otherwise, it will create a constitutional imbalance.

8. We may examine the first question from another angle. Let us put this question on the test of the rule of harmony and find out its answer. It is now well recognized that the Constitution is to be construed in a manner which may give effect to each and every word of the same, and which may harmonize the working of the same, and which may achieve the object underlined in the relevant provisions[4]. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution[5]. In the case at hands, the pivotal provisions

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[3] **- Expressio unius, exclusio alterius**
**- Khawaja Ghulam Sarwar v. Pakistan through the General Manager, PWR Lahore (PLD 1962 SC 142)**
**- R(Veolia ES Nottinghamshire Ltd) v. Nottinghamshire County Council (2010 EWCA Cir 1214**
**- Construction of Statutes by Earl T. Crawford, section 195**

[4] **D. Ginsberg & Sons v. Popkin 285 US 204**
**Canada Sugar Refining Co. Ltd. v. R (1898) AC 735**
**Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324)**
**Syed Masroor Ahsan and others v. Ardeshir Cowasjee and others (PLD 1998 SC 823)**

[5] **Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473)**

for the question under consideration are provided in clause (6) of Article 224 of the Constitution which proclaims that when a seat reserved for women or non-Muslims in the Provincial Assembly falls vacant, it shall be filled by the next person in order of precedence from the party list of the candidates submitted to the ECP by the political party whose member has vacated such seat. On the contrary, a perusal of the impugned order dated 2nd June, 2022 gives the impression that the ECP while returning its findings did not notice the implication of the expression "**whose member has vacated such seat**" mentioned in Article 224(6) of the Constitution and through its interpretation made it redundant. This was highly improper and against the rule of harmony. In my view, the said expression is a sinew of Article 106(3)(c) and Article 224(6) of the Constitution, and, for the situation with which we are confronted here, its use provides us a solid foundation to suggest a complete pragmatic answer to the question under consideration, that is, once the quota of reserved seats is determined after every general election, it becomes indissoluble for the whole tenure of the Assembly, secondly, any subsequent change in the total number of general seats won by a political party will be inconsequential to fill the vacant reserved seats, and thirdly, it will be a ministerial function of the ECP, of course, subject to compliance with certain formalities of law by the candidate, to fill the vacant reserved seats from the party list of the candidates submitted to it by the political party whose member has vacated such seat.

9. I will now turn my attention to the argument that the respondents did not present to the ECP but did put before me. They said that the reserved seats had become vacant due to the defection of PTI members and since defection is not disqualification as per Article 63 of the Constitution, the procedure prescribed in Article 224(6) cannot be resorted to filling the vacant reserved seats. Explaining this argument, their lawyers argued that the instant matter does not fall under the purview of Article 224(6) of the Constitution as it applies to vacancies arising on account of death, resignation or disqualification of a reserved seat member and not de-seating of a member, and secondly, that Article 63A(4) of the Constitution stipulates that upon confirmation of a declaration by the ECP, the defected member shall cease to be a member of the House, and his seat shall become vacant; this entails de-seating of the defected member as opposed to triggering the distinctive disqualifications enshrined in Article 63 of the Constitution. This argument just does not hold water. Article 224(6) of the Constitution indeed talks about the seats that fall vacant on account of disqualification, but by any means, it does not mean that it envisages only that disqualification that has been enumerated in Article 63 of the Constitution. If I were to accept this argument, it will run counter to the well-settled principles of interpretation of constitutional provisions, bring irreconcilable anomalies, and also make certain provisions of the Constitution redundant, so it would be prudent to ignore it and to find out some other valid practical solution to it. It is a matter of fact that the word disqualification is not defined in the Constitution, and thus, it must be given simple, natural, general, and grammatical meaning consistent with the purpose

of the Constitution and also to bring harmony in its all clauses[6]. It is common knowledge that the word disqualification is a noun and it simply means the act of preventing somebody from doing something because he has broken a rule or is not suitable[7]. The use of this plain meaning makes it clear that a person stands disqualified to act as a member of the Assembly either on the basis of matters listed in Article 63 of the Constitution or on the ground of defection provided in Article 63A of the Constitution. So, it can be safely concluded that when a reserved seat becomes vacant on account of any kind of above-stated disqualifications, it shall be filled in accordance with the procedure laid down in Article 224(6) of the Constitution.

10. In the position of law described above, there is little need for further deliberation, and to address the other two questions formulated by the ECP, suffice is to say that, in the given circumstances, there is no barrier to filling the vacant reserved seats from the list of candidates furnished by the PTI, and in doing so, the proportional representation system mentioned in Article 106(3)(c) will not be defeated.

11. The foregoing were the reasons that persuaded me to reverse the order dated 2nd June, 2022 of the ECP and to accept these two constitutional petitions through the following short order:-

> "For the reasons to be recorded later, this constitutional petition and the connected petition i.e. W.P.No.34645 of 2022 are allowed, the order dated 2nd June, 2022 of the Election Commission of Pakistan, Islamabad is set aside and declared to have been passed without lawful authority and of no legal effect, and as a consequence, the application of Pakistan Tehreek-e-Insaf (PTI) for issuance of notification of members of the Provincial Assembly, Punjab against reserved seats from its priority list and application of Muhammad Sibtain Khan, MPA, Parliamentary Leader of Pakistan Tehreek-e-Insaf (PTI), Punjab, for issuance of notification of nominated members of Pakistan Tehreek-e-Insaf (PTI) for reserved seats for women and non-Muslims are allowed, while the application of Pakistan Muslim League (N) for recalculation of quota of reserved seats after disqualification of members of Pakistan Tehreek-e-Insaf (PTI) under Article 63-A of the Constitution of the Islamic Republic of Pakistan, 1973 is dismissed. The Election Commission of Pakistan is directed to issue notification of members

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[6] **Ripon (Highfield) Housing Conformation Order, 1938**
**White & Collins v. Minister of Health (1939) 2 KB 838**
**Bibi Gurdevi v. Chaudhri Muhammad Bakhsh and others (AIR 1943 Lah. 65)**
**Ghulam Murtaza v. Muhammad Ilyas and 3 others (PLD 1980 Lahore 495)**
**Understanding Statutes**
**(Cannons of Construction) by S.M.Zafar, Edition 2016, Page 88**

[7] **Oxford Advanced Learner's Dictionary of Current English, Seventh Edition, Page 441**
**Cambridge International Dictionary of English, Edition 1995, Page 397**

of Provincial Assembly, Punjab against the vacant reserved seats from the priority list of Pakistan Tehreek-e-Insaf (PTI).

2. The Additional Registrar (Judicial) of this Court shall communicate this order to the Election Commission of Pakistan for compliance.

3. Office is directed to place the photostat copy of this order in connected W.P.No.34645 of 2022."

**2022 CLC 1973**

**Muhammad Hussain deceased through L.Rs. & other---Appellant**

**Versus**
**Muhammad Ali & others---Respondents**

**Civil Revision No.490 of 2013**

| | |
|---|---|
| Petitioners by | Mian Mahmud Ahmad Kasuri, Advocate |
| Respondents No.1-A to1-E and 2 by | M/s Shaukat Ali Mehar,<br>Malik Muhammad Aslam and<br>Abdul Khaliq Butt, Advocates |
| Respondents No.3 to 10 by | Nemo |
| Date of hearing | 12.05.2022 |

**JUDGMENT**

**SHAHID WAHEED, J:-** This application under Section 115 CPC is of the unsuccessful plaintiffs and seeks revision of the concurrent findings of the two Courts below whereby their declaratory suit was dismissed.

2. The pleadings, in this case, unfurl that the dispute is related to an unpartitioned share of land measuring 163 kanals 8 marlas out of total land of 467 kanals, 18 marlas situated within the revenue estate Baghsingh Wala, Tehsil and District Kasur. This land belonged to Taj Din who was unmarried and had two brothers, namely, Nawab Din and Siraj Din and both of them had died. The plaintiff No.1 was the son of Siraj Din whereas other plaintiffs and defendant No.1 were the daughters and sons of Nawab Din. The defendant No.2, Muhammad Zahid is the son of defendant No.1. Taj Din passed away on 2nd January, 1998, and after his death, the plaintiffs probed the revenue records and found that the disputed land, based on two documents, had already been mutated in the name of defendant No.1. The first document was the registered General Power of Attorney No.67 dated 20th January, 1994 (Ex.P-1) in which the defendant No.2 was stated to be the attorney of Taj Din, and the second document was the registered deed No.1861 dated 23rd April, 1994 (Ex.P-1 = Ex.D-1) by which defendant No.2, based on the first document, gifted the disputed land to his father (defendant No.1). This transaction was incorporated in the revenue record vide mutation No.154 dated 29th November, 1995 (Ex.P-3). The plaintiffs then on 30th March, 2000 instituted their suit seeking

declaration to the effect that Power of Attorney (Ex.P-1), gift deed No.1861 (Ex.P-2) and mutation No.154 (Ex.P-3) were illegal and had no effect on their rights. The rationale of their challenge was that Taj Din was over 90 years old at the time of alleged execution of the documents and that he had lost his senses and eyesight, and since the defendant No.1 was a Lambardar, he fraudulently, firstly by obtaining a thumb-mark of Taj Din on the first document got appointed his son as general attorney and then from him got transferred the disputed land to his name through gift deed and mutation. On the other hand, the defendants No.1 and 2 through their joint written statement denied the allegations and maintained that Taj Din in his lifetime and his full senses had appointed Muhammad Zahid (defendant No.2) as his general attorney to look after the affairs of the disputed property, and one of the powers granted to Muhammad Zahid was that he could gift the disputed property, and that based on said power, the attorney validly gifted it to his real father (defendant No.1).

3. The divergent stances of the parties to the suit led the Trial Court to frame issues and to record evidence thereon. On consideration of the evidence available on record, the Trial Court dismissed the suit vide judgment and decree dated 15th November, 2010. Against this decision the plaintiffs took an appeal to the District Court. Their appeal was heard by the Additional District Judge, Kasur but it could not evoke a favourable response and the same was dismissed vide judgment and decree dated 27th November, 2012. So, this revision.

4. Name of learned counsel for respondents No.3 to 5 duly reflects in the cause list, nonetheless, no one is present on their behalf. Despite service, no one is present on behalf of respondents No.9 & 10. Thus, respondents No.3 to 5, 9 and 10 are proceeded against ex-parte. Respondents No.6 to 8 have already been proceeded against ex-parte vide order dated 27th June, 2019.

5. After hearing both the sides, it appears that the allegations of fraud, though are important and require a meticulous appraisal of evidence available on record, but I think, they may be put on the back-burner, so as to first consider the prime question, that is, assuming the General Power of Attorney (Ex.P-1) is valid (without declaring it so), whether the defendant No.2, exercising power under it, could transfer the disputed property to his father (defendant No.1) as a gift. It is to be noted that gift is a personal action which can be performed by the owner himself only and for that reason, it is now well settled that the agent cannot of his own transfer the immovable property of the principal/owner through gift based on any power of attorney, even if the power of attorney contains the power to transfer the property through gift. In the case of "**Ijaz Bashir Qureshi** v. **Shams-Un-Nisa Qureshi and others**" (**2021 SCMR 1298**), it has been held that such powers can only be used for completion of codal formalities of the gift which must be by the owner himself and if on the contrary a transfer is made, it will be invalid. In the

present case, the gift was allegedly based on consideration of love and affection of Taj Din for his nephew, Muhammad Ali, defendant No.1, which he had developed in lieu of his services. Love and affection, as per above-stated principle, could not be expressed by the attorney (defendant No.2) on behalf of Taj Din. The sentiments which were the consideration for gift and also the intention to make it must be established to have come in clear terms from Taj Din. On the contrary, a perusal of the evidence available on record does not suggest that the attorney (defendant No.2) before executing gift deed (Ex.P-2) or making gift in favour of his father (defendant No.1) ever obtained the consent and permission of Taj Din, and recitals of the gift deed (Ex.P-2) indicate that the attorney, of his own, had transferred the property through gift to his father, which was not permissible under the law. There is yet another aspect of the matter. According to "**Ghulam Haider** v. **Ghulam Rasool and others**" (**2003 SCMR 1829**) and "**Mst. Kulsoom Bibi and another** v. **Muhammad Arif and others**" (**2005 SCMR 135**) a donee claiming under a gift that excludes an heir, is required by law to establish the original transaction of gift irrespective of whether such transaction is evidenced by a registered deed. In the present case, the defendant No.1 was the beneficiary of the transaction but he did not appear as his own witness to substantiate the stance stated by him in his written statement and also to prove the essential ingredients of gifts, and his two witnesses, that is, DW-2 and DW-3 though stated in their statements that Taj Din had told them that he wanted to give his land to defendant No.1, but both the witnesses did not say that Taj Din ever declared that he had given his land as a gift to defendant No.1. So, the conclusion would be that there was no evidence of declaration of gift by Taj Din or its acceptance by defendant No.1. In fact, the defendant No.1 in his written statement did not state that Taj Din had ever made the gift, but his stance was that the defendant No.2-attorney had gifted the disputed land to him on the basis of General Power of Attorney (Ex.P-1). In these attending circumstances, mere transfer of possession to defendant No.1 was not sufficient to constitute a valid gift, nor could the gift deed (Ex.P-2), per the judgment reported as "**Barkat Ali through legal heirs and others** v. **Muhammad Ismail through legal heirs and others**" (**2002 SCMR 1938**), be held valid as it did not justify the disinheritance of other heirs from the gift. All these legal aspects of the matter escaped from the consideration of the two Courts below and thus, they fell in error while returning their findings.

6. Faced with the above legal position, the learned counsel for the defendants sought to cover up the shortcomings by referring the contents of para 5 of the written statement which stated that the defendant No.1 had instituted a suit for

declaration of title on the basis of gift, and since Taj Din while appearing in that suit had admitted the gift, the suit was withdrawn. The gist of this argument is that since Taj Din had never questioned the gift in his lifetime, the plaintiffs had no right to challenge it. Upon hearing this argument, I asked the learned counsel as to whether the above-referred statement of Taj Din and order of the Court were presented in evidence before the Trial Court. He submitted that this was not done during trial, but even so , to satisfy this Court two applications for their production as additional evidence were filed. I then examined the record and found that the defendants had filed two miscellaneous applications for additional evidence. They were C.M.No.01-C of 2016 and C.M.No.02-C of 2016. It is an admitted fact that the second application i.e. C.M.No.02-C of 2016 was dismissed as withdrawn vide order dated 1st December, 2016, whereas the first application (C.M.No.01-C of 2016) was dismissed for non-prosecution vide order dated 1st October, 2019, and thereafter no effort was made to get it restored. Given the circumstances, the above-stated argument loses its efficacy due to lack of supporting evidence. Notwithstanding the above, to meet the ends of justice, I examined the documents attached to C.M.No.01-C/2016, and they were (i) copy of plaint (ii) copy of written statement (iii) copy of application for temporary injunction and its reply, and (iv) copy of proceedings-sheet of the Court. In all these documents three things were stated, firstly, that Taj Din had appointed Muhammad Zahid (defendant No.2) as his general attorney, and secondly, Muhammad Zahid based on general power of attorney gifted the disputed land to his father (defendant No.1) and, thirdly, that upon the execution of gift deed the defendant No.1 had become absolute owner, but Taj Din had illegally started claiming his ownership over the disputed land. The averments made in the plaint of said suit suggest that Taj Din had never accepted the gift. The fraud of the defendants also became clear from the statement of defendant No.2 which he made in that suit. He stated that he was the general attorney of Taj Din son of Din Muhammad, and that he had gifted the property to Muhammad Ali on 24th April, 1994. It means that the attorney had gifted the disputed property without getting approval of Taj Din, and that was illegal.

7. The defendants' counsel then tried to persuade me to decline the revision on the ground that the suit brought by the plaintiffs was out of time, but there was no substance in it. It has now been established that the gift was not valid, and since the plaintiffs and the defendant No.1 were the legal heirs of Taj Din, the defendant No.1 would be considered to be in constructive possession of the disputed land on behalf of all the legal heirs, in spite of his exclusive possession and the cause of action would be deemed to have arisen when the plaintiffs were denied their rights. In the present case, the plaintiffs were denied their rights when Taj Din passed away on 2nd January, 1998 and the suit was within time from that date. Even otherwise, it is now well settled that limitation does not run against co-sharer, nor can it be allowed to form the basis for depriving a legal heir of his share in the inheritance. This view finds support from the cases of "**Ghulam Ali and 2 others** v. **Mst. Ghulam Sarwar Naqvi**" (**PLD 1990 SC 1**) and "**Muhammad Anwar and 2 others** v. **Khuda Yar and 25 others**" (**2008 SCMR 905**).

8. Lastly, it was contended that the plaintiffs were estopped by their words and conduct to challenge the gift. Elaborating this plea it was submitted that the plaintiff No.1 had brought the proceedings before the Revenue Officer for getting separate possession of his share by partitioning the total land measuring 467 kanals, 18 marlas and in it, he had not claimed any share in the disputed land or the land of Taj Din, and thus, after partition proceedings, he could not be allowed to make any grouse. To prove it reference was made to (i) copy of application dated 25.06.1995 for partition of land (Ex.D-2), (ii) copy of Naqsha Alif (Ex.D-3), (iii) copy of order dated 25.08.1997 of the AC (Ex.D-4) and (iv) copy of memorandum of appeal dated 24.09.1997 (Ex.D-5). I am afraid these documents do not extend any help to the defendants, for, firstly, all these documents were signed/executed before the date of the death of Taj Din. It means that partition proceedings were initiated during the lifetime of Taj Din and also terminated before his death and thus, there was no occasion to claim any share in the inheritance of Taj Din, and secondly, the

plaintiffs nowhere in these documents stated that they had relinquished or surrendered their share. Thus, they could not be estopped to maintain their declaratory suit.

9. The result is that this application succeeds and the revision sought for is granted, consequently, the judgments and decrees of the two Courts below are accordingly set aside and the suit of the plaintiffs is decreed as prayed for with no order as to costs.