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Synopsis of Contents

Supreme Court of Pakistan

When there is a doubt about the meaning of some words in a contract, those words will be construed against the person who put them forward, for whoever holds the pen creates the ambiguity and must live with the consequences.

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In respect of a void document, the person aggrieved has the option to institute a suit either for cancellation of that document under S. 39 of the Specific Relief Act of 1877 or for declaration of his right not to be affected by that document under S. 42 of the said Act.

A bank or insurance guarantee is a contract independent of the contract for which performance one party furnishes the guarantee to the other.

Where some of the matters in issue in the subsequent suit are the same and some are not, then proceedings of that suit cannot be stayed under Section 10, CPC; however, in order to avoid any conflicting finding on the issues that are common in both the suits, the proceedings of both the suits may be consolidated.

Scope of pre-arrest bail has been broadened by enunciation of principles of criminal jurisprudence by the Superior Courts from time to time; Courts can consider merits of the case and are to decide such matters in a more liberal manner.

Misappropriation and embezzlement of the amount by the employees of financial institutions and government departments shatter the confidence of public on the credibility and goodwill of the institution and department concerned; immediate disciplinary action against the delinquent should be taken in such cases, without any leniency, in accordance with law.

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Where one party contracts with another to carry out works for it, and the contract provides that liquidated damages are payable if the works are delayed, whether the employer only has a right to such damages if the contractor completes the works, or such damages are still payable even if the employer terminates the contract before completion.

Supreme Court of Pakistan

1. *Reference No.1 of 2020 regarding interpretation of Article 226 of the Constitution*

https://www.supremecourt.gov.pk/downloads_judgements/reference_1_2020.pdf

Present: Mr. Justice Gulzar Ahmed, CJ, Mr. Justice Mushir Alam, Mr. Justice Umar Ata Bandial, Mr. Justice Ijaz ul Ahsan and Mr. Justice Yahya Afridi

The President of Pakistan had sought the opinion of the Supreme Court of Pakistan, under Article 186 of the Constitution of Pakistan, 1973 on the following question:

> Whether the condition of 'secret ballot' referred to in Article 226 of the Constitution of Islamic Republic of Pakistan, is applicable only for the elections held 'under' the Constitution such as the election to the office of President of Pakistan, Speaker and Deputy Speaker of National Assembly, Chairman and Deputy Chairman of Senate, Speakers and Deputy Speakers of the Provincial Assemblies and not to other elections such as the election for the members of the Senate of Pakistan held under the Elections Act, 2017, enacted pursuant to Article 222 read with Entry 41, Part 1, Fourth Schedule to the Constitution, which may be held by way of secret or open ballot, as may be provided for in the Election Act, 2017?

Some of the political parties appearing before the Court raised objection to the very maintainability of the Reference with the submission that the Reference raised a political question; therefore, the Court should not give its opinion thereon. The majority of four Hon'ble Judges rejected this objection, while one Hon'ble Judge sustained it.

The question referred to the Court in the Reference is primarily of interpretation of the constitutional provisions of Article 226 of the Constitution, and it is the exclusive domain of the Superior Courts to interpret the constitutional provisions. Failing to do so would deny the role for which the Courts have been created.

The Hon'ble Chief Justice Gulzar Ahmed speaking for the majority observed: "[T]he very document of the Constitution of 1973, is a political document, which the people of Pakistan through their chosen representatives have given to themselves, in which limits of powers to be exercised by the State organs have been expressly laid down. The State and its organs have to function within those limits and all excesses of limits would be nothing but illegal. Broadly speaking, where the questions such as that of Foreign Policy, Defence of the Country from external threat, Monetary Policy, making amendments in the Constitution, organizing the governments at the Federal and Provincial level apparently, are the questions purely of political nature and the Courts always exercise restraint in entering upon such questions as these questions necessarily are best left to the people...The question that has been posed before the Court by the present Reference is more of interpretation of the Constitutional provisions, particularly, Article 226 of the Constitution and in all circumstances, it is the exclusive domain of the superior Courts especially this Court, to interpret the Constitutional provisions... Failing to do so, would deny the role for which the Courts had been created. …[T]he superior Courts and this Court, being the exclusive forum for the interpretation of the constitutional provisions, conferred on it by the Constitution itself, and the question which is raised in the present Reference being primarily of interpretation of the constitutional provisions, particularly, its Article 226, we, in our opinion, find the Reference to be maintainable." (Paras 48-50)

Dissent - When a 'question of law' that has political implication is referred to the Court for its 'opinion', in its 'advisory jurisdiction' under Article 186 of the Constitution, the Court has the discretion not to answer the question.

Hon'ble Justice Yahya Afridi dissented, and observed: "I am fully convinced and agree with the proposition that this Court should not decline to adjudicate a case, or to answer a question of law involving

interpretation of some provisions of the law or the Constitution raised therein, in its 'adjudicatory jurisdiction' merely because the decision of the case or the determination of the question would have some political repercussions. The Court cannot abdicate performance of its constitutional duty…But the position would be different, when a 'question of law' that has, political implication is referred to this Court for its 'opinion', in its 'advisory jurisdiction' under Article 186 of the Constitution. In this jurisdiction, the Court has the discretion not to answer the question; the only restraint is that, like all other discretions, the Court is to exercise this discretion judiciously for valid reasons and not arbitrarily. The Indian Supreme Court returned Reference No.1 of 1993, Ismail Frauqui v. Union of India (AIR 1995 SC 605), unanswered with the observation that the Reference favours one religious community and disfavours another; and the dignity and honour of the Supreme Court cannot be compromised because of it. Like the religious disputes, the involvement of the Court in political disputes in its advisory jurisdiction would also have, in my humble but considered view, the effect of compromising the dignity and honour of the apex Court of the country. In the present Reference, it is not in dispute that: the question referred has political implications; the Federal Government earlier, unsuccessfully attempted to resolve it through a constitutional amendment; and all major political parties in opposition want resolution of the question through political and legislative process in Parliament. In such a clear split between the ruling political parties and major opposition political parties, and the charged political atmosphere, the resolution of the question through intervention of the Court, and that too in its advisory jurisdiction would be, in my considered opinion, inappropriate and, to say the least, would invite untoward criticism on the Court." (Paras 23-24)

The elections to the Senate are held 'under the Constitution'; they are to be held by secret ballot as provided in Article 226. The procedure and machinery provisions for conducting the elections to the Senate are laid down in the Elections Act 2017.

While answering the question referred, the **Hon'ble Chief Justice Gulzar Ahmed** speaking for the majority observed: "The use of the word "elected" [in Article 59(1)], which is a second form of word "elect" of which noun is "election" will bring this very election [to the Senate] within the term 'all elections under the Constitution', as provided in Article 226 of the Constitution and such elections are to be held by secret ballot. No other meaning to Article 226 of the Constitution can legitimately be given than the one that the election to the Senate are elections under the Constitution and they are to be held by secret ballot. No exclusion of elections either of the President, or that of the Speaker and the Deputy Speaker of the National as well as the Provincial Assemblies, and the Chairman and the Deputy Chairman of the Senate, [can be made] from the ambit of Article 226 of the Constitution, which has itself excluded from its operation, the elections of the Prime Minister and the Chief Ministers… Though…sub-section (6) of Section 122 of the Elections Act, 2017, has laid down that the poll for election of members of the Senate shall be held by secret ballot but making of this provision will not cast any shadow or doubt on provision of Article 226 of the Constitution, being a Constitutional provision which independently controls its own mandate being the supreme law of the land. (Paras 56 and 59)

His lordship further observed: "We see no reason as to why Article 226 of the Constitution in any manner be read other than the language, which has been applied and used in the very Article and it plainly says all elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot. Once the Article 226 itself uses the term 'all elections under the Constitution', it cannot be read in any other manner then that all

elections under the Constitution… Article 226 of the Constitution has its own characteristics and when read as a whole, leads to only one conclusion that the words 'all elections under the Constitution' are all those elections, which are provided in the Constitution including the elections to the Senate. The elections to the Senate are held under the Constitution and the procedure and machinery provision for conducting of the elections to the Senate is laid down in the Elections Act, 2017. The substantive provision of the elections to the Senate are contained in the Constitution while the Elections Act, 2017, only deals with the procedure and machinery provision for holding of such elections. (Paras 68 and 73)

2. *Muhammad Afzal v. Secretary, Establishment Division*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._491_2012.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Qazi Muhammad Amin Ahmed and Mr. Justice Amin-Ud-Din Khan

The Parliament of Pakistan (Federal Legislature) enacted the Sacked Employees (Reinstatement) Act 2010, whereunder the employees appointed during the period from 1st November 1993 to 30th November 1996 and sacked during the period from 1st November 1996 to 12th October 1999 in different Federal Government departments/ organisations were reinstated in service on one scale higher than that held by them at the time of their sacking during the said period. The regular employees of the departments/ organizations whose seniority was affected by the employees reinstated under the said Act, and the persons who were not extended the benefit of the said Act by some departments/organizations agitated their grievances in different High Courts of the country and in the Federal Service Tribunal. The matter ultimately reached the apex Court of the country.

In the said backdrop, the question before the Court was: whether the Sacked Employees (Reinstatement) Act 2010 offended the fundamental rights of the regular employees and is ultra vires the Constitution of Pakistan.

The Sacked Employees (Reinstatement) Act 2010 is violative of the rights to 'status' and 'reputation' and 'equal protection of law' of the regular employees enshrined under Articles 9 and 25 of the Constitution.

Hon'ble Justice Mushir Alam speaking for the Court held: "The legislature has, through the operation of The Act of 2010, attempted to extend undue benefit to a limited class of employees. This legislation has a direct correlation to the right enshrined under Article 9 of the Constitution for employees currently serving in the departments falling under section 2(d) of The Act of 2010. Under Article 9 of the Constitution, a civil servant has been extended the right to 'status' and 'reputation'. The right to 'status' and 'reputation' are not mutually exclusive and are encompassed by the wider umbrella of Article 9 of the Constitution. Upon the 'reinstatement' of the 'sacked employees', the 'status' of the employees currently in service is violated as the reinstated employees are granted seniority over them. This is an absurd proposition to consider as the legislature has, through legal fiction, deemed that employees from a certain time period are reinstated and regularized without due consideration to how the fundamental rights of the people currently serving would be affected…Similarly, this Act is also in violation of the right enshrined under Article 4 [sic – 25] of the Constitution, that provides that [sic- the] citizens equal protection before law, as backdated seniority is granted to the 'sacked employees' who, out of their own volition, did not challenge their termination or removal under their respective regulatory frameworks. Therefore, by doing so, the legislature has granted undue favors through circumvention and obviation of the very framework of the civil structure envisaged by the Constitution and law." (Paras 34 and 36)

The Sacked Employees (Reinstatement) Act 2010 is repugnant to the provisions of Articles 240 and 242 of the Constitution of Pakistan.

The Court observed: "Furthermore, S.2(f)(i) and S.2(f)(ii) clearly envisions that reinstatement and regularization should be extended to not only regular employees who were either dismissed, removed, or terminated, but to ad-hoc and contract basis employees as well. When S.2 is read holistically, the overall effect of the enactment is that the overall recruitment process is overlooked and non-civil servants are 'reinstated' into civil service thereby deeming them to be members of civil service through a deeming clause. Therefore, given the fact that it is settled law that the legislature cannot, through deeming clause, confer the status of a civil servant, it has overlooked the relevant framework for employees in the service of Pakistan in clear violation of Article 240 and Article 242 of the Constitution." (Paras 49-50)

3. *Orient Power Company v. SNGPL*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1547_2019.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Qazi Faez Isa and Mr. Justice Sajjad Ali Shah

The appellant, a power generating company, entered into a Gas Supply Agreement ("GSA") with the respondent. The GSA contained a 'Take or Pay Clause'. Differences arose between the parties, among other matters, with respect to the appellant's obligation under the said take or pay clause. The respondent referred the disputes for arbitration, pursuant to arbitration clause in the GSA, in London under the rules of the London Court of International Arbitration. The Arbitrator issued the Award allowing the claim of the respondent under the 'take or Pay clause' of the GSA, and a single bench of the Lahore High Court decreed the respondent's suit, declaring that the Award shall be recognized and enforced, in Pakistan, as a judgment and decree of the court under Section 6 of the Foreign Awards (Recognition and Enforcement) of Foreign Arbitral Awards 2011. The appellant filed an intra-court appeal, which was dismissed by a division bench of that High Court. The appellant then agitated the matter before the Supreme Court of Pakistan, through an appeal by leave of the Court.

In the said background, the Court dealt with, inter alia, with the question: Whether the enforcement of the 'take or pay clause' by the impugned Award has breached the provisions of Section 74 of the Contract Act, 1872, and amounts to unjust enrichment. The Court, after making an exhaustive survey of the municipal and international jurisprudence, answered the question in negative.

The arbitration award enforcing the 'take or pay clause' does not breach the provisions of Section 74 of the Contract Act 1872.

Hon'ble Justice Mushir Alam speaking for the Court held: "There are two separate obligations in most take or pay contracts. First, there is the obligation on the seller to make the gas available to the Buyer. Secondly, there is the obligation on the Buyer to pay for the gas that has been made available (either as well as, or instead of, taking up the gas). Furthermore, take or pay payments have been widely understood to be an amount due to the seller or transportation company as a debt for having made the gas or transportation services available, and not as damages for failure on the other party to take gas. The rule of penalties in this case is not held to apply generally, because the seller or the transportation company is providing the service of making gas or transportation services available to the other party, in accordance with the Gas Sale/Supply Agreement or the Gas Transportation Agreement which creates a debt owing to the seller or the transportation company for that service. (Para 74)

His lordship further observed: "The first condition for an invocation of Section 74…is breach of Contract…The Take or Pay payment is not due as a result of a contract breach or default, but rather, it flows from the Appellant's valid choice/decision not to take the take or pay quantity. The take or pay payment under Section 3.6 [of GSA] is therefore essentially an agreement whereby the Appellant agrees to either take and pay the contract price for, a minimum contract quantity of Gas; or pay the applicable contract price for such Take or Pay Quantity if it is not taken. Thus, the Appellant's obligation may be described as being in the "alternative" as it can be satisfied in either of the two ways. Therefore, even if the Appellant did not take up the Gas, but did pay for it, there would be no breach of contract. No penalty was attracted as a result of the Appellant not taking up the Gas, rather, conversely, under Section 3.6(c) of the GSA, the Appellant was allowed to 'make up' for the amount he had paid for. Thus, we are unable to agree with the contention of the Appellant that failure to take up the Gas had resulted in breach of contract. (Paras 82 and 84)

The arbitration award rendered on the basis of 'take or pay clause' does not amount to unjust enrichment.

The Court held: "[F]or a claim of unjust enrichment to succeed, there must be enrichment at the expense of the plaintiff and this enrichment must be unjust in such a way that there should be no lawful justification for the same. Relating back to the case at hand, learned counsel for the Appellant argues that the fact that the Respondent was entitled to recover the amounts for the same Gas twice, amounts to unjust enrichment of the Respondent, which is therefore contrary to the Contract Act, and also the principles of public policy. We cannot agree with this argument. While it may be so that the Respondent is receiving payment for the same amount of Gas twice, it needs to be clarified that this is upon failure of the Appellant to take up the Gas, and further, the Respondent, in any case, is not recovering the same amount, due to the fact that it is redirecting transmission to its domestic consumers, which pay a lower tariff than Independent Power Producers (IPP). Furthermore, to allow the Appellant's claim would mean overlooking the fact that the Respondent is still under an obligation to supply the Make-Up Gas to the Appellant at any time within the duration stipulated under Section 3.6(c) of the GSA. There is, therefore, presence of 'juristic reason' for the enrichment. Further, the Appellant has failed to prove its deprivation as it is entitled to Make-Up Gas at a later date... Therefore, we hold that the Appellant has failed to make out a claim for unjust enrichment of the Respondent." (Para 96)

4. JS Bank Ltd v. Province of Punjab

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1057_2019.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Qazi Muhammad Amin Ahmed and Mr. Justice Amin-Ud-Din Khan

The Cane Commissioner passed orders under the Punjab Sugar Factories Control Act 1950, to recover the pending payments of the cane growers against the Sugar Mills as arrears of land revenue by attachment and sale of the movable property of the Sugar Mills, *viz*, the bags of sugar lying in the godowns of the Sugar Mills. Some Banks who had a pledge on those bags of sugar against the finance facility (loan) availed by the Sugar Mills challenged the said orders of the Cane Commissioner in the High Court, claiming that they were the secured creditors and had a preferential right against the cane growers, the unsecured creditors, to recover their amount of debt by sale of the pledged sugar bags. The High Court rejected the claim of the Banks, holding that a statutory retention of title clause is created in favour of the cane growers in the sugarcane sold on credit to the Sugar Mills as well as in the further products made of those sugarcane by the Sugar Mills, vis, the sugar, under the provisions of the

1950 Act and the Rules made thereunder; therefore, the Banks had no preferential right against the cane growers. The Banks knocked at the doors of the Supreme Court, agitating their grievance against the judgment of the High Court.

In the said backdrop, the question before the court was: whether the Banks, the secured creditors, had a preferential right against the cane growers, the unpaid sellers, to recover their amount of debt by sale of the pledged sugar bags. The Court answered the question in negative and maintained the decision of the High Court but for different reasons.

The title in the sold sugarcane is transferred to the Sugar Mills (the buyer); the interest of the sugarcane growers (the unpaid sellers) in the sold sugarcane or its byproducts is not one of an unsecured creditor but is that of a creditor having a statutory first charge for payment of the unpaid price.

Hon'ble Justice Mushir Alam (with whom Hon'ble Justice Qazi Muhammad Amin Ahmed agreed) held that "the title in the sugarcane is transferred to the sugar mills as they deal with the goods in a manner akin to that of an owner. The contract is clearly one of deferred payment under the law. S.19 of the Sales of Goods Act 1930 clearly stipulates that the property passes when intended to pass. We could not locate any provisions of the Sugar Factories Act 1950 or find any evidence through the conduct of the sugarcane growers that the property was intended to pass when the payment was completed…Upon the passing of property in the sugarcane, the mills process the sugarcane into sugar as well as other byproducts. While the mills become the legal and beneficial owner of the sugarcane, a SFC [statutory first charge] is created not only on the sugar but also on all its byproducts as and when the title in the sugarcane is transferred to the mills. It is when the title in goods is transferred and purchase price becomes due, payable, and recoverable that a SFC is created over the unpaid goods. The interest of the sugarcane growers is not one of an unsecured creditor but, that of a creditor holding a SFC defeasible upon the payment of liability owed to them under the Sugar Factories Act. The interests of the mills are protected as the legal owner, and the interests of the banks are protected as secured creditors; however, the first preference in satisfaction of the mill's debts is to be given to the sugarcane growers as they hold a SFC." (Paras 27-28)

Minority Opinion - Only the legal title passes on to the Sugar Mills in the sold sugarcane, the equitable title remains with the cane growers till payment of the sale price; the converted goods (sugar) is in the possession of the Sugar Mill as a constructive trust.

Hon'ble Justice Amin-Ud-Din Khan observed: **"**The occupier purchases sugar cane from the grower under the statutory assurance and converts it to his own use without paying to the grower…, it would amount to unjust enrichment with the occupier and the same cannot be allowed. In such like situations, the courts may apply the doctrine of "remedial constructive trust..[A]fter the passing of legal title of sugarcane to the Occupier [Sugar Mills], the equitable title shall remain with the grower till the payment is made and the buyer/occupier of the mills cannot pass on better title than his own. The court would be justified in imposing constructive trust upon the converted goods/sugar cane in the possession of the Occupier in favour of the grower... Since, the title of white sugar to the extent of unpaid amount remains with the growers, there arises no occasion for the lien of the creditor Banks to the "pledged stock". A valid pledge could only be created against the goods owned by the occupier [Sugar Mills] and not the third party. The Creditor Banks and the growers are stranger to each other and their respective rights are not dependent upon each other. The formers have a contractual relationship with the occupier and may find a remedy under the private law. While, the latter have a statutory relationship with the Occupier [Sugar Mills] and their

rights and liabilities would be governed by the statute." (Paras 17-19)

5. *Commissioner Inland Revenue v. M/s Acro Spinning & Weaving Mills*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._846_l_2017.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Munib Akhtar

While hearing the petitions filed by the petitioners for leave to appeal against certain orders of the High Court whereby the High Court had allowed the writ petitions of the respondents while relying upon its earlier decision in MKB Spinning Mills v. Federation (2018 PTD 2364), the apex Court though maintained the impugned orders of the High Court but took exception to certain observations made by the High Court in MKB Spinning Mills case as to import and scope of Sections 3 and 4 of the Sales Tax Act, 1990.

The Sales Tax Act, 1990 does not impose two or more tax regimes; it creates and enforces one integrated tax regime, which operates as a single whole. The provisions of Section 3(1A) pertaining to levy of tax in value added mode (VAT) are subservient to the provisions of Section 4 which provides for charging tax on certain goods at the zero per cent rate.

Hon'ble Justice Umar Ata Bandial, speaking for the Court, observed: "It is clear from the aforesaid provision [of Section 4] that zero rating of taxable supplies is an overriding provision on account of the non-obstante clause by which it starts. The provisions of section 3(1A) pertaining to further tax are subservient to the effect of zero rating. Consequently, zero rated goods are not liable to any of the provisions under section 3 of the Act…[T]here are unfortunately certain observations made by the learned High Court in the reported decision [MKB Spinning Mills v. Federation 2018 PTD 2364] that are erroneous and cannot be sustained. It has been observed in para 5 of the judgment that "the Act visualizes two regimes of tax; one under section 3…. and the other under section 4 under which tax is to be charged at zero rate". It has also been said of section 4, in para 10 of the judgment that "the benefit of zero percent tax conferred by this provision was meant to support that component of local industry which was engaged in manufacturing export oriented products". It must be clearly understood that these observations are incorrect. The Act does not impose two (or more) tax regimes. It creates and enforces one integrated tax regime, which operates as a single whole, namely the levy of tax in VAT (value added) mode. The manner in which the VAT mechanism works and the conceptual framework of the same including, in particular, the reason why exports are zero rated has been considered and explained in some detail by one of us (Munib Akhtar, J.) while in the High Court: see Pakistan Beverage Ltd. v. Large Taxpayer Unit 2010 PTD 2673 (paras 10-17; "Pakistan Beverage"). The cited observations of the learned High Court run contrary to the conceptual framework of a tax levied in the VAT mode, and, if not corrected, are liable to mislead. However, this error, which is hereby rectified in terms of what has been said in Pakistan Beverage, does not affect the overall reasoning and conclusions of the High Court insofar as the facts and circumstances of the present cases are concerned." (Paras 6-7)

6. *M/s Fateh Yarn (Pvt.) Ltd. v. Commissioner Inland Revenue*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1972_l_2017.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Sajjad Ali Shah and Mr. Justice Munib Akhtar

The apex Court was hearing a petition for leave to appeal against the judgment of a

High Court passed in a Sales Tax Reference filed under the Sale Tax Act 1990, in the background of following facts. The petitioner was issued a show cause notice by the Additional Collector asking an explanation as to why the entire output tax for the period February 2001 till March 2005 should not be recovered from it. The petitioner did not appear before the Additional Collector, nor put forth any explanation. Therefore, the Additional Collector, on the basis of available material, upheld the charge framed against the petitioner in the notice and ordered the recovery of Rs.76.563 million from it for the period beginning in February 2001 and ending in January 2006. The High Court upheld that order of the Additional Collector. The apex Court, however, modified the period of tax liability of the petitioner as per the period mentioned in the show cause notice with the following observations.

As an order of adjudication determining tax liability passed on the basis of a ground not stated in the notice is palpably illegal and void on the face of it, so is an order imposing a tax liability for a time period not mentioned in the notice.

Hon'ble Justice Umar Ata Bandial, speaking for the Court, held: "[I]t is an accepted fact that the allegation levelled against the petitioner in the notice was for the period ending in March 2005. However, the subsequent orders passed by the fora below have imposed a tax liability on the petitioner for the period ending in January 2006. This Court has already held in The Collector Central Excise and Land Customs v. Rahm Din (1987 SCMR 1840) that an order of adjudication passed on the basis of a ground not stated in the notice is 'palpably illegal and void on the face of it [para 7]. We see no reason why the same logic should not extend to an order imposing a tax liability for a time period not mentioned in the notice. The purpose of serving a notice on a taxpayer is to notify him of the case against him. When such a document contains incomplete information it can seriously prejudice the taxpayer's defence. As the petitioner has undoubtedly been saddled with a tax liability for a period which was not disclosed in the notice, we exclude the said additional period (March, 2005 till January, 2006) from the purview of the impugned orders passed by the Collector and Collector (Appeals)." (Para 7)

7. *Govt. of Khyber Pakhtunkhwa v. Saeed ul Hassan*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._249_2020.pdf

Present: Mr. Justice Gulzar Ahmed, HCJ, Mr. Justice Ijaz-Ul-Ahsan and Mr. Justice Munib Akhtar

The respondents were appointed on contract basis in different projects against different posts. Their services were extended from time to time and eventually terminated by the appellants on completion of the respective projects in which they were appointed. In most cases, on completion of the projects, the projects posts were abolished, while in few they were converted to the regular side. The respondents filed Constitutional Petitions in the High Court, to challenge the termination of their services, which were allowed and the appellants were directed to reinstate and regularize the respondents in their respective posts. The appellants impugned the order of the High Court in the Supreme Court.

The Court considered the questions: (i) could the appellants terminate the services of the respondents after the competition of the period of the respective projects in which the respondents were appointed, and (ii) whether the conversion of the project posts to the regular posts in some departments conferred any right to the contract employees for regularization. The Court answered the first question in affirmative and the second in negative.

The creation of posts on the regular side does not confer, in the absence of any statutory support, an automatic right of

regularization in favour of the employees employed on contractual basis against project posts.

Hon'ble Justice Ijaz-Ul-Ahsan speaking for the Court held: "A bare perusal of the afore-noted clause of the Project Policy makes it clear that employees, who were employed in a project, would stand terminated, on the completion of the project. The only exception is that the said employees would be re-appointed on need basis if the project is extended over any "new phase or phases". The record reveals that the Respondents were terminated after the projects in which they were appointed came to an end or, were converted to the regular side. The learned High Court in the impugned judgments has held that the Respondents had a vested right to be regularized, on the basis of satisfactory service, because of the conversion of different projects to the regular side. We are unable to agree with the view taken by the High Court for the reason that it is by now a settled principle of law that, long or satisfactory contractual service does not confer a vested right for regularization as conversion from contractual to regular appointment requires statutory support. We note that, even in those Appeals before us where posts were created on the regular side…, the posts in question were limited. If the Government has created a limited number of posts on the regular side, the learned High Court could not have stepped into the shoes of the appointing authority and order the regularization of each Respondent irrespective of availability of regular posts. Appointments on the regular and newly created posts was to be made through advertisement, open competition through a transparent process via the KP Public Service Commission. It was essentially a policy matter within the domain of the Executive. The High Court therefore erred in law in interfering with the same for no valid or justifiable reason. The creation of a post or posts on the regular side does not confer, in the absence of any statutory support, an automatic right of regularization in favour of the employees employed on contractual basis against project posts. Therefore, we hold that the conclusion reached by the High Court in this regard is not sustainable. (Paras 8-9)

8. *Muhammad Latif v. Muhammad Sharif*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._805_l_2019.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Sajjad All Shah and Mr. Justice Yahya Afridi

While hearing a petition filed by the petitioner, a landlord, for seeking leave to appeal against an order of the High Court whereby the High Court had dismissed his constitutional petitions against an order of the Rent Controller. The Rent Controller, vide the impugned order, had though declined to grant the respondents, the tenants, leave to defend the ejectment petition but directed the petitioner to adduce evidence and also granted the respondents the right to cross examine the petitioner's witnesses.

In this background, the Court took up the question: whether the Rent Controller after declining leave to the tenant to contest the ejectment application could direct the land-lord to adduce evidence and allow the tenant to cross examine the land-lord.

A Rent Controller cannot, after declining leave to the tenant to contest the ejectment application, direct the land-lord to adduce evidence and allow the tenant to cross examine the land-lord's witnesses.

Hon'ble Justice Sajjad All Shah, speaking for the Court, answered the question in negative with the observations: "[T]he provision of sub-Section 6 of Section 22 of the Act, 2009 specifically provide that in case where the leave to contest is refused or the respondent has failed to file application for leave to contest within the stipulated time, the rent Tribunal shall pass the final order. This being a mandatory provision with the

consequences spelled leaves no option for the Rent Controller but to pass final order. However, it is to be noted that the language employed in Section 22(6) by using the words "final order" instead of "ejectment order", leaves room for the Rent Controller to apply his judicial mind before passing a final order as required under the circumstances of each case may it be ejectment of a tenant or otherwise…. It is to be noted that the powers conferred on the Rent Controller under sub-Section 6 of Section 22 of the Act, 2009 are more akin to the provisions of Order XXXVII Rule 2 CPC which provide that on default of defendant in obtaining leave to defend, the plaintiff shall be entitled to a decree. Likewise, in cases where a tenant is declined leave to contest, the Rent Controller is left with no option but to pass a final order." (Paras 6-7)

9. *Govt. of the Punjab v. Ms. Shamim Usman*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1097_l_2020.pdf

Present: Mr. Justice Sajjad Ali Shah and Mr. Justice Syed Mansoor Ali Shah

The petitioner considered the matter of promotion of the respondent, under a direction passed by the High Court in an earlier petition of the respondent, but declined to grant her *proforma* promotion as claimed by her, mainly on the ground that there were a large number of officers senior to her awaiting promotion. The respondent agitated her grievance again in the High Court invoking its constitutional jurisdiction under Article 199 of the Constitution of Pakistan 1973. The High Court made the order directing the petitioner "to grant *proforma* promotion to the petitioner". The petitioner challenged the order of the High Court in the Supreme, primarily on the ground that the High Court had no jurisdiction to entertain the said matter in the light of the constitutional bar contained in Article 212 of the Constitution.

In the said background, the question of law before the Court was: whether the matter fell in the exclusive jurisdiction of the Service Tribunal established under the law enacted in pursuance of the provisions of Article 212 of the Constitution and the jurisdiction of the High Court was barred. The Court answered the question in affirmative.

A departmental order or decision determining the "eligibility", not "fitness", of a civil servant for promotion falls within the purview of the jurisdiction of the Service Tribunal, and the jurisdiction of the High Court in respect of such order or decision is barred under Article 212(2) of the Constitution.

Hon'ble Justice Syed Mansoor Ali Shah, speaking for the Court, held: "Article 212(2) [of the Constitution] in unambiguous terms states that no other Court can grant injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends. Scope of jurisdiction and powers of the Tribunal are provided in sections 4 and 5 of the [Punjab Service Tribunals] Act. The High Court, therefore, has no jurisdiction to entertain any proceedings in respect of terms and conditions of service of a civil servant which can be adjudicated upon by the Tribunal under the Act. It is only under section 4(1)(b) of the Act that no appeal can lie to a Tribunal against an order or decision determining the "fitness" of a person to be appointed or promoted and falls outside the purview of the jurisdiction of the Tribunal. In order to fall in the exception envisaged under section 4(1)(b) of the Act, the order must determine "fitness" of a civil servant to an appointment or promotion. In the instant case, the order under challenge before the High Court pertained to the eligibility of the petitioner to be even considered for *proforma* promotion due to the seniority of a large number of officers awaiting promotion before her and in no manner determined the "fitness" of the respondent…Therefore, unless the jurisdiction of the Tribunal is ousted under

section 4(1)(b) of the Act, as described above, assumption of jurisdiction by the High Court in respect of matters of terms and conditions of a civil servant is unconstitutional and impermissible. Even the direction passed in the earlier constitutional petition, in this case, was impermissible under the Constitution." (Para 5)

10. Province of Punjab v. Muhammad Ahmad

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1274_l_2013.pdf

Present: Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Amin-ud-Din Khan

While hearing a petition for leave to appeal filed against an order of the High Court, the Supreme Court noted that the High Court had relied on a series of case law, referred to in the impugned order by reproducing the headnotes of the law reports.

Headnotes prepared by the editors and published in the case law reports preceding the judgment of court are not a part of that judgment; it is neither safe nor desirable to cite a dictum by reference to the headnotes.

Hon'ble Justice Syed Mansoor Ali Shah, speaking for the Court, deprecated such practice and observed: "The headnotes preceding the judgment of a court are not a part of that judgment but are the notes prepared by the editors of the law-reports, highlighting the key law points discussed in the judgment and are supplied just to facilitate the reader with a summarized version of the salient features of the case which helps in quickly scanning through the law reports. It is a matter of common knowledge that the headnotes are at times misleading and contrary to the text of the judgment. Headnotes by the editors of the law-reports cannot be taken as verbatim extracts of the judgment and relied upon as conclusive guide to the text of the judgment reported, hence they should not be cited as such. Therefore, it is neither safe nor desirable to cite a dictum by reference to the headnotes. We are sanguine that in future the High Courts and the District Courts while referring to a precedent or case law in their judgments and orders will cite the actual text of the judgment rather than place reliance on the headnotes thereof." (Para 2)

11. Shahzaib v. The State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1075_l_2020.pdf

Present: Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Amin-ud-Din Khan

While hearing a petition filed for leave to appeal against an order of the High Court whereby the High Court had dismissed the pre-arrest bail petition of the petitioner on the ground of his non-appearance as well as on merits, the Court addressed the question whether the High Court could have proceeded to decide the pre-arrest bail petition on merits in absence of the petitioner, in view of the provisions of Section 498-A of the Code of Criminal Procedure 1898.

The Court cannot, in the absence of the petitioner, decide a pre-arrest bail petition on merits, in view of the provisions of Section 498-A of the Code of Criminal Procedure, 1898.

Hon'ble Justice Syed Mansoor Ali Shah, speaking for the Court, answered the question in negative with the observations: "After the insertion of Section 498-A of the Code of Criminal Procedure, 1898 ("CrPC") if the accused seeking pre-arrest bail is not present before the Court, the Court is not authorized to grant bail to such an accused and therefore, the petition is liable to be dismissed in the light of the said statutory provision…Section 498-A, CrPC creates a statutory fetter or a statutory precondition requiring the presence of the petitioner in person in Court for the exercise of

jurisdiction by the court for granting pre-arrest bail. In case the petitioner (accused) is not personally present in Court, the Court is not authorized to grant him bail and the petition is to be dismissed for his lack of presence in Court. However, in case some explanation is furnished for his non-appearance, the Court may, if it finds that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period. The Court cannot, in the absence of the personal appearance of the petitioner, travel further into the case and examine the merits of the case. In fact the examination of the merits of the case in the absence of the accused totally defeats the intent and purpose of the aforementioned statutory provision. This is because once the Court proceeds to examine the merits of the case, then the Court has the option to either dismiss or allow the bail petition, while under Section 498-A CrPC the Court is not authorized to admit the accused to bail in his absence." (Para 4)

12. Iqbal Khan Noori v. NAB

https://www.supremecourt.gov.pk/downloads_judgements/c.p._3637_2019.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Amin-ud-Din Khan

The High Court had, vide the impugned order, dismissed the petitions filed by the petitioners under Article 199 of the Constitution, praying for grant of the relief of post arrest bail till completion of their trial in the case. The High Court while dismissing the said petitions had made the observation that the offence with which the petitioners were charged fell within the prohibitory clause of Section 497(1) of the Code of Criminal Procedure, 1898 ("Cr.P.C"). Section 9(b) of the NAB Ordinance 1999 specifically states that Section 497, along-with other related Sections, of the Cr.P.C are not applicable in NAB cases. The apex Court, in view of the said observation of the High Court, elucidated that these are the grounds under the Constitution and not the statutory grounds mentioned in Section 497 of the Cr.P.C, which are relevant and are to be considered by the High Courts for allowing or declining bail to any person accused of an offence under the NAB Ordinance.

Constitutional grounds for grant of bail in NAB cases: the requirement of 'sufficient material"to connect the accused with the commission of alleged offence for justifying his detention pending trial, in NAB cases, emanates from the fundamental rights to liberty, dignity, fair trial and protection against arbitrary arrest and detention, not from Section 497, CrPC.

Hon'ble Justice Syed Mansoor Ali Shah, speaking for the Court, observed: "The phrase except or save in accordance with law [used in Articles 4 and 9 of the Constitution] implies that not only should the procedural requirements of the "law" be fully met but also its substantive content, i.e., there must be sufficient material/evidence on the record that can justify the application of such a "law." Therefore, material/evidence must be sufficient enough to persuade the constitutional court to deprive an individual of his fundamental right. The requirement of sufficiency of material is also echoed in the right guaranteed under Article 10, which requires that any person who is arrested shall not be detained in custody without being informed of the grounds for such arrest. The word "grounds" used in Article 10 is not limited to mere allegations but means allegations supported by sufficient material/evidence connecting the person with the offence justifying his arrest and detention. Article 10-A creates a constitutional obligation to conduct a fair trial and ensures due process. The spectrum of fair trial and due process is extensive and over-arching; an arrest and detention of a person without any sufficient incriminating material/evidence would offend his right to

fair trial. Right to dignity under Article 14 is an absolute constitutional standard, which is not subject to law…Arresting and detaining a person without any incriminating material offends his or her right to dignity… [The principle that a person is presumed innocent until proven guilty by a court of law…is pillared on constitutional right to liberty, fair trial and human dignity. This presumption can only be dislodged if there is sufficient incriminating material against a person as underlined and reinforced by the aforesaid constitutional rights…The High Court while exercising its jurisdiction under Article 199 of the Constitution for the enforcement of fundamental rights can pass appropriate orders, which include an unconditional release or release on bail, to grant the relief to the aggrieved person. It is for the enforcement of fundamental rights under the Constitution and not the sub-constitutional statutory grounds provided in Section 497 CrPC, that this Court has been granting bails to the accused persons in NAB cases in exercise of constitutional jurisdiction under Article 199 read with Article 185(3) of the Constitution, mainly on the grounds of…non-availability of sufficient incriminating material against the accused." (Para 5)

13. Muhammad Salman v. Naveed Anjum

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1498_2018.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Munib Akhtar

The appellant contested the election to a seat of a Provincial Assembly and was declared the returned candidate by the Election Commission. The respondents, the two registered voters of the constituency, challenged the qualification of the appellant to contest the election, alleging that he was under-age (i.e., less than 25 years of age) on the last date of submission of his nomination paper, before the Election Commission under Section 9 of the Elections Act 2017 read with Article 218(3) of the Constitution of Pakistan. The Election Commission conducted an enquiry on the allegation and, finding the same to be correct, declared the election void. In this background, the question before the Court was: whether the Election Commission has the jurisdiction to examine the questions of qualification or disqualification of a returned candidate, under Section 9 of the Election Act 2017 and/or under Article 218(3) of the Constitution.

The majority comprising Hon'ble Justices Syed Mansoor Ali shah and Munib Akhtar answered the question in the negative; Hon'ble Justice Mushir Alam dissented.

The Election Commission does not have the jurisdiction to examine the questions of qualification or disqualification of a returned candidate, under Section 9 of the Election Act 2017 and/or under Article 218(3) of the Constitution.

Hon'ble Justice Munib Akhtar speaking for the majority (i.e., for himself and Hon'ble Justice Syed Mansoor Ali Shah) held: "In our view, the answer must be in the negative. We begin with an obvious point: neither of the sections [s. 103AA of 1976 Act and s. 9 of the 2017 Act] expressly or explicitly conferred (or confers) any such jurisdiction [on the Election Commission]. If at all it exists, it has therefore to be read into the provisions, and discovered collaterally or by implication. Now, the question of whether a candidate is qualified or disqualified goes to his status, i.e., ability to contest the election. Both the sections however are primarily (though not exclusively) directed towards what happens on the polling day, i.e., towards the process of the actual conduct of the election itself. Obviously, this remains unaffected by the status (qualified/ disqualified) of the candidates. Section 9(1) even otherwise makes this clear, in two ways. Firstly, by adding the test of materiality: the "result of the poll" should have been affected. Even if (and secondly) the test applies only to second condition (a point on which we form no definite opinion), the last part of the

subsection, which allows only for a recasting of votes to be ordered, makes it clear that the slate of candidates remains the same." (Para 41)

His lordship further observed: "It is also to be remembered that in the entire process leading up to the day of the election, the question of whether the candidate was qualified or disqualified has already been scrutinized. This scrutiny, of the nomination papers, is done by the Returning Officers. However, they are not the only ones allowed by law to scrutinize the nomination papers. They are also open to objections by others. Under the 1976 Act this right was of a somewhat restricted nature: see s. 14(1). Under s. 62 of the 2017 Act the right has been extended to any voter of the constituency. There is a right of appeal to an appellate forum comprising of High Court judges. Under the 1976 Act this right of appeal was restricted to candidates only, whereas the 2017 Act has expanded it to include the objector as well. After this appellate forum there can be (though not of course as of right) constitutional petitions under Article 199 and even petitions to this Court under Article 185(3). In other words, the question of qualification/disqualification is thoroughly tested by a dedicated procedure before the day of the election. And of course, after the election a losing candidate can always file a petition before the election tribunal and again bring the question into issue. There is a direct appeal to this Court against the decision of the election tribunal. When such a framework is available, it is difficult to see why any such jurisdiction should be impliedly read into s. 103AA and/or s. 9 so as to empower the Commission. In our view, if at all Parliament has the legislative competence to confer such a jurisdiction on the Commission in terms of a law made under Article 222 (an assumption we make for purposes of this judgment, without deciding), then it must be done explicitly and by express conferment, and the use of clear language. The provisions of s. 103AA and s. 9 fall far short of this. (Para 42)

There is no power or jurisdiction inherent in the Election Commission under Article 218(3) of the Constitution of Pakistan, to consider the qualification/disqualification of a candidate/member.

Hon'ble Justice Munib Akhtar speaking for the majority observed: "Insofar as the question of qualification or disqualification, arising as part of an election dispute and being considered by the Commission directly in terms of Article 218(3), is concerned, the provisions of Article 225 need to be kept in mind. This provides as follows: "No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament)". To hold that there is an independent power inhering in the Commission in terms of Article 218(3) would trench upon this constitutional provision which, it is to be noted, is cast in strongly negative terms. This indicates that those election disputes as properly come within the scope of Article 225 are to be considered by an election tribunal and not elsewhere and before some other forum such as, e.g., the Commission purporting to exercise a jurisdiction said to inhere in it under Article 218(3). It is no doubt for this reason that both in terms of s. 103AA [of 1976 Act] and s. 9 [of 2017 Act], the Commission was, and continues to be, "deemed to be an Election Tribunal to which an election petition has been presented". And even here, interestingly, the jurisdiction conferred on the Commission came, and comes, with a sunset provision: it must decide the matter within the stipulated 60 days, else "the election of the returned candidate shall be deemed to have become final", subject to a petition (if any) before the election tribunal constituted in terms of s. 57 of the 1976 Act and now s. 140 of the 2017 Act… It follows from the foregoing discussion that in our view there is no power or jurisdiction inherent in the Commission itself in terms of Article 218(3) to consider the qualification/disqualification of a

candidate/member, whether as an independent, standalone issue or as part of an election dispute. (Paras 26-27)

Dissent - The Election Commission has the inherent powers under Article 218(3) read with Article 222 of the Constitution, to make such declarations and orders as are necessary to ensure that the election is conducted honestly, justly, fairly, in accordance with law, and that corrupt practices are guarded against; Section 9 of the Elections Act 2017, is an enabling provision emanating from the said constitutional mandate.

Hon'ble Justice Mushir Alam dissented and observed: "It is manifest from the scheme of the Constitution that the Commission has been created to organize and conduct the election and to make such arrangement as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practice are guarded against…The power of election commission, which are mentioned in the Constitution neither stipulate nor require nor are dependent on the legislature granting amongst other, specific powers to the Election Commission to order repoll…Section 9 of the Elections Act 2017, is enabling power emanating from the noted constitutional mandate of Article 218(3), together with concluding part of Article 222 of the Constitution, is to be read generously. The Commission may take cognizance of a matter "if from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll. Furthermore, the Commission shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections. Such powers are exercisable by the Commission in consonance with the constitutional duty, as conferred under sub article (3) of Article 218 of the Constitution, read with the saving of the Constitutional insulation against legislative enslavement under Article 222 of the Constitution, to ensure that the election is conducted honestly, justly, fairly, in accordance with law, and that corrupt practices are guarded against. The Constitution has conferred a sacred duty on the Commission to guard against corrupt practices, specifying the parameters where the Commission may exercise the powers to make a declaration and call upon the voters in the concerned polling station/stations, or in the whole constituency to recast their vote. Another manner in which the Commission can take cognizance is in cases where information is laid before as regard such grave illegalities or the violations of the Elections Act, 2017. Even in such a scenario, the authority of Commission is not dependent on any formal complaint but the Commission is obligated to exercise its inherent powers to issue such declarations and order repolling when on the basis of any information before it, having conducted an enquiry through, which it is satisfied that by reasons of grave illegalities or such violations of the provisions of Elections Act, 2017 or the Rules as have materially affected the result of the poll." (Paras 53, 55-57)

14. M/s. Universal Insurance Company v. Karim Gul

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1280_2019.pdf

Present: Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Munib Akhtar

The appellant, an insurance company, had insured a car. That car met an incident, resulting in considerable damage to it, such that it became a "total loss". The "salvage" of the car was sold off by the appellant to the respondent for a sum of Rs. 130,000/-. The respondent expended an amount of Rs. 470,000/- to repair the car and bring it into usable condition. However, when he went to have its registration with the motor vehicle authority transferred to his name he was informed that there was already another

vehicle registered with the same number and that the documents produced by him were not genuine. The respondent was therefore unable to use the repaired car. He filed suit in the civil courts against the appellant, claiming damages in the sum of Rs. 10,00,000/-. The trail court decreed the suit, but the appellate court dismissed the same. The High Court set aside the judgment of the appellate court and restored that of the trial court. The matter reached the Supreme Court. The court, for deciding the matter, formulated the following questions: (i) Was it, as claimed by the respondent, a motor vehicle sold to him in howsoever badly damaged a condition it may have been? or (ii) Was it, as contended by the appellant, nothing but (and only) a wreck which was not a motor vehicle in any meaningful sense, and absolutely no regard had to be given to what the respondent intended to, or could, or actually did, do with it? The Court while interpreting the terms of the contract entered between the parties answered the first question in affirmative and the second in negative, and thus maintained the judgments of the trial court and of the High Court. The Court, in the course of making deliberation on the said questions, enunciated the following principles of law:

A contract is to be interpreted objectively and not as per the subjective views of the parties.

Hon'ble Justice Munib Akhtar, speaking for the Court, observed: "A contract has to be interpreted objectively and not as per the subjective views of the parties. Its terms… are to bear that meaning as they would have for, or convey to, a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract... The contract here is of just one paragraph. In our view, the key words to be examined are 'total loss'. The question is how this term is to be interpreted and applied." (Para 7 - internal references and quotation marks omitted)

Difference between the terms "actual total loss" and "constructive total loss", used in insurance business, explained.

His lordship elaborated: "[I]n the insurance business the thing insured can be declared to be a "total loss" in two different senses. One is of it being an 'actual total loss'. Here, the sense is that the insured property has been destroyed or damaged to such an extent that it can be neither recovered nor repaired for further use; it has been (to use a somewhat everyday expression) 'totaled'. In this sense the insured property is reduced to just wreckage and nothing more. The other is 'constructive total loss'. This is the situation where the repair cost of the damaged insured property exceeds its market value if the repairs were undertaken. … It will be seen that in an "actual total loss" situation, the thing insured (here, the car) is so damaged that it ceases to be a thing of the kind insured. In other words, the car would cease to be as such, and become mere wreckage. However, in 'constructive total loss' the insured property does retain its description as such; it is simply that it is not worthwhile to pay for the repairs or have them undertaken. In this sense, as regards the present appeal, the car would be regarded as continuing to remain as such no matter how much damage it may have suffered. The question to be resolved therefore becomes, in what sense were the words 'total loss' used in the contract: as 'actual' or 'constructive' total loss? (Para 7 - internal double quotation marks converted into single)

When there is a doubt about the meaning of some words in a contract, those words will be construed against the person who put them forward, for whoever holds the pen creates the ambiguity and must live with the consequences.

His lordship held: "[T]he contract…was the creation of the appellant. The appellant's case is that that sense was of 'actual' total loss, i.e., the thing sold was mere wreckage. In our view, there is a certain ambiguity as to in which of the two technical senses the

words were used. Now, a well known principle of interpretation of contracts is the *contra proferentem* rule: when there is a doubt about the meaning of a contract, the words will be construed against the person who put them forward'… [T]he rule is 'a principle not only of law but of justice… [W]hoever holds the pen creates the ambiguity and must live with the consequences... This rule applies here, and the ambiguity must be resolved against the appellant. The words 'total loss' used in the contract ought not to be construed in the sense of 'actual total loss', which would reduce that what was sold to mere wreckage. They should be taken to have the other technical meaning, i.e., 'constructive total loss'. In other words, the car in question retained its character as such, and did not cease to be a thing of the kind that had been insured. (Para 8- internal references and quotation marks omitted)

15. *M/s Nishat Mills Limited v. Commissioner of Income/Wealth Tax*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._2256_l_2015.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Munib Akhtar and Mr. Justice Amin-Ud-Din Khan

The petitioners ("assessees") filed returns for the assessment years 1993-94, 1994-95 and 1999-2000, and the assessment orders were made by the Income Tax Officers ("ITO") under section 62 of the erstwhile Income Tax Ordinance, 1979 ("1979 Ordinance"). The Inspecting Additional Commissioners ("IAC") sought to revise those assessment orders under section 66-A on the ground that the same were erroneous and prejudicial to the interests of the revenue. The orders so made by the IAC were challenged before the Appellate Tribunal by the assessees on the point that the ITO had consulted the IAC under section 7 of the 1979 Ordinance for making the assessment orders; therefore, the IAC could not revise those orders under section 66-A of the 1979 Ordinance. The Tribunal accepted the contention of the assessees, and set aside the orders of the IAC. The department thereafter filed tax references, which were decided in its favour by the High Court. The assessees filed petitions for leave to appeal against judgment of the High Court in the Supreme Court. The apex Court maintained the decision of the High, but for reasons somewhat different from that which prevailed with the High Court.

Applicability and scope of the provisions of Section 7 of the Income Tax Ordinance 1979 and of the identical provisions of section 213 of the Income Tax Ordinance 2001, elaborated.

The Court while dealing with the point agitated by the assessees elaborated the meaning, scope and applicability of the provisions of Section 7 of the 1979 Ordinance and of the identical provisions of section 213 of the Income Tax Ordinance 2001 ("2001 Ordinance").

Hon'ble Justice Munib Akhtar, speaking for the Court, observed: "It is to be noted that s. 7 [of the 1979 Ordinance] and s. 213 of the 2001 Ordinance are cast in virtually identical terms. Now, in any organization (including a Government department) it is only to be expected that there will be, in the ordinary course and as part of the normal routine, an ongoing consultation and interaction among persons holding different posts in the hierarchy. Juniors would wish (and indeed, in most cases, be expected) to seek informal guidance from their seniors, or to be assisted and even instructed by them, and thereby benefit from their experience and the collective institutional wisdom. For example, as is well known, fresh recruits and probationers are attached for some time to senior officers for this very purpose. But the process is not so narrow or limited. It continues throughout an officer's career, certainly at the junior or middle levels. Even seniors can benefit from what other seniors (or even junior officers) may have to offer.

Such consultations, communications and interactions (or, to use the words of ss. 7 and 213, assistance, guidance or instruction) are part of the woof and warp of any organization, and that certainly includes the bureaucracies of the State. There is nothing strange or exceptional about this. Indeed, it is the absence of such activity that would call for comment and be a matter of concern. It is also to be kept in mind that the informality of the process means that the assistance, guidance or instruction is not generally regarded as binding in a formal sense. They are, rather, a resource that is available, and one which inures especially to the benefit of those lower down the hierarchy. It is something that can be usefully and productively drawn upon, as and when needed…What s. 7 and s. 213 did was simply to give statutory recognition to the processes and procedures described above. These provisions formalized what would have happened informally in any case, and gave it statutory expression. The learned High Court has correctly characterized the scope and intent of these provisions as being concerned with "administrative instruction[s] meant for [the] internal consumption of the department"…It is to be emphasized that these sections do not make permissible what would otherwise be impermissible. Rather, they (as it were) lay bare the internal functioning and "piping" of the (here) revenue bureaucracy, for the removal of any confusion. The sections are, in our view, neither enabling or permissive in the technical sense but rather more akin to an explanation (i.e., meant for the avoidance or resolution of any doubt)." (Paras 6-7)

16. Khallid Hussain v. Nazir Ahmad

https://www.supremecourt.gov.pk/downloads_judgements/c.p._2144_l_2011.pdf

Present: Mr. Justice Ijaz Ul Ahsan and Mr. Justice Yahya Afridi

The petitioners filed a suit for declaration asserting that the gift deed purported to have been executed by their predecessor in favour of the respondents was void and ineffective against their rights. The trial court dismissed the suit, but the appellate court decreed the same. The revisional court (High Court) set aside the judgment of the appellate court and restored that of the trial court. The apex Court reversed the judgment of the High Court and upheld the judgment of the appellate court.

While dealing with the reasons that prevailed with the High Court, the Supreme Court explained the distinction between a suit for cancellation of a document under section 39 of the Specific Relief Act 1877 and a suit for declaration of a document under section 42 of the said Act, as follows:

In respect of a void document, the person aggrieved has the option to institute a suit either for cancellation of that document under S. 39 of the Specific Relief Act of 1877 or for declaration of his right not to be affected by that document under S. 42 of the said Act.

Hon'ble Justice Yahya Afridi speaking for the Court observed: "There is a marked yet subtle distinction between a suit for cancellation of a document under section 39 of the [Specific Relief] Act of 1877, and a suit for declaration of a document under section 42 of the Act of 1877. The crucial feature determining which remedy the aggrieved person is to adopt, is: whether the document is void or voidable. In case of a voidable document, for instance, where the document is admitted to have been executed by the executant, but is challenged for his consent having been obtained by coercion, fraud, misrepresentation or undue influence, then the person aggrieved only has the remedy of instituting a suit for cancellation of that document under section 39 of the Act of 1877, and a suit for declaration regarding the said document under section 42 is not maintainable. On the other hand, in respect of a void document, for instance, when the execution of the document is denied as being forged or procured through deceit about the very nature of the document, then the person aggrieved has the option to institute a suit, either for cancellation of that instrument

under section 39 of the Act of 1877, or for declaration of his right not to be affected by that document under section 42 of the Act of 1877; it is not necessary for him to file a suit for cancellation of the void document." (Para 4)

17. Atif Mehmood v. M/s Sukh Chayn (Pvt) Ltd

https://www.supremecourt.gov.pk/downloads_judgements/c.p._3209_2020.pdf

Present: Mr. Justice Mazhar Alam Khan Miankhel and Mr. Justice Amin-Ud-Din Khan

The matter that reached the apex Court had arisen out of two miscellaneous applications filed by the petitioners, one for temporary injunction and the other for stay of proceedings of the respondent's suit, in two suits instituted by the parties against each other. The trial court had allowed the said applications, while the High Court reversed the orders of the trial court. The Supreme Court maintained the judgment of the High Court, and enunciated the following principles of law:

A bank or insurance guarantee is a contract independent of the contract for which performance one party furnishes the guarantee to the other.

Hon'ble Justice Amin-Ud-Din Khan speaking for the Court enunciated: "A bank or insurance guarantee that contains a categorical undertaking and impose absolute obligation on the guarantor, i.e., the bank or the insurance company, to pay the guaranteed amount, irrespective of any dispute which may arise between the parties regarding breach of the contract for which performance…one party furnishes the guarantee to the other, is an independent contract; therefore, the guarantor must discharge its obligations under the contract of guarantee as per the terms thereof, independent of the dispute as to performance of the primary contract between the parties. (Para 5)

Where some of the matters in issue in the subsequent suit are the same and some are not, then proceedings of that suit cannot be stayed under Section 10, CPC; however, in order to avoid any conflicting finding on the issues that are common in both the suits, the proceedings of both the suits may be consolidated.

His lordship further observed: "For attracting the application of the provisions of Section 10 of the Code of Civil Procedure 1980 ("CPC"), the matter in issue or all the matters in issue, if there are more than one, must be directly and substantially the same…Where some of the matters in issue in the subsequent suits are same and some are not, then proceedings of that suit cannot be stayed under Section 10, CPC; however, in order to avoid any conflicting finding on the issues that are common in both the suits, the proceedings of both the suits may be consolidated by the court in exercise of its inherent power under Section 151 CPC, for securing ends of justice and preventing abuse of the process of the court. (Para 6)

18. Sajid Hussain v. The State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._537_2021.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Mazhar Alam Khan Miankhel and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

The Court was dealing with a petition for leave to appeal filed by the petitioner, an accused in a case involving offence of murder, against an order of the High Court, whereby his pre-arrest bail application had been dismissed by the High Court. The Court considered facts and circumstances of the case and the incriminating material available on record against the petitioner, and reached to the conclusion that the petitioner had made out a case for grant of relief of pre-arrest bail. The Court thus set aside the impugned order of the High Court and granted the petitioner the relief of pre-arrest bail prayed for.

Scope of pre-arrest bail has been broadened by enunciation of principles of criminal jurisprudence by the Superior Courts from time to time; Courts can consider merits of the case and are to decide such matters in a more liberal manner.

Hon'ble Justice Sayyed Mazahar Ali Akbar Naqvi, speaking for the Court, observed: "This Court in the above-referred salutary judgment [Miran Bux v. the State PLD 1989 SC 347] rendered by a five members' bench has broadened the scope of pre-arrest bail and held that while granting extraordinary relief of pre-arrest bail, merits of the case can be touched upon. Hence, virtually the scope of pre-arrest bail has been extended by this Court while rendering the afore-referred judgment. Even otherwise, this aspect of the law further lends support from the bare reading of provisions of Section 497/498 Cr.P.C. The word 'further inquiry' has wide connotation. Interpretation of criminal law requires that the same should be interpreted in the way it defined the object and not to construe in a manner that could defeat the ends of justice. Otherwise, an accused is always considered a 'favorite child of law'. When all these aspects are considered conjointly on the touchstone of principles of criminal jurisprudence enunciated by superior courts from time to time, there is no second thought to this proposition that the scope of pre-arrest bail indeed has been stretched out further which impliedly persuade the courts to decide such like matters in more liberal manner. Because basic law is bail not jail. Otherwise, the liberty of a person is a precious right, which has been guaranteed by the Constitution of Islamic Republic of Pakistan, 1973. Denial of liberty of a person is a serious step in law, therefore, the Courts should apply judicial mind with deep thought for reaching at a fair and proper conclusion. Such exercise should not be carried out in vacuum or in a flimsy or casual manner as that would defeat the ends of justice because if the accused is ultimately acquitted at the trial then no reparation or compensation can be awarded to him for the long incarceration he had already suffered." (Para 7)

19. Muhammad Shafique v. Addl. Finance Secretary (Budget)

https://www.supremecourt.gov.pk/downloads_judgements/c.a._469_2021.pdf

Present: Mr. Justice Gulzar Ahmed, HCJ, Mr. Justice Ijaz Ul Ahsan and Mr. Justice Muhammad Ali Mazhar

The appellant, a Deputy National Saving Officer at a National Saving Center, was found in departmental inquiry. to have committed embezzlement of a prize bond which had won the prize of Rs.50 Million in the draw. The competent authority imposed major penalty of reduction to a lower post upon the appellant. The departmental as well as service appeals filed by the appellant failed. The apex Court also maintained those concurrent decisions against the appellant.

Misappropriation and embezzlement of the amount by the employees of financial institutions and government departments shatter the confidence of public on the credibility and goodwill of the institution and department concerned; immediate disciplinary action against the delinquent should be taken in such cases, without any leniency, in accordance with law.

Hon'ble Justice Muhammad Ali Mazhar, speaking for the Court, observed: "All financial institutions have traditionally recognized their duty to act in a manner of public trust and confidence. Its reputation, goodwill and integrity is most valuable virtue and asset which is indeed established by the demeanor of its employees and management who have a duty to perform their duties with utmost honesty, dedication, professional manner and commitment without any cause of complaint to its customers/clients. They are expected to act in a way that enhances reputation of institution and nurtures its client relationships and expected not to give rise to a conflict of interests between their personal interests and their financial

institution. They need to provide their customers transparency, reciprocal loyalty, and truly personal customer relationships. In the line of duty they should shun and avoid involvement in any act of misconduct, embezzlement or fraudulent activity which may destroy or shatter the confidence of public on the credibility and goodwill of financial institutions which will obviously result in immediate disciplinary action without any leniency and imposition of penalty in accordance with law…This court has already expressed strong views for deterrence and took serious note of cases of fraud and misappropriation/embezzlement committed by the employees of financial institutions/government departments." (Paras 9 and 10)

Foreign Superior Courts

SUPREME COURT OF THE UNITED STATES

1. *Whole Woman's Health v Austin Reeve Jackson*

2021 U.S. LEXIS 3680, 2021 WL 3910722
https://www.supremecourt.gov/opinions/20pdf/21a24_8759.pdf

Coram: Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett JJ

Restrictive abortion measure – injunctive relief denied

A new law enacted in Texas prohibiting abortions once medical professionals could detect cardiac activity, usually about six weeks and before most women know they were pregnant. Challenging the constitutionality of the Texas law, abortion and women's health providers sought an injunction on enforcement of the ban in an application presented to Justice Alito who referred it to the Court.

The Supreme Court, by a 5-4 vote, denied the request for injunction. It held that to prevail in an application for a stay or an injunction, an applicant must carry the burden of making a "strong showing" that it is "likely to succeed on the merits," that it will be "irreparably injured absent a stay," that the balance of the equities favors it, and that a stay is consistent with the public interest. The majority noted that though the applicants have raised serious questions regarding the constitutionality of the law at issue, their application at the same time presents complex and novel antecedent procedural questions on which they have not carried their burden and it is unclear whether the named defendants in the lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit the Court's intervention. Also, the majority said that its ruling does not make any conclusions on the constitutionality of the Texas law and allows legal challenges to the legislation to move forward.

Chief Justice John Roberts, Justice Stephen Breyer, Justice Sonia Sotomayor and Justice Elena Kagan dissented and wrote their separate reasons. Chief Justice Roberts observed that he would have blocked the law while appeals moved forward. "The statutory scheme before the court is not only unusual, but unprecedented. The legislature has imposed a prohibition on abortions after roughly six weeks, and then essentially delegated enforcement of that prohibition to the populace at large. The desired consequence appears to be to insulate the state from responsibility for implementing and enforcing the regulatory regime."

SUPREME COURT OF UNITED KINGDOM

2. *Harcus Sinclair LLP v Your Lawyers Ltd*

[2021] UKSC 32
https://www.supremecourt.uk/cases/docs/uksc-2019-0098-judgment.pdf

Coram: Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Hamblen, Lord Burrows.

The non-compete clause was an unreasonable restraint of trade; it would

not be enforceable as a solicitor's undertaking.

Your Lawyers LLP issued a claim against the Volkswagen Group with the intention of applying for a Group Litigation Order ("GLO") in the emissions litigation. Harcus Sinclair LLP, which is experienced in group litigation, entered into an NDA with Your Lawyers, in order to receive confidential information. The NDA included a non-compete clause through which Harcus Sinclair undertook, for six years, "not to accept instructions for or to act on behalf of any other group of claimants in the contemplated group action" without Your Lawyers' permission. Harcus Sinclair recruited claimants for its own group action, issued a claim and filed an application to be lead solicitor in the group action. It agreed to collaborate with another law firm. Your Lawyers contended that the non-compete clause amounted to a solicitor's undertaking.

The Supreme Court observed that the non-compete clause is a restraint of trade. The issue is whether it is reasonable. This means it must be both (i) reasonable between the parties and (ii) not contrary to the public interest. To be reasonable between the parties it must protect the legitimate interests of the party seeking its protection and go no further than is reasonably necessary to protect those legitimate interests. For an undertaking given by a solicitor to be a solicitor's undertaking it must be given in their "capacity as a solicitor". In addressing this test, the Court holds that in general it will be helpful to consider two questions. First, whether what the undertaking requires the solicitor to do (or not do) is something that solicitors regularly carry out (or refrain from carrying out) as part of their ordinary professional practice. Second, whether the matter to which the undertaking relates involves the sort of work which solicitors regularly carry out as part of their ordinary professional practice. Harcus Sinclair's promise not to compete with Your Lawyers in the emissions litigation does not involve the sort of work which solicitors undertake not to do as part of their ordinary professional practice. The matter to which the promise relates was a potential business opportunity and the reason for giving it was to further the parties' business interests rather than that of any client. In giving the undertaking, Harcus Sinclair was acting in a business capacity rather than a professional capacity. The non-compete clause is not a solicitor's undertaking.

3. Triple Point Technology, Inc v. Public Company Ltd

[2021] UKSC 29
https://www.supremecourt.uk/cases/docs/uksc-2019-0074-judgment.pdf

Coram: Lord Hodge (Deputy President), Lady Arden, Lord Sales, Lord Leggatt, Lord Burrows

Where one party contracts with another to carry out works for it, and the contract provides that liquidated damages are payable if the works are delayed, whether the employer only has a right to such damages if the contractor completes the works, or such damages are still payable even if the employer terminates the contract before completion.

The Appellant was a Thai company which trades in oil and gas. The Respondent was a US-based company which specializes in the development and implementation of commodities trading software. The parties entered into a contract under which the Respondent agreed to provide software and software implementation services to the Appellant. It was provided in the contract that liquidated damages to be paid in the event of the Respondent's work being delayed. A dispute arose over payments due and the Respondent suspended work. The Appellant terminated the contract. Proceedings were commenced by the Respondent to claim sums it alleged were due in respect of software licence fees; the Appellant counterclaimed for liquidated damages for delay prior to termination and its

costs arising out of the termination of the contract.

The Supreme Court observed that liquidated damages would accrue until the contract was terminated. At that point the contractor becomes liable to pay damages for breach of contract. In some cases, it might be inconsistent with the parties' agreement to categorize the employer's losses as subject to the liquidated damages clause until contractual termination and thereafter as damages. This approach was inconsistent with commercial reality and the accepted function of liquidated damages. The parties' aim was that the employer should not have to quantify its loss which it may be difficult for it to do. The parties should be taken to know that liquidated damages would cease to accrue on termination; they did not have to provide for that expressly. Reading the clause in that way reduced the risk that the contractor was not liable for liquidated damages for delay and the extinction of accrued rights to liquidated damages. Under the CTRM Contract, liquidated damages were payable where Triple Point never completed the work.

4. Times Travel (UK) Ltd v. Pakistan International Airline Corporation

https://www.supremecourt.uk/cases/docs/uksc-2019-0142-judgment.pdf
[2021] UKSC 40

Coram: Lord Reed, President Lord Hodge, Deputy President Lord Lloyd-Jones Lord Kitchin Lord Burrows

A party can set aside a contract on the ground that it was entered into as a result of the other party threatening to do a lawful act.

Times Travel ("**TT**") was a travel agent whose business consisted almost exclusively of selling plane tickets to and from Pakistan. Pakistan International Airline Corporation ("**PIAC**") was the sole operator of those flights. It allocated tickets to TT and paid commission to TT for the tickets it sold. This contractual arrangement could be terminated by PIAC at one month's notice.

In September 2012 PIAC cut TT's normal fortnightly ticket allocation from 300 to 60 tickets, as it was entitled to do, and gave notice that it would terminate their existing arrangement at the end of October 2012. This would have put TT out of business and so on 24 September 2012 TT agreed to accept new terms (the "**New Agreement**") by which it waived any claims it might have for the previously unpaid commission. One of the directors of TT had been shown a draft of the New Agreement a few days beforehand but PIAC had refused his request to take a copy with him in order to discuss it and obtain legal advice. Later on, TT brought a claim against PIAC for the unpaid commission and argued that it could rescind the New Agreement **for lawful act economic duress**. The trial judge agreed but also found that PIAC had genuinely believed that the disputed commission was not due. The Court of Appeal allowed PIAC's appeal as PIAC had not acted in bad faith in that sense. TT appealed to the Supreme Court.

The issue in this appeal was whether a party can set aside a contract on the ground that it was entered into as a result of the other party threatening to do a lawful act. The Supreme Court observed that when it was alleged that a respondent had induced a claimant to enter into a contract by duress there are two essential elements that the claimant needed to establish to rescind the contract: (i) the threat or pressure by the respondent must have been illegitimate and (ii) the threat or pressure must have caused the claimant to enter the contract. Economic duress also has a third element: (iii) the claimant must have had no reasonable alternative to giving in to the threat or pressure. It is not in dispute that TT entered into the New Agreement as a result of PIAC's threats, and that it had no reasonable alternative. This appeal solely concerns the first element: was PIAC's threat illegitimate. The Court, however, held that TT cannot rescind the New Agreement.

PIAC giving notice that the previous contract would be terminated and cutting TT's ticket allocation was not reprehensible conduct. PIAC's genuine belief that it was not liable to pay the disputed commission further supports the view that its behaviour was not reprehensible, and dismissed the appeal.

COURT OF APPEAL UK (CIVIL DIVISION)

5. *Stephen Thaler v Comptroller General of Patents, Trade Marks and Designs*

[2021] EWCA Civ 1374
https://www.bailii.org/ew/cases/EWCA/Civ/2021/1374.pdf

Coram: Lord Justice Arnold, Lady Justice Elisabeth Laing and Lord Justice Birss

Artificial intelligence machine is not recognised as an inventor by the UK patent system

The case related to two patent applications submitted to the UK Intellectual Property Office ("IPO") by Dr Stephen Thaler. Both applications listed the inventor as 'DABUS', an AI machine built for the purpose of inventing, which had successfully come up with two patentable inventions. The UK IPO refused to process either application as they failed to comply with the requirement to list an inventor and Dr Thaler was not entitled to apply for the patents. According to the Patents Act 1977, an inventor must be a 'person'. The High Court upheld the IPO's decision.

The Court of Appeal unanimously held that the Act was drafted on the basis that an "inventor" had to be a "person" to be an actual deviser. As such, AI machine is not currently recognised by the UK patent system, even if it created the invention. As regards Dr Thaler entitlement to apply for a patent for an invention created by the AI machine, it was held that an applicant who is not the inventor must be able to point to an entitlement to apply for a patent in respect of the invention. Dr Thaler argued that as owner of AI machine, he was entitled to the property in any of DABUS' inventions. Lord Justice Arnold held that as a matter of law this is incorrect, holding that this rule only applied to tangible property and there was no principle of law that an intangible property right (such as intellectual property) created by a person's property is owned by that person. As Dr Thaler did not identify a person as the inventor, and failed to identify the derivation of his right to be granted the patent (he simply asserted that it was sufficient that he owned the AI machine), the IPO and the judge at First Instance were correct to reject the patent application. The appeal was dismissed. However, although the Court ultimately agreed with the IPO, the decision was split 2-1. Lord Justice Arnold and Lady Justice Laing agreed that the IPO was justified in its decision not to process Dr Thaler's patent applications, while Lord Justice Birss was in the minority, stating that 'the fact that the creator of the inventions in this case was a machine is no impediment to patents being granted to this applicant'.

HIGH COURT OF AUSTRALIA

6. *Fairfax Media Publications Pty Ltd v Voller*

[2021] HCA 27
https://eresources.hcourt.gov.au/downloadPdf/2021/HCA/27

Coram: Kiefel CJ, and Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Media outlets liable for third party content on their Facebook pages, as publishers

The appellant media companies maintained public Facebook pages on which they posted content relating to news stories and provided hyperlinks to those stories on their website. After posting content relating to particular news stories referring to the respondent, including posts concerning his incarceration in a juvenile justice detention centre, a number of third-party Facebook users responded with comments that were alleged to be defamatory of the respondent. The respondent brought proceedings against the appellants alleging that they were liable for

defamation as the publishers of those comments. The primary judge ordered that a question concerning the issue of publication, as agreed by the parties, be decided separately from the balance of the proceedings. The question was whether the respondent had established the publication element of the cause of action of defamation against the appellants in respect of each of the Facebook comments by third-party users. The Court of Appeal concluded that the primary judge did not err in answering that question in the affirmative.

The High Court by majority dismissed the appeals and found that the appellants were the publishers of the third-party Facebook user comments. It was held that the liability of a person as a publisher depends upon whether that person, by facilitating and encouraging the relevant communication, "participated" in the communication of the defamatory matter to a third person. The majority rejected the appellants' argument that for a person to be a publisher they must know of the relevant defamatory matter and intend to convey it. Each appellant, by the creation of a public Facebook page and the posting of content on that page, facilitated, encouraged and thereby assisted the publication of comments from third-party Facebook users. The appellants were therefore publishers of the third-party comments. The appeals were dismissed clearing the way for the respondent to continue his defamation case against the media companies.

CONSTITUTIONAL COURT OF SOUTH AFRICA

7. *Centre for Child Law v Director General: Department of Home Affairs*

[2021] ZACC 31
https://collections.concourt.org.za/bitstream/handle/20.500.12144/36654/%5bJudgment%5d%20CCT%20101-20%20Centre%20for%20Child%20Law%20v%20Director%20General%20Department....pdf?sequence=18&isAllowed=y

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Children born outside marital bond blameless; differential treatment towards them unconstitutional

In 2016, a South African man and a woman who was a citizen of the Democratic Republic of Congo ("DRC") sought to register the birth of their daughter, born in Grahamstown, with the Department of Home Affairs (Department) in Grahamstown. Before their daughter's birth, the woman travelled to and from South Africa to the DRC on a visitor's visa. Shortly before their daughter was born, her visa expired. Due to her pregnancy, she could not renew the visa or travel back to the DRC. The Department refused to register the child's birth on the basis that the mother lacked a valid visa or permit and could not comply with certain Regulations on the Registration of Births and Deaths, 2014 (Regulations). The couple brought an application to the High Court to review and set aside the decision refusing to register their daughter's birth, and challenged the constitutionality of the relevant Regulations. The Centre for Child Law was admitted as an intervening applicant. The High Court held that sections 9 and 10 of the Births and Deaths Registration Act ("the Act") do not prohibit unmarried fathers from, registering the births of their children in the absence of the mother who gave birth to such children. It held that the requirement is that such children must be born alive, in which case any one of the parents, regardless of their marital status, would be able to give notice of the birth. With leave, the Centre for Child Law appealed to the Full Court of the High Court on the question of the constitutional validity of section 10 of the Act. The Full Court found that, even though

section 9 of the Act empowers an unmarried father to give notice of his child's birth, the exercise by an unmarried father of his right under section 9(1) is contingent on either the mother's presence or her consent, in terms of section 10. In effect, section 10 presents a bar to a father giving notice of the birth of his child under his surname in the mother's absence. The Full Court thus declared section 10 invalid and inconsistent with the Constitution.

The Constitutional Court by majority judgment confirmed the order of constitutional invalidity made by the Full Court. It found that section 10 of the Act does limit the ability of an unmarried father to confer his surname on his child. There is no justification for differentiating between married and unmarried fathers in relation to conferring a surname on a child and accordingly, section 10 of the Act is unconstitutional, invalid and amounts to unfair discrimination on the listed grounds of marital status, sex and gender, which is prohibited by section 9(3) of the Constitution. It also held that section 10 of the Act impairs the dignity of both unmarried fathers, whose bonds with their children are deemed less worthy, and the children of unmarried parents. The concept of "illegitimacy" and differential rights for children born in and out of wedlock is inconsistent with the principle in section 28(2) of the Constitution that the rights of the child are paramount. It was held that section 10 also constitutes an infringement on a child's right not to be discriminated against on the grounds of social origin or birth. For all of these reasons, the main judgment concluded that section 10 of the Act is manifestly inconsistent with the rights to equality, dignity and the best interests of the child and invalid to the extent that it limits the rights of unmarried fathers to give notice of the birth of their child in their surname.

In a dissenting judgment, Mogoeng CJ, with Mathopo AJ concurring, acknowledged that section 10 of the Act does discriminate against unmarried fathers on the basis of marital status. However, he held that the discrimination is reasonable, justifiable and fair. He held that children are vulnerable and their best interests are of paramount importance when issues that concern them have to be addressed. The CJ further reasoned that they must be protected and not be exposed to the risk of being easily claimed and "adopted" by people whose relationship with them or suitability to be in their lives, has not been established. In conclusion, he held that sections 9 and 10 of the Act are capable of being read in a manner that is constitutionally compliant.

SUPREME COURT OF CANADA

8. *York University v Canadian Copyright Licensing Agency (Access Copyright)*

2021 SCC 32
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18972/index.do

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

Copyright tariffs are not mandatory

Access Copyright ("Access"), a collective society, licences and administers reproduction rights in published literary works on behalf of creators and publishers. From 1994 to 2010, a licence agreement permitted professors at York University ("York") to make copies of published works in Access's repertoire and set the applicable royalties. As licence renewal negotiations were underway, the relationship between Access and York deteriorated, resulting in Access filing a proposed tariff with the Copyright Board for post secondary

educational institutions. Unsure that it would be able to reach an agreement with York before the expiry of its licence, Access applied to the Board for certification of a tariff on an interim basis, generally matching the pre existing licence agreement, to operate until the Board approved a final tariff. The Board granted Access's request for an interim tariff. York initially paid the approved royalties, but eventually informed Access that it would not continue as a licensee. Access sought enforcement of the interim tariff in the Federal Court, and York counterclaimed for a declaration that any copying conducted within its fair dealing guidelines was protected by fair dealing rights under the Copyright Act. The trial judge found that the interim tariff was enforceable against York and that neither its guidelines nor its actual practices constituted fair dealing. The Federal Court of Appeal allowed York's appeal on the tariff enforcement action, holding that Board approved tariffs are voluntary for users, but dismissed its appeal on the fair dealing counterclaim. Access appeals to the Court on the tariff issue, and York appeals from the dismissal of its fair dealing counterclaim.

The Court unanimously held that a tariff set by the Copyright Board is not mandatory. The existing relevant legislation did not permit Access to force York to comply with the voluntary tariff set by the Board to which York chose not to be a party. The object of the statutory scheme governing collective administration is the protection of users. Empowering a society to foist a licence on an unwilling user would be discordant with the protective purpose of the regime. Users are therefore entitled to choose whether or not to accept a licence on Board-approved terms. Relevant provisions of the Copyright Act create a dichotomy between users who choose to be licensed pursuant to the terms of a Board approved tariff, and those who choose not to acquire a licence. A person cannot simultaneously be an infringer and a licensee. A collective society has a remedy for defaulted payments from voluntary licensees and that actions for recovery can be brought in Federal Court. There is no duty to pay approved royalties to a collective society that operates a licensing scheme anywhere in the Copyright Act. The Court also held that it would be inappropriate to entertain York's request for declaratory relief because in light of the conclusion that the interim tariff is not mandatory and is therefore unenforceable against York, there is no live dispute between the parties. This is not an action for infringement, since Access has no standing to bring such an action. Furthermore, the copyright owners who do have standing are not parties to these proceedings and have not had the opportunity to advance arguments about the impact of York's activities on their copyrighted works. Assessing fair dealing guidelines in the absence of a genuine dispute between proper parties would anchor the analysis in aggregate findings and general assumptions without a connection to specific instances of works being copied.

9. Price v Spoor

[2021] HCA 12
https://eresources.hcourt.gov.au/downloadPdf/2021/HCA/20

Coram: Kiefel CJ, and Gageler, Gordon, Edelman and Steward JJ

Contracting out of statutory limitation periods

The parties entered into a mortgage contract. The intent of one of the clauses was to contract out of the provisions of any relevant limitation legislation. The respondents, as the mortgagees of the land, brought legal proceedings against the appellants, who were the mortgagors, claiming $4 million as monies owing under the mortgage and seeking to recover the land subject to the mortgage. The mortgagors claimed that the Limitation Act prevented the respondents from bringing the claim and that the mortgagees' title to the land had extinguished.

The Chief Justice and Justice Edelman referred to a precedent where the Court stated that a person on whom a statute confers a right may waive that right unless it would be contrary to the statute to do so. The Court

explained it would be contrary to the statute where the statute expressly prohibits "contracting out" of rights or where the statute is inconsistent with a person forgoing their statutory rights. Contractual arrangements will not be enforceable where they operate to defeat a statutory purpose where statutory rights are conferred in the public interest, rather than for individual benefit alone. The Chief Justice and Justice Edelman observed that the equivalent Act in Victoria gave parties a right to plead the expiry of the relevant time period as a defence and therefore conferred a benefit on individuals, rather than meeting some public need. The Chief Justice and Justice Edelman concluded that the mortgagors could, therefore, agree to waive their right not to rely on the provisions of the Limitation Act and the clause of the contract was enforceable. Justices Gaegler and Gordon substantially agreed with the Chief Justice and Justice Edelman and went on to explain that, while the Limitation Act gave effect to the public policy objective of ensuring finality in litigation, the Limitation Act gave effect to that purpose by conferring a right on an individual to elect to plead that limitation period in a particular case. Justices Gaegler and Gordon therefore concluded that enforcing an agreement not to plead a limitation period was compatible with the Limitation Act, because it was always left to an individual to choose whether to forgo the right under the Act. Justice Steward agreed substantially with the other Justices.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

10. Nimble Investments (Pty) Ltd v Johanna Malan and Others

http://www.supremecourtofappeal.org.za/images/judgment_2021/sca2021-129ms.pdf

Coram: Dambuza, Schippers and Mbatha JJA and Carelse and Eksteen AJJA

A landowner cannot be forced to continue with a tenancy relationship which, according to the evidence, was practically impossible to restore

The respondents were evicted from a farm known as Topshell Park in Stellenbosch, Western Cape (the farm) by the Stellenbosch Magistrate's Court. The ground for their eviction was essentially that the first respondent had committed a fundamental breach of the relationship between her and the manager or owner of the farm. The first respondent actually breached the relationship when, without permission, she removed the building materials from Cottage 1 and used them to erect an illegal structure next to Cottage 5. When confronted about this, she told the manager that Cottage 1 was her house and she could do with the materials as she pleased. The first respondent refused to demolish the structure or return the materials. However, the said order was set aside by the Land Claims Court, Randburg on the ground that she was not given an opportunity to make representations as envisaged under the law on the subject. The appellant challenged the order of the Land Claims Court before the Supreme Court of Appeal of South Africa.

The Supreme Court of Appeal held that The SCA held that the eviction was just and equitable as it was untenable to force a landowner to continue with a relationship which, according to the evidence was practically impossible to restore. For this reason and on a proper construction of relevant law it was unnecessary to grant the respondents an opportunity to make representations against her impugned eviction.

SUPREME COURT OF INDIA

11. High Court of Judicature for Rajasthan (Appellant) v The State of Rajasthan (Respondent)

Criminal Appeal No. 849-850 of 2021
https://www.livelaw.in/pdf_upload/ll-2021-sc-492-triyambak-s-hegde-vs-sripad-1-401175.pdf

Coram: A.S. Bopanna, J. N.V. Ramana, J. Surya Kant, J.

If signature on the cheque is admitted, presumption under section 139 of

Negotiable Instruments Act, 1881 will be raised.

The Supreme Court has observed that if the signature on the cheque is admitted, then presumption under Section 139 of the Negotiable Instruments Act that the cheque was issued in discharge of a legally enforceable debt will be raised. Upon such presumption being raised, it is incumbent upon the accused to rebut the same. The principles on Sections 118 (a) and 139 of the Negotiable Instruments Act, 1881 were stated as: (i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability. (ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. (iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely. (iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden. (v) It is not necessary for the accused to come in the witness box to support his defence. Applying the principles to the facts of the case, the Court set aside the High Court's acquittal and restored the conviction.

12. Shakuntala Shukla (Appellants) v. State of Uttar Pradesh (Respondents)

MANU/SC/0611/2021
https://indiankanoon.org/doc/154384989/

Coram: Dr. D.Y. Chandrachud and M.R. Shah, JJ.

The necessary ingredients of writing a judgment stated.

The Supreme Court observed that every judgment contains four basic elements and they are: (i) statement of material (relevant) facts; (ii) legal issues or questions; (iii) deliberation to reach at decision; and (iv) the ratio or conclusive decision. A judgment should be coherent, systematic and logically organised. It should enable the reader to trace the fact to a logical conclusion on the basis of legal principles. A judgment has to formulate findings of fact, it has to decide what the relevant principles of law are, and it has to apply those legal principles to the facts. The important elements of a judgment are: (i) Caption; (ii) Case number and citation; (iii) Facts; (iv) Issues; (v) Summary of arguments by both the parties; (vi) Application of law (vii) Final conclusive verdict. The judgment replicates the individuality of the judge and therefore it is indispensable that it should be written with care and caution. The reasoning in the judgment should be intelligible and logical. Clarity and precision should be the goal. All conclusions should be supported by reasons duly recorded. The findings and directions should be precise and specific. The Court explained that whenever a judgment is written, it should have clarity on facts; on submissions made on behalf of the rival parties; discussion on law points and thereafter reasoning and thereafter the ultimate conclusion and the findings and thereafter the operative portion of the order. There must be a clarity on the final relief granted. A party to the litigation must know what actually he has got by way of final relief. These aspects are to be borne in mind while writing the judgment, which would reduce the burden of the appellate court too.

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